

## THE EXECUTIVE INSTITUTION OF MERCY IN AUSTRALIA: THE CASE AND MODEL FOR REFORM

DAVID CARUSO\* AND NICHOLAS CRAWFORD\*\*

### I INTRODUCTION

Post-conviction review procedures in Australia have been static despite significant reform in other Commonwealth countries. Responsibility for review and the powers to do so, collectively, the ‘Institution of Mercy’ (‘IOM’), are vested in the executive of each Australian jurisdiction. We argue that the executive should not have those powers or responsibilities. To vest the executive with those powers ignores international reform, the history and development of the powers and, most importantly, is contrary to fundamental principles of a constitutional democracy. We consider recent reforms in South Australia are a model worthy of consideration by other Australian and common law jurisdictions.

The Royal Prerogative of Mercy (‘POM’) is indelible in Australian history. Modern Australia began as a penal colony of Great Britain where convicts were sent and utilised as a labour force. Some were sent because they had committed crimes that carried the penalty of transportation.<sup>1</sup> Others were sent in lieu of graver penalty. Most tried at the Old Bailey could be sentenced to death. Larceny of more than a shilling<sup>2</sup> could see the culprit hang. Punishments imposed by the court, however, were frequently modified. Sixty per cent of those sentenced to death in the 18<sup>th</sup> century were pardoned. This figure rose to over 90 per cent in the 1830s.<sup>3</sup> A sentence of death was often commuted to one of transportation.<sup>4</sup>

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\* Foundation Director, Advocacy and Justice Unit, Faculty of Professions, University of Adelaide; Lecturer, Adelaide Law School, University of Adelaide; Special Counsel, Fisher Jeffries, Gadens Group; Vice-President, Law Society of South Australia; Associate, South Australian Centre for Economic Studies. The authors are grateful to the anonymous reviewers for their perspicacious advice. Any errors or omissions are those of the authors.

\*\* Associate, Advocacy and Justice Unit, Faculty of Professions, University of Adelaide.

1 Sentencing convicts to transportation was introduced by the *Transportation Act of 1718*, by which merchants were contracted to ship convicted persons to the United States and then Australia.

2 A\$50.

3 See David Bentley, *English Criminal Justice in the Nineteenth Century* (Hambledon Press, 1998); J A Sharpe, *Judicial Punishment in England* (Faber and Faber, 1990).

However, the POM accounts for only one of the three powers constituting the IOM. For Commonwealth nations,<sup>5</sup> the IOM is a combination of prerogative and statutory powers, typically arising for exercise in response to a petition for mercy. In Australia, the powers operate as follows. First, the POM by which the Governor, as the Queen's representative, of each Australian jurisdiction may pardon a convicted person or mitigate a sentence. The prerogative is exercised by the Governor on the binding advice of the executive government of the jurisdiction. Second, to assist the executive in its exercise of the prerogative, statute permits the chief legal minister, the Attorney-General (in the federal and state jurisdictions) or Crown Law Officer (in the mainland territories), to seek assistance from the Supreme Court of the jurisdiction by way of referring to the court a question (of law, fact or both) relating to the petitioned case in respect of which the court must furnish the minister with its opinion. This is the 'opinion power'. Third, statute permits the minister to refer a petitioned case to the Supreme Court in full, to be dealt with by the court as an appeal. This is the 'reference power'. As indicated, in Australia, these powers are vested in the executive arm of government, under the control of the chief legal minister of the jurisdiction.<sup>6</sup>

This article argues that the powers of the IOM should not be vested in the executive. The executive is not the appropriate arm of government, or authority, to be responsible for the IOM.

Part II examines the development of each of the powers from their origins in English law. It explains the central role of the executive in post-conviction review, compared with the reform of that position in other Commonwealth nations. The present approach to the IOM powers and the executive's role in Australia is shown to be static and unresponsive to Commonwealth concerns about post-conviction procedure and review.

Against that background, Part III argues that present practice of the IOM is unconstitutional as it contravenes the doctrine and conventions of the separation of powers ('SOP'), as it applies at Australian federal and state level. That argument follows an examination of the nature and character of each of the IOM powers. First, the POM offends the doctrine because it involves exercise of judicial power. This is supported not only by a consideration of the nature and character of the POM but by its history and relationship to other executive prerogative powers. The opinion power offends the SOP because it requires the judiciary to exercise non-judicial power by providing advisory opinions to the

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4 See Albert W Alschuler, 'Plea Bargaining and Its History' (1979) 79 *Columbia Law Review* 1. See also Simon Devereaux, 'In Place of Death: Transportation, Penal Practices, and the English State, 1770–1830' in Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion* (UBC Press, 1996) 52, 52–77.

5 For the purposes herein: England, New Zealand, Scotland and Canada.

6 Globally, the power to exercise clemency or pardon a convicted person is typically vested in the equivalent of the executive arm of government, with the equivalent of the justice minister having responsibility for them: Leslie Sebba, 'The Pardoning Power: A World Survey' (1977) 68 *Journal of Criminal Law and Criminology* 83, 84.

executive. The reference power offends the SOP because its exercise may involve judicial power or, the judicial response to its exercise may adversely affect public confidence in the impartial and objective administration of justice by the courts – the maintenance of public confidence being a principal tenet of the SOP doctrine.

Part IV explains recent reforms in South Australia, enacted through the *Statutes Amendments (Appeals) Act 2013* (SA), that address the concerns of executive function explained and analysed in this article. It is submitted that the reforms adopted in South Australia provide a sensible model, legally and practically, for consideration by other jurisdictions.

## II THE DEVELOPMENT OF THE INSTITUTION OF MERCY IN AUSTRALIA AND THE COMMONWEALTH

### A The Three Powers and the Role of the Executive

Blackstone traced the POM to the laws of Edward the Confessor (1042–66). The power derived from the sovereign's 'pure grace' to pardon an offender by mitigating or removing the consequences of conviction.<sup>7</sup> There are four types of pardon:<sup>8</sup> the absolute, conditional, remission of sentence and respite of sentence.<sup>9</sup> Letters patent delegated the prerogative throughout the Commonwealth;<sup>10</sup> in Australia it was vested in the Governors of the colonies.<sup>11</sup> The Governor was expected to take advice from his Executive Council in exercising the power, but was not bound by that advice until late in the 19<sup>th</sup> century.<sup>12</sup> Upon federation, the Governor-General was also vested with the POM,<sup>13</sup> which, by constitutional convention, is exercised on the advice of the Federal Executive Cabinet.<sup>14</sup>

When Queen Victoria assumed the throne in 1837, the POM became a special ministerial responsibility of England's Home Secretary.<sup>15</sup> Debate then began<sup>16</sup> as to whether the POM, typically reserved for extreme cases, was

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7 *R v Milnes* (1983) 33 SASR 211, 237 (Legoe J) ('*Milnes*'), citing *Bullock v Dodds* (1819) 106 ER 361, 364, 368.

8 There are many types because there is no standard form, but those described here are the main: see A T H Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398, 417.

9 *Ibid.* See also Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 20; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 103.

10 Fox and Freiberg, above n 9, 21; Smith, above n 8, 426.

11 Taylor, above n 9, 103; J M Bennett, 'The Royal Prerogative of Mercy – Putting in the Boots' (2007) 81 *Australian Law Journal* 35, 36.

12 For a discussion of the tension between the Governor and Executive on this point, see Bennett, above n 11, 36–45.

13 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 660–2.

14 *Ibid.* 664; Taylor, above n 9, 104.

15 See Fenton Bresler, *Reprieve: A Study of a System* (Harrap, 1965) 52; O R Marshall, 'The Prerogative of Mercy' (1948) 1 *Current Legal Problems* 104.

16 Rosemary Pattenden, *English Criminal Appeals 1844–1994* (Clarendon Press, 1996) 6–7.

sufficient to right jury errors.<sup>17</sup> Until the establishment of the English Court of Criminal Appeal in 1907,<sup>18</sup> the prerogative, with some minor exceptions, was the only means of doing so. Section 19 of the 1907 legislation and then section 17 of the amending *Criminal Appeal Act 1968* (UK) gave the Home Secretary the statutory reference and opinion powers. The prerogative power was unaffected, expressly saved and preserved.<sup>19</sup>

The legislation was the model for equivalent legislative extension of the IOM in Canada,<sup>20</sup> New Zealand,<sup>21</sup> Scotland,<sup>22</sup> and each Australian state and territory.<sup>23</sup> These statutory powers differed slightly between these countries and within Australia, yet their effect was the same. The South Australian provisions, as they existed prior to the reforms discussed in Part IV, illustrate it:

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

- (a) refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
- (b) if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.<sup>24</sup>

Each Australian jurisdiction (except federal) enacts like powers.<sup>25</sup> Each vests those powers in the chief legal minister of the Executive Council. As in England, each statutory formulation of the powers expressly left the prerogative untouched and unaffected.<sup>26</sup>

17 See United Kingdom, *Report of the Royal Commission on Criminal Justice*, Cm 2263 (1993) 162 [2] ('*Runciman Report*').

18 Now known as the Court of Appeal Criminal Division ('CACD').

19 Pattenden, above n 16, 32.

20 *Criminal Code*, RSC 1985, c C-46, s 690 (formerly *Criminal Code*, RSC 1927, c 36, s 1022, and then *Criminal Code*, SC 1953–54, c 51, s 596, and in 2002, amended and replaced by ss 696.1–696.6).

21 *Crimes Act 1961* (NZ) ss 406–7.

22 For the evolution and amendment of the legislation, which followed that in the United Kingdom, see *Criminal Appeal (Scotland) Act 1926* (Scot); *Criminal Appeal (Scotland) Act 1927* (Scot); *Criminal Justice (Scotland) Act 1949* (Scot); *Criminal Procedure (Scotland) Act 1995* (Scot); see also Sutherland Committee, *Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures*, Cm 3245 (1996) ('*Sutherland Report*').

23 See David Ross, *Ross on Crime* (Thomson Lawbook, 4<sup>th</sup> ed, 2009) 903.

24 *Criminal Law Consolidation Act 1935* (SA) s 369.

25 ACT: Previously *Crimes Act 1900* (ACT) ss 433, 475. Now pt 20 of the same *Act*; NSW: Previously *Crimes Act 1900* (NSW) ss 474B, 474C–G, which slightly extended the pardon provision by alternatively allowing for an application to go to the Supreme Court. Now *Crimes (Appeal and Review) Act 2001* (NSW); NT: *Criminal Code Act* (NT) ss 431, 433A; Qld: *Criminal Code Act 1899* (Qld) ss 18, 672A, 675; Tas: *Criminal Code Act 1924* (Tas) ss 13, 398, 419; Vic: *Criminal Procedure Act 2009* (Vic) s 327 and *Sentencing Act 1991* (Vic) s 106; WA: *Sentencing Act 1995* (WA) ss 137, 140.

26 See the legislation listed: above n 25. See also *Tait v The Queen* [1963] VR 547, 556 (Smith J).

The reference power empowers the minister to refer the whole case, the subject of the petition,<sup>27</sup> to the Supreme Court of the state or territory, usually by letter to the chief justice. The court supposedly treats the reference like the lodging of an appeal,<sup>28</sup> however the rules regarding the reception of evidence upon reference are unclear. *After* deciding to refer the case the minister has no further involvement.<sup>29</sup> But the minister need not refer the whole case. The minister can determine the petition, but, in doing so, may need assistance on a particular point. If so, the opinion power permits the minister to have any question answered by the appeal court.<sup>30</sup> The court provides its opinion to the minister to assist the executive in the exercise of the POM.<sup>31</sup> The minister may or may not take that opinion into account in determining the petition.<sup>32</sup>

The minister's position with respect to the statutory referral powers was summarised by Lander J<sup>33</sup> in *Von Einem*:

the Attorney-General has the responsibility to advise his Excellency the Governor in relation to any petition for the exercise of the prerogative of mercy which is presented to his Excellency. The Attorney-General is entitled to take whatever advice he likes. More particularly, however, he is entitled in the exercise of his uncontrolled discretion to call upon the courts for assistance in the two separate ways provided for. He does not have to do so. He does not have to exercise a discretion at all to invoke either of the powers ... He may do so.<sup>34</sup>

The executive is not limited to following the statutory process, or any particular procedure, in taking advice on a petition.<sup>35</sup> It may utilise its statutory powers, it might choose a different course, it may do both.

The traditional centrality of the executive in the post-conviction review process within Australia is revealed by the chief legal minister's role, both in advising the head of state in regards to the exercise of the POM as well as the statutory powers concerning the reference and opinions powers. Current practice of the IOM is so integrated within the criminal justice system that the High Court has refused special leave on the view that the case is more appropriately one for the minister's consideration and possible reference back to the jurisdiction's Supreme Court.<sup>36</sup>

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27 *Von Einem v Griffin* (1998) 72 SASR 110, 113 (Prior J) ('*Von Einem*').

28 *R v Davies* [1937] VLR 150, 152 ('*Davies*'); *Mallard v The Queen* (2005) 224 CLR 125.

29 *Re Matthews* [1973] VR 199, 200 (Barber and McInerney JJ, Norris AJ).

30 *Pepper v A-G* [2008] 2 Qd R 353, 360 [11] (Muir JA, de Jersey CJ and Fraser JA agreeing).

31 *Re Van Beelen* (1974) 9 SASR 163, 181 (Walters, Wells and Jacobs JJ) ('*Van Beelen*').

32 *Thomas v The Queen* [1980] AC 125 (PC); Pattenden, above n 16, 363; Smith, above n 8, 408.

33 Now a judge of the Federal Court of Australia.

34 (1998) 72 SASR 110, 135.

35 *De Freitas v Benny* [1976] AC 239, 247–8 (Lord Diplock) ('*De Freitas*'), but the process must be procedurally fair: *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349 ('*Bentley*').

36 See *Davies* [1937] VLR 150.

## B Commonwealth Reviews and the Australian Position

England, Canada,<sup>37</sup> New Zealand<sup>38</sup> and Scotland,<sup>39</sup> in and around the 1990s, reviewed their IOM.<sup>40</sup> The English review, the report of the Runciman Commission,<sup>41</sup> followed miscarriages of justice in the cases of the Birmingham Six and Guildford Four.<sup>42</sup> The other reviews followed England's. The central concern of each review was the extent to which the IOM powers should be a function of the executive. Except Canada, each review recommended independent authorities be established and vested with the statutory referral powers held by the executive.<sup>43</sup>

Despite these initiatives, the constitutional difficulties affecting the IOM, which led to review and reform in other countries, do not appear to have been recognised in Australia. New South Wales ('NSW') reviewed its post-conviction review processes in the 1990s. In the Australian Capital Territory ('ACT') and NSW, petitions for mercy could be made directly to the Supreme Court, which can order an inquiry into the matter or refer the case to the Court of Criminal Appeal to be dealt with as an appeal.<sup>44</sup> The NSW provisions only extend the reference power to the Supreme Court, which must keep the executive informed of what it does.<sup>45</sup> Today, in every Australian jurisdiction, the executive, through the Governor, may exercise the POM at its own behest, without reference to or involvement of the courts.<sup>46</sup> NSW and the ACT aside, if the courts are involved, it is only if the executive, per their statutory powers, refers the whole case or seeks the court's opinion, that the court is involved. Lynne Weathered summarised the IOM as it long existed, in the main, throughout Australia:

A petition for a pardon must go to the Governor of a State or other relevant executive body who may, inter alia, issue a pardon as an executive decision ... or more importantly refer the case to the Court of Appeal. Virtually no guidelines exist as to when, why or how the decision on whether or not to refer the case to the Court of Appeal is made. A letter stating that the application for pardon has been unsuccessful (ie the case has not been referred to the Court of Appeal) may be the extent of disclosure regarding the entire process. This process is non-transparent and purely discretionary. Further, the reliance on the executive for

37 Criminal Conviction Review Group conducted a review which led to a 1998 Consultation Paper: Department of Justice (Canada), *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code* (Consultation Paper, 1998).

38 Neville Trendle, 'The Royal Prerogative of Mercy: A Review of New Zealand Practice' (Report, Ministry of Justice, 2003) <[http://www.peterellis.org.nz/docs/2003-0500\\_MinistryJustice\\_RoyalPrerogativeOfMercy-Review.htm](http://www.peterellis.org.nz/docs/2003-0500_MinistryJustice_RoyalPrerogativeOfMercy-Review.htm)> ('Trendle Report').

39 *Sutherland Report*, above n 22.

40 The reviews have been recognised in Australia: *Von Einem* (1998) 72 SASR 110, 114 (Prior J).

41 See *Runciman Report*, above n 17.

42 Most notably, there were others: see Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (Federation Press, 4<sup>th</sup> ed, 2006) 292–5.

43 For a good synopsis, see *Trendle Report*, above n 38; see also Pattenden, above n 16.

44 *Crimes (Appeal and Review) Act 2001* (NSW) s 78(1).

45 *Ibid* s 78(2).

46 This, technically, remains the case following the South Australian reforms, however, the nature of the reforms effectively allows litigants to seek relief directly from the Court, thereby removing the executive from the process: see Part IV below.

referral to the Court of Appeal leaves the process open to political considerations and public pressure, is insufficiently independent from the original wrongful conviction and is arguably a breach of the doctrine of the separation of powers.<sup>47</sup>

It is that last point which is examined in Part III. Is vesting the powers of the IOM in the executive a breach of the SOP doctrine? Our analysis concerns the legal basis, derived from constitutional doctrine in the Australian federation, for regarding the IOM as an unconstitutional practice. We note and emphasise, however, that the SOP is not reducible to a set of rules or doctrinal restrictions. It is a normative concept that provides a model for governance upon which modern democratic societies are built. Montesquieu, the father of the doctrine, envisioned the SOP as fundamental to the pursuit of justice:

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>48</sup>

John Adams, a Founding Father and Second President of the United States of America, expressed this as a system of checks and balances:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skilful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.<sup>49</sup>

Critically, for present purposes, both architects of the normative theory that constitutes the SOP envisaged, and indeed premised, the system of government as reposing judicial power – the power to judge, to finally decide disputes pertaining to the ‘legislated law’ – in the judicial arm of government and (absent compelling reason) in that arm alone. The SOP is a democratic norm to safeguard against any one arm of government amassing undue and unchecked power. It is written into and/or inferred from constitutions and practices of governance, ensuring that the powers to govern are divided amongst those bodies best suited to wield them. Vesting the executive with the powers of the IOM permits it to assume a judicial power and thereby usurp the properly held role and power of the courts. The reasons for this are different for each power of the IOM.

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47 Lynne Weathered, ‘Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia’ (2005) 17 *Current Issues in Criminal Justice* 203, 212 (citations omitted).

48 Charles-Louis de Secondat, Barone de La Brède et de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, Printed for F Wingrave, successor to Mr Nourse; W Clarke and Son; J Sewell; J Deighton; and Vennor and Hood, 6<sup>th</sup> ed, 1793) 113 [trans of: *De l’Esprit des Loix* (first published 1748)].

49 John Adams and Charles Francis Adams (ed), *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations* (Little, Brown and Co, 1851) vol 4, 198.

### III THE INSTITUTION OF MERCY IN AUSTRALIA: UNCONSTITUTIONAL PRACTICE

#### A The Prerogative of Mercy: Judicial Power

The executive's exercise of the POM is one of judicial power and as such contravenes the doctrines and conventions of the SOP in Australia, rendering it constitutionally prohibited. Analysing (i) the nature and effect of the power, (ii) its history and (iii) by comparison against properly non-judicial executive prerogatives, shows the POM to be a judicial power.

While attempts have been made,<sup>50</sup> judicial power is not something that can be readily defined. Factors and indicators, drawn from proposed definitions, suggest whether a power is judicial. They include: whether the power is controlled, whether the power finally determines the matter, the effect of the power on individual rights and the duty to exercise the power.<sup>51</sup> Applied to the POM, these factors indicate a judicial power.

##### 1 *The Controlled Manner of Its Exercise*

Lord Diplock characterised the POM as 'the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function'.<sup>52</sup> His Lordship rejected the idea that the role of the minister in tendering advice to the sovereign was in any sense a quasi-judicial function, because the minister was not bound by any advice he might take into account.<sup>53</sup> That misses the point.<sup>54</sup> It is the manner in which the judge arrives at the decision, and so too the manner in which the minister on a petition determines the advice to proffer, which indicates the function as judicial. Judicial power 'is *controlled* power, in the sense that its exercise must be based on authoritative legal materials; the rules, principles, conceptions and standards applied must be drawn from existing law'.<sup>55</sup> Whilst Lander J in *Von Einem* said the minister's discretion was 'unconfined and uncontrolled'<sup>56</sup> and Crisp J in *Re Matthews*<sup>57</sup> considered the POM a 'matter of complete executive discretion',<sup>58</sup> such statements should be seen as describing the breadth of the power and considerations the executive might take into account in exercising the discretion; not that the approach taken by the executive in considering exercise of the POM might be arbitrary or

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50 See *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4<sup>th</sup> ed, 2006) 663.

51 See A R Blackshield, 'The Law' in *Power in Australia: Directions of Change* (Centre for Continuing Education, Australian National University, 1981) 171.

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

53 *Ibid* 247–8.

54 With great respect to his Lordship.

55 Blackshield, above n 51, 185 (emphasis in original).

56 *Von Einem* (1998) 72 SASR 110, 130 (Lander J).

57 [1973] VR 199.

58 *Ibid* 201–2.



unguided and uncontrolled by materials, rules, standards, principles and, ultimately, law.<sup>59</sup>

For many years, exercise of the POM was considered unreviewable by courts,<sup>60</sup> which reasoned that the high public policy involved in such decisions was for the executive.<sup>61</sup> But the POM is controlled by the executive's *reliance* on interpreted legal standards in deciding how to proceed; not policy, which reflects a discretionary power.<sup>62</sup> Whatever be 'high public policy' or 'substantial public policy',<sup>63</sup> it does not decide petitions for mercy. Many petitions will not involve any significant policy element.<sup>64</sup> The discretion is exercised having regard to legal standards as applied to an assessment of evidence.

So much is plain from a principal category of case in which the POM is exercised: that of inadmissible exculpatory evidence. The experience across Commonwealth jurisdictions is that the executive exercises the POM in two particular types of case. One is where fresh compelling exculpatory evidence comes to hand, which is considered inadmissible in court.<sup>65</sup> The executive acts because there is something new *it thinks* the court cannot take into account.<sup>66</sup> Patrick Meehan was convicted of murder in 1969.<sup>67</sup> He was pardoned in 1976 on the recommendation of the Scottish Secretary of State. In justifying the grant of a pardon and the bypassing of the court, the Secretary said: 'The Secretary of State will not hesitate to recommend the exercise of that power [the POM] if there are substantial grounds for believing that a miscarriage of justice may have occurred for which there is no remedy in the courts'.<sup>68</sup> That necessitates an assessment of evidence against legal standards.

In *Eastman v Director of Public Prosecutions (ACT)*,<sup>69</sup> Heydon J noted that since the close of the 19<sup>th</sup> century, it has been English practice to refuse a free pardon unless the Home Secretary felt certain of the applicant's innocence.<sup>70</sup> However, his Honour noted a Home Office memorandum which provided that a

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59 See *Bentley* [1994] QB 349. For Home Secretaries who have been ruthlessly judicious in exercising the POM, see C H Rolph, *The Queen's Pardon* (Cassell, 1978).

60 *Horwitz v Connor* (1908) 6 CLR 38; *Hanratty v Lord Butler* (1971) 115 SJ 386. See generally B V Harris, 'Judicial Review of the Prerogative of Mercy?' [1991] *Public Law* 386.

61 See, eg, *Burt v Governor-General* [1989] 3 NZLR 64, 73–4 (Greig J); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('CCSU').

62 *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, 149 (Lord Simonds).

63 See, eg, *Burt v Governor-General* [1989] 3 NZLR 64, 73–4 (Greig J); *CCSU* [1985] AC 374.

64 Harris, above n 60, 398.

65 The second is discussed below at Part III(E); see *Ratten v The Queen* (1974) 131 CLR 510 ('*Ratten*'); *Gallagher v The Queen* (1986) 160 CLR 392 ('*Gallagher*').

66 The executive only interferes by use of the POM 'where there are convincing reasons for believing that a person is innocent but a reference to the [court] is not practicable, for example because relevant material would not be admissible in evidence': *Runciman Report*, above n 17, 180–1 [3]. See also *Dallas* [1971] Crim LR 90; Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14 *Sydney Law Review* 432, 454, citing Harris, above n 60, 388.

67 For a brief account, see Rolph, above n 59, 80–1.

68 *Ibid* 85.

69 (2003) 214 CLR 318 ('*Eastman*').

70 *Ibid* 352.

free pardon could be granted ‘on legal grounds, or where there is ascertained innocence or a doubt of guilt’.<sup>71</sup> Legal grounds referred to ‘factors vitiating the conviction’.<sup>72</sup> A pardon granted on legal grounds, or grounds of innocence or doubt of guilt begs two questions: what standards are applied to those grounds and what material is required to meet them?

(a) *The Test*

In determining whether to exercise the POM, the executive is applying a standard, a test, as consistently as courts of law endeavour to do with legal standards. In some cases the standards replicate those of the criminal appeal courts. That accords with Justice Heydon’s view of the Home Office memorandum reference to ‘legal grounds’ being a reference to ‘factors vitiating the conviction’. In New Zealand, in 1908, John James Meikle, convicted of sheep stealing, was granted a pardon on the basis that ‘the evidence of his guilt is so far from conclusive that it would ... have been proper to acquit the claimant’.<sup>73</sup> That is akin to an appeal grounded and allowed on the verdict being unsafe and unsatisfactory. In 1979, Arthur Allan Thomas was pardoned following an inquiry which proceeded on the basis that Thomas was ‘a man accused of a crime as opposed to a man convicted of it’.<sup>74</sup> This suggested the approach, whether before or after conviction, is the same and was borne out in the recommendation for pardon.

Sometimes the standard applied is *more* onerous for a pardon than an acquittal,<sup>75</sup> in that, for a free pardon, innocence is required not just on the facts but also morally.<sup>76</sup> Atenai Saifiti, convicted for assaulting a prison officer in a prison brawl, was pardoned in 1972 after the Chief Ombudsman concluded that ‘there are substantial grounds for believing that Saifiti was innocent of the offence for which he was convicted’.<sup>77</sup> The New Zealand review of the IOM, the *Trendle Report*, noted that ‘a full pardon is normally entertained only ... in cases where no reasonable jury, apprised of all the relevant evidence, could have found the accused guilty’.<sup>78</sup> This was described as a ‘high threshold’ and ‘a higher level

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71 *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349, 357, cited in *Eastman* (2003) 214 CLR 318, 352 (Heydon J).

72 *Eastman* (2003) 214 CLR 318, 352 (Heydon J).

73 The *Trendle Report* notes ‘[i]t may be that in fact the Commissioners meant that they could not be certain of Meikle’s innocence nor even that this was reasonably likely, but nonetheless it seems that in their view the pardon threshold was no higher than the normal criminal standard.’: *Trendle Report*, above n 38, ‘Criteria for Pardons’.

74 *Ibid.*

75 Which is fascinating considering the different effect they, supposedly, have in law: see below n 118 and accompanying text.

76 Home Affairs Committee, *Miscarriages of Justice*, House of Commons Paper No 421, Session 1981–2 (1982) 3 (‘*Miscarriages of Justice*’).

77 Sir Thomas Thorp considered this a higher threshold than those in *Meikle* and *Thomas*: there being a valid distinction between substantial grounds for a belief in innocence as opposed to doubt about one’s guilt: *Trendle Report*, above n 38, ‘Criteria for Pardons’.

78 *Trendle Report*, above n 38, ‘Criteria for Pardons’.

of justification for the granting of a pardon than for referring a case to the Court of Appeal.<sup>79</sup>

The *Devlin Report* criticised the very heavy burden of demonstrating innocence,<sup>80</sup> particularly as the onus was on the prisoner; the reverse usually applying in criminal cases. The standards applied in other Commonwealth nations, which share the POM's common origin, reflect the standards and tests employed in Australia.<sup>81</sup> The standards vary. Yet, whether the standard is correct is a separate issue from its existence as a control on the exercise of the POM.

The standards the executive applies are not dissimilar from those employed in judicial determinations. Judicial power requires that decision to be made by: consideration of legal principles, tests and interpretation of laws; scrutiny of evidence to determine facts; weighing evidence against standards of proof to determine liability; and, in criminal matters, considering all the foregoing together to decide criminal responsibility and punitive punishment.<sup>82</sup> This is what the minister seeks to do and seeks to demonstrate is being done. These determinations are exclusive incidents of judicial power.<sup>83</sup>

#### (b) *The Process*

The executive aims to dispel any sense that the POM is informal, opaque or in any sense exercised arbitrarily.<sup>84</sup> It wants to be seen and known as discharging the POM impartially and responsibly.<sup>85</sup> In England, private consultations with the Lord Chief Justice, while certainly open to the minister given the scope of his discretion,<sup>86</sup> were abandoned: 'Between them, the Home Secretary and the Lord Chief Justice are dispensing justice, not mercy, and justice is not a cloistered virtue.'<sup>87</sup>

It is precisely because exercise of the POM involves a marriage, not divorce, of justice and mercy,<sup>88</sup> that senior legal personnel are consulted on the matters raised by the petition and their effect in law.<sup>89</sup> The reliance in New Zealand, as in

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79 Ibid.

80 Home Office, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification*, Cd 338 (1976) [6.20] ('*Devlin Report*'); supported by *Miscarriages of Justice*, above n 76, 30.

81 See *Von Einem* (1998) 72 SASR 110, 120 (Lander J); *Martens v Commonwealth* (2009) 174 FCR 114, 133 (Logan J) ('*Martens*'); *Eastman* (2003) 214 CLR 318, 352–3 (Heydon J).

82 Pattenden, above n 16, 389.

83 *R v Davison* (1954) 90 CLR 353, 369 (Dixon CJ and McTiernan J); *Rola Co (Aust) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 203 (Rich J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258–9 (Mason CJ, Brennan and Toohey JJ).

84 The difficulty with the executive controlling the process is that often those representing the petitioner (assuming representation) are not aware of the precise status of the process: see *Von Einem* (1998) 72 SASR 110, 124–6 (Lander J).

85 Pattenden, above n 16, 410.

86 See, eg, *Re Matthews* [1973] VR 199; *Bentley* [1994] QB 349.

87 Smith, above n 8, 406 (emphasis added); Pattenden, above n 16, 360. Between them, yes, but the final declaration belongs to the executive: see below Part III(A)(1)(c).

88 See below Part III(A)(1)(c).

89 Harris, above n 60, 389.

Australia, on senior legal personnel, often judges, to advise the minister on the petition lays credence to the power being controlled by evidential and legal standards apposite to legal and judicial decision-making expertise. Von Einem's<sup>90</sup> petition for exercise of the POM provides insight into the executive's process in determining the petition. In an affidavit sworn in connection with the consequent application for judicial review of his decision, the Attorney explained, '[i]n accordance with usual practice the matter was initially referred to the Director of Public Prosecutions for his views and then to the Solicitor General for advice.'<sup>91</sup> He concluded:

On the basis of the Solicitor General's report *I formed the view that it was inappropriate to refer the case to the Court or to seek the assistance of the Judges in that it did not seem to me that there was a reasonable possibility that a miscarriage of justice had occurred.*<sup>92</sup>

Our advice from the Office of the Attorney-General of South Australia is that neither records nor annual statistical data are maintained with respect to the number of matters in which the POM is exercised or a matter referred to the Court (for opinion or on a full reference), nor how many petitions are received each year; any such information is informal and pertains to ad hoc experience. Usual practice is to seek opinions from chief legal advisers to the government and then for the minister to form a view in relation to that advice, guided by the standard of a reasonable possibility of a miscarriage of justice. The minister is not bound to follow this practice and may act on his or her own accord.

While reforms in other countries have answered many concerns regarding transparency of the process,<sup>93</sup> in Australia, information is not easily found.<sup>94</sup> The basic approach is somewhat discernible from decisions like *Von Einem* and departmental statements. Yet the point is that, even if the process is shrouded in mystery for petitioners, it does not mean it is uncontrolled,<sup>95</sup> does not adhere to a structure or fails to regularly observe and apply standards and principles consistently with judicial power.

### (c) *Mercy Is Justice*

We mentioned above that the executive is most likely to exercise the POM in two particular types of case. The second is where the offending is minor and, more importantly, the executive considers the sentence imposed to be too severe.<sup>96</sup> The executive acts, in the true sense of mercy, because *it thinks* the sentence passed is too harsh in the circumstances of the offending.<sup>97</sup> The POM

90 Von Einem is serving a sentence of life imprisonment for murder.

91 *Von Einem* (1998) 72 SASR 110, 119–20 (Lander J).

92 *Ibid* 119 (emphasis added).

93 On New Zealand's post-conviction procedures, see The Governor-General, New Zealand Government, *The Royal Prerogative of Mercy* <<http://gg.govt.nz/role/royalprerogative.htm>>.

94 Weathered, 'Pardon Me', above n 47, 212.

95 Rolph notes the 'prerogatives office' knows the techniques and procedure well: Rolph, above n 59, 11.

96 Often the result of legislated requirements as to what penalty must be imposed.

97 *Runciman Report*, above n 17, 180–1 [4].

permits an entirely merciful act. In *Von Einem*, Lander J in discussing the reference power said:

*If the petitioner was simply seeking an act of mercy on the part of his Excellency the Governor, without any complaint about the conviction or the sentence imposed upon the conviction, then the Attorney-General would not refer the matter to the Full Court because no question for judicial consideration would arise.*<sup>98</sup>

That no judicial considerations arise on an act of mercy derives from Lord Diplock's decree in *De Freitas*,<sup>99</sup> but it is artificial. It suggests it is the manner in which the question arises, rather than how it is answered, that determines the character of the power exercised in considering it.<sup>100</sup> Mercy does not begin where legal rights end. Decisions to exercise the POM may be based on standards of good conscience and equity. Similar considerations, importing a subjective evaluation, have failed to invalidate powers as non-judicial.<sup>101</sup> Mercy is not granted without regard to law; mercy is granted to ameliorate the effect of law.<sup>102</sup> That necessitates consideration and application of the law.

That the executive *may* exercise the POM on any basis<sup>103</sup> does not reflect how it *is* exercised. Its exercise is controlled by the consideration of relevant material, the application of standards and consistency in process, all with a view to holding the POM out as impartial and objectively justifiable. In describing judicial power, Blackshield says the point is not whether the ultimate decision is *in fact* a predetermined inference from existing rules of law,<sup>104</sup> but whether the judge *believes, and acts as if*, the principles he applies are derived *from the existing legal materials*.<sup>105</sup> That is precisely how the executive traditionally believes it acts, seeks to act and wants to be seen as acting on the POM.

## 2 *The Finality of the Decision*

Rosemary Pattenden questioned the propriety in giving 'this quasi-judicial function' (the POM) to even the most impartial and righteous politician.<sup>106</sup> That concern springs from the reality of the public perception that the decision is guided by politics. For the reasons just given the executive takes some trouble to dispel such a perception. But Pattenden lends credence, in contrast to Lord Diplock, to regarding the POM as a judicial power. Having determined issues of

98 *Von Einem* (1998) 72 SASR 110, 130 (emphasis added).

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

100 An analogy suggesting the deficiency in such an approach may be seen in the development of the law to focus on the nature of the power rather than its source in considering its amenability to review.

101 Blackshield, above n 51, 185.

102 Smith, above n 8, 398–9.

103 Remembering there is now an increased scope for judicial review.

104 *Prentis v Atlantic Coast Line Co*, 211 US 210, 226–7 (Holmes J) (1908) (emphasis added):

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under law *supposed* already to exist. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts *that establish* the law.

105 Blackshield, above n 51, 186.

106 Pattenden, above n 16, 389.

fact and law, in a controlled way, the critical aspect of judicial power is that the controversy be *finally* decided by applying the law to the facts, as found.<sup>107</sup> The determinations settle conclusively the rights and liabilities of those who are subject to the decision.<sup>108</sup> A decision that is not conclusive of the rights of the parties, and subject to later review, does not involve judicial power but the finality of the decision is not affected because the decision may be appealed.<sup>109</sup> A decision not to pardon or to refer the matter to the Court of Appeal do not possess the judicial characteristic of being final and binding as a petitioner may continuously lodge subsequent submissions (most likely to no avail). However, for those petitioners unable to lodge an appeal, these decisions still leave access to courts at the whim of the executive.

A pardon has the judicial characteristic of being *final* and *binding*. This is because: (i) a pardon cannot be refused, (ii) a pardon affects the court record and (iii) the appearance, intent and effect of the pardon is to finally exonerate.

(a) *A Pardon Cannot Be Refused*

Peter Brett concluded that the executive has no power to commute a death sentence without the consent of the condemned person.<sup>110</sup> That proposition has been overwhelmingly rejected.<sup>111</sup> Once the executive has determined that a pardon will be granted, it cannot be refused by the grantee. *Ex parte Lawrence*<sup>112</sup> illustrates the point. Mr Lawrence's death sentence was commuted to life imprisonment. Lawrence had not requested or consented to any commutation of his sentence. He applied to the Supreme Court of South Australia for an order that the death sentence be carried out. Legislation resolved the issue<sup>113</sup> but as to whether a prisoner could refuse a pardon and demand the court-imposed sentence, Bray CJ said:

In short, to put the matter in jurisprudential terms, it seems to me that a sentence duly passed by a criminal court creates a right in the Crown to the enforcement of the punishment provided by the sentence and a duty or obligation on the convicted person to submit to that enforcement. The argument before us inverts that proposition and contends that the sentence also creates a right in the convicted person to the enforcement of the sentence upon him and a duty on the Crown so to enforce it. There is no authority for such a proposition and, in my view, as at present advised, it is unsound.<sup>114</sup>

107 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188.

108 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652, 659 (Dixon CJ).

109 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

110 Peter Brett, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20 *Modern Law Review* 131.

111 See, eg, Fox and Freiberg, above n 9, 23; *Censori v Holland* [1993] 1 VR 509, 514 (Harper J).

112 (1972) 3 SASR 361 ('*Lawrence*').

113 The legislation is discussed below at Part IV. Chief Justice Bray said '[l]egislation in this form appears to me to avoid the difficulties referred to by Professor Brett': *Lawrence* (1972) 3 SASR 361, 366.

114 *Lawrence* (1972) 3 SASR 361, 369.

(b) *A Pardon Affects the Court Record*

It is traditionally said that the free pardon wipes out the conviction and all its consequences and puts the person pardoned in exactly the same position as if he had never been convicted,<sup>115</sup> but this does not represent the modern approach.<sup>116</sup> In *R v Cosgrove*,<sup>117</sup> Morris CJ said:

*Blackstone* states the effect of a pardon ... as follows: '4. Lastly, the effect of such pardon ... is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity.' ... Accordingly, a pardon is in no sense equivalent to an acquittal. It contains no notion that that 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.<sup>118</sup>

'May one be pardoned and retain th'offence?'<sup>119</sup> At common law, yes. A pardon removes the consequences of the conviction; it does not affect the court record so as to provide that the pardoned person was actually acquitted.<sup>120</sup> Thomas's case illustrates the result. Thomas<sup>121</sup> was pardoned, on the basis that incriminating evidence against him may have been planted by police, and 'a Royal Commission was established to investigate the alleged police malpractice'.<sup>122</sup> The Commission held that it could not receive any evidence tending to implicate Thomas in the crime, given his pardon. The High Court disagreed, and said the effect of the pardon was

to remove the criminal element of the offence named in the pardon but not to create any factual fiction or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted ... [Thomas] is by reason of the pardon [only] deemed to have been wrongly convicted.<sup>123</sup>

The POM cannot eliminate a conviction, but only pardon its effects. In *Foster*,<sup>124</sup> it was said that the only body with the statutory power to lift a conviction is the appellate court. That exercise of the POM does not affect legal rights because it does not affect the court's verdict or record is, we suggest, the main contradictor to showing the power to be a judicial power. How can it be judicial power when it does not affect judicial decisions?

115 *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561, 564–5 (Pollock B). 'The King's pardon doth not only clear the offence itself, but all the dependencies, penalties and disabilities incident unto it': *Cuddington v Wilkins* (1615) Hob 67, 82 (Hobart CJ).

116 Which creates uncertainty as to the effect of a pardon: see Smith, above n 8, 417. [1948] Tas SR 99.

117 Ibid 105–6 (emphasis in original), approved in *R v Foster* [1985] QB 115, 128 (Watkins and May LJ, and Butler-Sloss J) ('*Foster*').

119 Jonathan Bate and Eric Rasmussen (eds), *William Shakespeare: Hamlet* (Palgrave Macmillan, 2008) 95.

120 'A pardon does not have the same effect as quashing a conviction; it merely relieves the pardoned defendant from serving the term of imprisonment or the burden of any fine or financial penalty ... The conviction remains.': *R v Maguire* [1992] QB 936, 947 (Stuart-Smith LJ).

121 See above Part III(A)(1)(a).

122 Smith, above n 8, 418.

123 *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602, 621.

124 [1985] QB 115.

The short answer is the position at common law has been altered by legislation. In respect of a federal (or offshore territory) offence,<sup>125</sup> a pardon affects and alters the court record. Section 85ZR of the *Crimes Act 1914* (Cth) expunges the conviction and the person pardoned is taken for all purposes never to have been convicted and may, pursuant to section 85ZS deny ever having been charged with or convicted of the offence.<sup>126</sup> Its effect is to ensure the finality of the exercise of the POM at law.

The federal legislation operates more beneficially than current legislation in some Australian states, which enact the common law position.<sup>127</sup> Legislation, however, in these and other jurisdictions,<sup>128</sup> previously prescribed conditional pardons affecting sentences to be treated as valid sentences of the courts. Legislation to the same effect existed in England<sup>129</sup> and New Zealand.<sup>130</sup>

The effect of federal legislation gives the POM an element of finality indicative of judicial power. Where legislation does not settle the issue of finality, as is the current position of many state jurisdictions, the varying approaches that have existed highlight the need to look to the actual appearance and effect of the pardon, as opposed to a ‘bright-line’ for the answer.

### (c) *The Appearance and Effect of Pardon Is Final*

Legislative intervention aside, the finality in a pardon must be based on a realistic appreciation of its purpose and use. To defend the exercise of the POM as an exercise of non-judicial power because it lacks the characteristic of finality, is to support a strained and unrealistic distinction between many pardons and an acquittal. The difficulty of the distinction and precise effect of a pardon is reflected in the inconsistent approaches of the federal, state and territory jurisdictions in Australia.

Intuitively, a pardon excuses something done.<sup>131</sup> President Nixon’s acceptance of the pardon was seen as an admission of guilt.<sup>132</sup> But pardons are often given to the innocent.<sup>133</sup> When John Dryden wrote: ‘Forgiveness to the injur’d does belong; But they ne’r pardon who have done the wrong,’<sup>134</sup> he

125 *Crimes Act 1914* (Cth) s 85ZL.

126 For the legislative background, see *Hartwig v PE Hack* [2007] FCA 1039 (6 July 2007).

127 *Criminal Code Act* (NT) s 433; *Criminal Code Act 1899* (QLD) s 677; *Sentencing Act 1995* (WA) s 138. There are no equivalent provisions in the other Australian jurisdictions.

128 See *Criminal Code Act Compilation Act 1913* (WA) s 679, as repealed by *Sentencing (Consequential Provisions) Act* (WA) s 26, described in *Censori v Holland* [1993] 1 VR 509, 515 (Harper J).

129 *Criminal Justice Act 1948* (UK) c 58, s 69.

130 See *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252.

131 See the remarks of Lord Robertson in *C H W Gane*, ‘The Effect of a Pardon in Scots Law’ (1980) 25 *Juridical Review* 18.

132 ‘Ford’s Own Story of the Nixon Pardon: “No Deal–Period”’, *US News and World Report* (Washington), 28 October 1974, 20.

133 Richard Lambert, *The Innocence of Edmund Galley* (Newnes, 1936), cited in Pattenden, above n 16, 378–9.

134 John Dryden, *The Conquest of Granada by the Spaniards: In Two Parts* (Henry Herringman, 3<sup>rd</sup> ed, 1678) Part II, Act I, Scene II, 67.



represented a popular perception that a pardon is a decree of innocence. Indeed, some petitioners may well seek a pardon *in addition* to their conviction being quashed: they want a pardon so people know it was not a technical error that saw their success on appeal. In 1976, *The Times* wrote that a pardon: ‘has one big disadvantage. It removes the consequences of conviction, but does not assert that the person convicted was in fact innocent of the crime charged. *In practice it has been taken to mean that by most people, but that is not what it says.*’<sup>135</sup>

Public uncertainty about the pardon arises because it is contrary to common sense to have different branches of government apply like standards to the same conduct, yet assign to a person different levels of criminal responsibility. That leads to confusion.<sup>136</sup> But, what does it mean to accept that the pardon is not the equivalent of acquittal? In *Foster*, counsel for the Crown submitted:

The Crown supports the appellant’s argument that a conviction is not expunged by the grant of a free pardon. *However, in general a pardon and the quashing of a conviction have the same effects*, for example a defendant cannot be tried for the same offence again; he may plead his pardon, or autrefois acquit.<sup>137</sup>

Modern executive practice on the POM, as evidenced by the English Home Office, shows the executive’s treatment of the POM as final. Since the 1960s, the Home Office increasingly referred cases back to the CACD using the reference power on the basis that ‘it is better to steer cases back into the judicial system than for the Home Office to make the *final decision*’.<sup>138</sup> The high threshold test sometimes applied by the executive to the grant of a pardon was justified by the *Trendle Report*: ‘One reason sometimes given for a higher threshold for pardon is that a pardon determines proceedings.’<sup>139</sup> These grounds directly reflect the finality in the process. Sir James Fitzjames Stephen, whilst a supporter of the executive having the pardoning power as the best authority to conduct the inquiry into the propriety of conviction,<sup>140</sup> still retained concerns about the Home Secretary as the ‘final dispenser of justice’.<sup>141</sup> Smith suggested a method by which the pardon and the court record could co-exist would be to give the executive power to ask the court to quash the conviction in circumstances where a pardon was to be granted.<sup>142</sup> This is what the legislation installing the pardon as a court judgment did (and does at federal level). It cements the finality of the decision.

European nations recognise the problem created by the nebulous reasons for which a pardon might be granted and take sensible measures to ensure the distinction between the pardon and the acquittal. In France the conviction remains after a pardon. But the French only use a pardon to forgive someone who *has* committed an unlawful act: cases of wrongful conviction are rectified by the

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135 Reproduced in Rolph, above n 59, 87 (emphasis added).

136 *Ibid* 62.

137 *Foster* [1985] QB 115, 119 (emphasis added).

138 Pattenden, above n 16, 392 (emphasis in original).

139 *Trendle Report*, above n 38 (emphasis added).

140 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 135.

141 *Ibid* vol 1, 317; Rolph, above n 59, 3.

142 Smith, above n 8, 421.

courts.<sup>143</sup> Sweden's pardoning power is unique; it can reverse acquittals. But the power extends only to the consequences of conviction: there can be no interference with the question of guilt. Sweden recognises that interference or perceived interference with verdicts of guilt (which is what the Australian approach to the pardon permits) are not for the executive.<sup>144</sup>

Whilst the ordinary understanding of a pardon is to forgive a wrong committed, in practice, the POM is often exercised to right a miscarriage of justice. It is foolhardy to think an uninformed person would consider a pardon to do anything but finally absolve the pardoned person from the crime recorded against them at law. It is equally absurd to think an informed person, informed of the high threshold standards the executive often requires to be satisfied as a prerequisite to the grant of a pardon, namely proof of innocence, would conclude the conviction should remain intact. Whilst it remains the case that a pardon does not exonerate the accused, the appearance and effect of many pardons is to achieve the same finality for the petitioner as an acquittal does. The difference rests in the record, which is unaltered, not the substance of the assessment or decision which is made.

### 3 *Distinguishing the POM from Other Prerogatives*

Justification for regarding the POM as rightly for the executive is simply that it passed together with other prerogative powers of the sovereign.<sup>145</sup> This was the basis on which many courts held the POM unreviewable.<sup>146</sup> *CCSU* established that prerogative powers are not subject to an absolute immunity from judicial review: it depends on their subject matter, but many of the prerogative powers still existing would generally be non-justiciable.<sup>147</sup> In *Toohey*,<sup>148</sup> Mason J said:

There is, as the commentators have noted, a contrast between the readiness of the courts to review a statutory discretion and their reluctance to review the prerogative. The difference in approach is none the less soundly based. *The statutory discretion is in so many instances readily susceptible to judicial review for a variety of reasons. Its exercise very often affects the right of the citizen; there may be a duty to exercise the discretion one way or another; the discretion may be precisely limited in scope; it may be conferred for a specific or an ascertainable purpose; and it will be exercisable by reference to criteria or considerations express or implied. The prerogative powers lack some or all of these characteristics.* Moreover, they are in some instances by reason of their very nature not susceptible of judicial review ... *the royal prerogatives relating to war and the armed services is based on the view that they are not, by reason of their character and their subject matter, susceptible of judicial review. It was for very much the same reason that this court ... refused to*

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143 Rolph, above n 59, 69.

144 Ibid 72.

145 Wheeler, above n 66, 439.

146 *Horwitz v Connor* (1908) 6 CLR 38; *De Freitas* [1976] AC 239; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 ('*Toohey*'); Harris, above n 60, 400.

147 *CCSU* [1985] AC 374.

148 (1981) 151 CLR 170.

*review the decision of the Attorney-General for New South Wales to file an ex officio information ...*<sup>149</sup>

This led Lander J to conclude in *Von Einem* that: ‘It is probable, therefore, that, as presently advised, the prerogative of mercy is not subject to review, not because its source is the prerogative but because of the subject matter of the power itself’.<sup>150</sup> Whilst these cases concern the reviewability of the prerogatives, the discussion of their justiciability reveals the nature and character of the power exercised. When the nature of the POM is considered, it is apparent that the POM is distinguishable from the other prerogatives with which it is typically associated to justify its non-justiciability. The POM is ‘the odd one out’ because it involves judicial power, unlike the others which are administrative powers.

The defence and treaty prerogatives are clearly administrative and rightly for the executive. Both are based on policy considerations, relating to international hostilities and economics, rightly for the governing cabinet. Likewise, the granting of honours, political appointments and dissolutions are matters guided by policy and governmental administration.

The ex officio and nolle prosequi<sup>151</sup> may be more closely aligned with the POM. Both concern actions in the courts; both deal with issues of criminal responsibility. But, like the defence and treaty powers, the ex officio and nolle are administrative functions. Unlike the POM, they involve no *final* determinations of criminal guilt: that is left to the courts.<sup>152</sup> In *Milnes*,<sup>153</sup> the difference between the power of pardon and those relating to the instigation and administration of prosecutions was succinctly put:

A pardon is also quite different, in my view, from a mere promise not to prosecute. An undertaking of that latter kind might not be worth very much in law under a procedure whereby any person is competent to lay an information before a justice charging another with an indictable offence. While I have not heard any argument on the matter, I take that to be the situation in South Australia, as it was under the common law of England. However, let it be supposed that the Attorney-General in this State could always frustrate a private prosecution, if it reached the stage of a trial in this Court, by simply taking it over and entering a nolle prosequi. It may therefore be said that “the government”, including for this purpose the police, can at the end of the day make good an undertaking that a suspected offender will not be prosecuted. Such an undertaking still falls critically short, in my opinion, of a pardon by the Crown as the common law understands it.<sup>154</sup>

In modern times, the prosecution of cases on behalf of the state is conducted by an independent prosecuting authority, the Office of the Director of Public Prosecutions (‘ODPP’) in Australian jurisdictions. The ex officio indictment is laid or a nolle entered by the ODPP. Undoubtedly, the creation of the Offices is a product of the growing workload and complexity of state prosecutions. But, it also reflects a concern that the executive, a political branch of government, not

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149 Ibid 219–20 (emphasis added) (citations omitted).

150 *Von Einem* (1998) 72 SASR 110, 129.

151 For a brief summary of the nolle power, see Smith, above n 8, 413.

152 See *Barton v The Queen* (1980) 147 CLR 75; *Fraser Henleins v Cody* (1945) 70 CLR 100.

153 (1983) 33 SASR 211.

154 Ibid 217–8 (Cox J) (citations omitted).

be seen as responsible for criminal proceedings: so as to separate it from decisions that even suggest a preliminary adjudication<sup>155</sup> on criminal liability.<sup>156</sup> Yet the executive retains a power which permits it to usurp the finality of curial decisions on criminal liability.<sup>157</sup> No other prerogative gives the executive that power.

## **B The Prerogative and Opinion Power: Contravention of the Separation of Powers**

In *Burt v Governor-General*,<sup>158</sup> the New Zealand Court of Appeal observed that the POM ‘has become an integral element in the criminal justice system, a constitutional safeguard against mistakes’.<sup>159</sup> That is the irony. It is constitutional principle, specifically SOP doctrine and conventions, which proscribe executive exercise of the POM. In *Eastman v Australian Capital Territory*,<sup>160</sup> the ACT Supreme Court said of the statement in *Burt*: ‘To treat executive intervention as an integral part of the criminal justice system would, in our view, be to depart from received views as to the separation of powers which have emerged over the last 300 years.’<sup>161</sup>

Constitutional principle is further strained, both at federal and state levels, when the executive, utilising the opinion power, seeks out the judiciary’s advice on a particular point in determining whether or not to exercise the POM.<sup>162</sup> Whilst the advice is given judicially, it remains just that: advice.

### **1 Contravention at Federal Level**

Section 61 of the *Australian Constitution* vests the executive power of the Commonwealth in the Queen, exercisable by the Governor-General. The separation of judicial from executive and legislative power is constitutionally entrenched from the text and structure of the *Constitution* itself.<sup>163</sup> Judicial power<sup>164</sup> can only be exercised by the judiciary<sup>165</sup> at federal level.<sup>166</sup> In *Pfeiffer v*

155 The ODPP does not instigate or cease prosecutions without an assessment of the strength of the case and hence the liability of the accused. There are cases in which the Attorney-General has directed the ODPP to, for example, lodge an appeal: see *Nemer v Holloway* (2003) 87 SASR 147, however this is contrary to the role the executive usually has and should have following the creation of the ODPP and the principles of SOP.

156 Smith, above n 8, 416.

157 See above Part III(A)(2).

158 [1992] 3 NZLR 672 (*‘Burt’*).

159 Ibid 681 (Cooke P) (emphasis added).

160 (2008) 163 ACTR 29.

161 Ibid 40 (Stone and Dowsett JJ) (emphasis added).

162 *Van Beelen* (1974) 9 SASR 163, 181 (Walters, Wells and Jacobs JJ); *A-G’s Reference (No 1 of 1983)* [1983] 2 VR 410, 412 (Young CJ, Anderson and Gobbo JJ).

163 See *New South Wales v Commonwealth* (1915) 20 CLR 54, 88–9 (Isaacs J) (*‘Wheat Case’*); *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*‘Boilermakers’ Case’*).

164 And only judicial power: *Boilermakers’ Case* (1956) 94 CLR 254.

*Stevens*,<sup>167</sup> Kirby J said: ‘[i]n Australia, the legitimacy and authority of all law must ultimately be traced to, or be consistent with, the federal *Constitution*’.<sup>168</sup> If it is accepted that an exercise of the POM involves an exercise of judicial power it cannot be for the federal executive in Australia.

## 2 *Contravention at State Level*

The effect of section 7 of the *Australia Act 1986* (Cth) is that ‘all powers and functions’ of the sovereign in respect of a state are exercisable by the Governor upon advice tendered by the Premier, with the Attorney-General having responsibility for that advice on the POM. The SOP is not textually entrenched in the constitutions of the states.<sup>169</sup> It was not part of their colonial constitutional law.<sup>170</sup> In the states, where the basic governmental structures were in place before the *Australian Constitution*, the SOP has little formalised constitutional existence,<sup>171</sup> but in cases such as *Clyne v East*<sup>172</sup> and *Kable v DPP (NSW)*,<sup>173</sup> it was said that a ‘general’ doctrine of SOP operates as accepted practice in the states through constitutional convention.<sup>174</sup> As McHugh J explained in *Kable*:

in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution’s plan of an Australian judicial system with State courts invested with federal jurisdiction that *no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts*.<sup>175</sup>

Whilst the POM may be a personal power of the executive, as it involves judicial power without legislative authority, there is a basis for saying state constitutional convention restricts its exercise other than through the judicial arm of government.

At state level the convention-based SOP may be overridden by the legislature.<sup>176</sup> Executive exercise of the POM (accepting it to be a judicial power) is not forbidden by an entrenched SOP, as it is federally. The legislature of a state may confer a judicial power on a body other than a court.<sup>177</sup> Furthermore, subject

165 The three classes of courts to which s 71 of the *Constitution* speaks are the High Court, federal courts created by the Federal Parliament, such as the Federal Court of Australia, and state and territory courts vested, by the Federal Parliament, with federal jurisdiction, being the state Supreme Courts.

166 *Wheat Case* (1915) 20 CLR 54.

167 (2001) 209 CLR 57.

168 *Ibid* 88.

169 See *Constitution Act 1902* (NSW); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1934* (Tas); *Constitution Act 1975* (Vic); *Constitution Act 1889* (WA). See also *Clyne v East* (1967) 68 SR (NSW) 385; *Gilbertson v South Australia* [1978] AC 772.

170 *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652.

171 *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

172 (1967) 68 SR (NSW) 385.

173 (1996) 189 CLR 51 (‘*Kable*’).

174 See also *Nicholas v Western Australia* (1971) WAR 168.

175 *Kable* (1996) 189 CLR 51, 118 (emphasis added).

176 See *Totani v SA* (2009) 105 SASR 244 (‘*Totani*’).

177 *A-G v Estcourt* (1995) 4 Tas R 355.

to limits flowing from the federal jurisdiction exercised by state Supreme Courts,<sup>178</sup> state parliaments may also confer non-judicial powers on state courts.<sup>179</sup> In *Fardon v Attorney-General (Qld)*,<sup>180</sup> McHugh J said:

Nor is there anything in the Constitution that would preclude the States from legislating so as to empower non judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law ... no process of legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with Federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.<sup>181</sup>

Lumb agrees that ‘there is no constitutional impediment to a state parliament legislating in a manner which would intrude upon the exercise of judicial power’.<sup>182</sup> But Alvey and Ryan note that, ‘this would, of course, then be open to an appeal to the High Court to possibly overrule the State Parliament and its legislation’.<sup>183</sup> This is because, as Taylor observes:

There is ... in the state a great wall of separation between the judiciary, on the one hand, and the executive and legislature on the other – a wall which supports the whole edifice. *It would certainly be alarming if, for example, criminal guilt was ever declared by the legislature or the executive, or if a Court of Appeals consisting of the executive were created.*<sup>184</sup>

That is because criminal guilt and punishment under a strict SOP is an exclusively judicial function and for a state parliament to act in a way that offends the SOP, there must be good reason if the SOP convention is to have any meaning for the governance of Australian states. There is no good reason for the executive to have blanket power to exercise the POM, given its exercise often involves judicial power, which would justify the derogation that role for the executive involves from the constitutional convention of SOP and the democratic principles it protects. To do otherwise than require good reason for departure from the constitutional convention of SOP at state level is to devalue the convention and allow non-judicial bodies to exercise what would be exclusively judicial functions at the federal level, merely due to the manner of drafting of the state constitutions.

Put aside arguments based on a strict SOP. In *North Australian Aboriginal Legal Aid Service v Bradley*,<sup>185</sup> a case concerning the appointment of judges, Weinberg J said the SOP is not a doctrine which simply requires the arms of

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178 *Kable* (1996) 189 CLR 51 is authority for the proposition that a state parliament may not vest jurisdiction and powers upon a state court of such a nature as to render them incompatible with the exercise by the same court of the judicial power of the Commonwealth.

179 *Gilbertson v SA* [1978] AC 772.

180 (2004) 223 CLR 575.

181 *Ibid* (citations omitted).

182 Richard D Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5<sup>th</sup> ed, 1991) 132.

183 John Alvey and Neal Ryan, ‘The Separation of Powers in Australia’ (Paper presented at the 53<sup>rd</sup> Australasian Political Studies Association Conference, New Zealand, 28–30 September 2005).

184 Taylor, above n 9, 439 (emphasis added).

185 (2001) 192 ALR 625.

government be independent.<sup>186</sup> The SOP doctrine represents an ideology for the workings of government,<sup>187</sup> not simply a mechanical division of labour between them according to the text of a written document. Even if only by convention, the SOP upholds a doctrine fundamental to democracy.<sup>188</sup> When parliament acts in a way that offends the SOP, a justification to warrant such offence must be found, to uphold the importance of the convention. In cases of courts exercising non-judicial power (the usual case), justification lies in the independence of the decision and the expertise of decision-making according to evidence and reason that courts apply. If parliament legislates to determine a case being litigated,<sup>189</sup> justification may be found in the public interest in the matter being resolved according to a particular standard, for which the law, without legislative change, does not provide.<sup>190</sup> In cases where state parliaments have legislated in a manner contrary to the SOP there is arguably a good reason for them to have done so. The constitutional convention applies and has the importance to be expected of a convention, which is the principal manifestation of the rule of law in democratic governments. As Alvey and Ryan note:

A tension within the separation of powers will always exist, and the greatest danger of abuse and excess will always lie with the executive arm – not judges or legislatures. It is in the executive that lies the greatest potential in theory and in practice for the misuse of power and for its corruption. *Preventing this in our system relies as much upon conventions as constitutions ...*<sup>191</sup>

The SOP is a democratic principle designed to ensure the independent but checked operation of each arm of government. The rationale and purpose of the SOP is to maintain public confidence that each arm of government is working in that way by guarding against any perception that one arm of the government is working at the behest or as the instrument of another. That is precisely not only the perception but the actual means of operation that exercise of the POM and the opinion power by the executive may permit. No better example exists in Australia than the case of Colin Campbell Ross.

Mr Ross was convicted of the murder of Alma Tirtschke, a 12-year-old school girl, in February 1922.<sup>192</sup> Permission to appeal to the High Court and then the Privy Council was refused.<sup>193</sup> Ross was executed in April 1922. The case against Ross was that he had lured Tirtschke into his wine shop and, after plying her with liquor, had raped and strangled her. The only physical evidence

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186 Ibid 698–9 [475]–[480].

187 See Sebba, above n 6, 110–12.

188 Respect and adherence for it was the basis on which the major political parties sought to capture the ‘legal vote’ in SA’s March 2010 election.

189 Parliament may adjust the substantive rights at issue in proceedings before a court: *Australian Building Construction Employees’ and Builders’ Labourers’ Federation v Commonwealth* (1986) 161 CLR 88, 96–7 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ). Parliament can prescribe what evidence may or may not be used in legal proceedings: *Commonwealth v Melbourne Harbour Trust* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ).

190 *Totani* (2009) 105 SASR 244, 303 (White J).

191 Alvey and Ryan, above n 183 (citations omitted) (emphasis added).

192 *Ross v The King* (1922) 30 CLR 246.

193 Ibid.

connecting him to the crime was hair found on a blanket at his home, which the jury was told came from the scalp of Tirtschke. Ross consistently denied any involvement in Tirtschke's death.<sup>194</sup> At trial, he was deprived of having a comparison of the blanket hairs and those taken from the head of Tirtschke conducted by an independent expert.

Ross' supporters petitioned for mercy (and inquiry) to no avail. In 1993, Kevin Morgan, a former schoolteacher, became interested in Ross's case and began research.<sup>195</sup> In 1995, after two years of inquiry, Morgan traced the original hair samples to files held by the ODPP.<sup>196</sup> He gained the right to submit the hair samples for DNA testing and, in 1998, Dr Bentley Atchison of the Victorian Institute of Forensic Medicine found the hairs were not from the same scalp. A second test by the Australian Federal Police confirmed Dr Atchison's findings that the key evidence against Ross was faulty. In addition to the DNA analysis, Morgan discovered that a prosecution witness, who testified that Ross had confessed to the crime, had been convicted of perjury: but that was not revealed to the jury. In addition, the Court had not heard from six reliable witnesses who supported Ross' alibi defence.

Following Morgan's endeavours, a further petition signed by both the Ross and Tirtschke families was sent to the Victorian Attorney-General.<sup>197</sup> This time action was taken. The Attorney first exercised the opinion power. The question he asked of the Court was whether there had been a miscarriage of justice in the conviction of Ross in light of the new forensic evidence about the blanket hairs and new character evidence about one of the prosecution witnesses. The Court furnished him with its opinion that there was a miscarriage of justice 'which would warrant the quashing of the conviction by an appellate court',<sup>198</sup> but added that he had the option 'of granting a pardon independently of this statutory regime'.<sup>199</sup>

The Attorney chose to recommend a pardon which was signed by the Governor on the same day the Court's opinion was published.

Morgan's work on the *Ross* case raised evidential matters clearly calling for adjudication by a court; that much is plain from the opinion sought. But the executive chose to maintain control of the outcome. The *Ross* case had been the subject of previous petitions, none of which had been acted on by the executives of the day. The 'Gun Alley Murder', as it came to be called, attracted much media attention. The evidence revealed in the 2006 petition received by the Attorney was more compelling. His use of the opinion power to seek the Court's

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194 He relied on a defence of alibi and gave evidence at his trial.

195 Morgan had read handwritten notes in the bible Ross had kept with him in prison, and which had been preserved by his family following his death. Morgan was moved by the simple notations in which Ross wrote of false witnesses, knowing that Ross had written these notes without expecting anyone else to read them: see Kevin Morgan, *Gun Alley: Murder, Lies and Failure of Justice* (Simon & Schuster, 2006).

196 They had been thought lost.

197 *Re Ross* (2007) 19 VR 272, 276–7 (Teague, Cummins and Coldrey JJ) ('*Ross*').

198 *Ibid* 293 (Teague, Cummins and Coldrey JJ).

199 *Ibid*.



opinion on the petition was an Australian first. *His decision* to recommend (grant) a posthumous<sup>200</sup> pardon to Ross having considered that opinion was an Australian first.

The *Ross* case was a great victory for both families.<sup>201</sup> But its conduct by the executive undermines the SOP. First, through the perception, if not the fact, that the executive might retain control of a matter, properly the province of the court to finally resolve,<sup>202</sup> if it is politically advantageous to be seen as the ‘ultimate arbiters’ of justice and mercy. The long history of *Ross*’ case, despite the relief it afforded the families, made it the perfect vehicle for the executive to be so seen. It is unlikely that the executive would have referred the case to the Court in full, absent its long history and the scope for ‘Australian firsts’.<sup>203</sup> That is not to say the executive will allow political points to guide its decision. But the *Ross* case may be contrasted with the similar English petition of Giuseppe Conlon where the opinion power was used but with the additional grant that if the court held it had jurisdiction to pardon posthumously it should determine the appeal itself.<sup>204</sup> As Pattenden says, no one doubts the executive endeavours to fulfil its role impartially and properly,<sup>205</sup> but *perceptions* must be closely guarded against in the endeavour to maintain public confidence in the judiciary.<sup>206</sup> It is the potential for the public perception to be that the executive is or might be acting out of political interest which must be guarded against: justice cannot just be done, it must be seen to be done.<sup>207</sup>

Second, the SOP is offended through undermining the independence of the judiciary by use of the opinion power to place the court in the position of advisor to the executive. As previously noted, the SOP operates at state level through constitutional convention. The Court, in giving its opinion in *Ross*, noted the constitutional constraints to what it was being asked to do, saying:

The procedure adopted by the Attorney-General in this case has never, so far as we are aware, been previously utilised in Victoria (or Australia) to tender advice. It requires an opinion which is not a judicial determination. Nor is the Attorney-General bound by any opinion furnished to him. Moreover, we are not reviewing or purporting to review the decision of the High Court. This opinion relates to matters of new evidence only.<sup>208</sup>

Public confidence in the impartiality of justice is not assisted if there is reason to think one arm of government may direct the other. This is especially so when, as with the referral powers, the executive has power to direct the court to

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200 Ibid 274–5 (Teague, Cummins and Coldrey JJ).

201 Both of whom held doubts about Ross’s conviction.

202 *Ross* (2007) 19 VR 272, 293 (Teague, Cummins and Coldrey JJ).

203 It is difficult to think the executive would be displeased with the following headline: ‘The State Government will create legal history today when it announces a posthumous pardon for a man wrongly executed 86 years ago in the notorious Gun Alley murder case’: John Silvester, ‘Ross Cleared of Murder Nearly 90 Years Ago’, *The Age* (Melbourne), 27 May 2008.

204 The circumstances of Giuseppe Conlon are drawn from *R v Maguire* [1992] QB 936, 947.

205 Pattenden, above n 16, 410.

206 See *Kable* (1996) 189 CLR 51, 107 (Gaudron J).

207 Ibid.

208 *Ross* (2007) 19 VR 272, 276 (Teague, Cummins and Coldrey JJ).

consider matters the court has already determined and would not reconsider but for the executive's insistence. The chief justice is required to lead the judiciary and maintain its independence from the government of the day.<sup>209</sup> How can that be achieved if the Attorney is directing the chief justice to provide him with advice? In *Ross*, despite the Court's clear statement that the case was appropriately one for *the Court* to quash the conviction, the executive chose to pardon. This supports a perception that the court is the instrument of the executive.

Third, the court acts as an instrument of the executive in providing advice which has no effect in law without a further act by the executive. In *Martens*, Logan J did not need to decide the point but recognised that federal law might prevent the executive having the benefit of the opinion power on a petition that sought a pardon in respect of a federal offence. His Honour said, '[a] concern would be whether that application would be prevented by the prohibition, arising from the interpretation of Ch III of the Constitution ... against the furnishing of advisory opinions in the exercise of judicial power in federal jurisdiction.'<sup>210</sup>

The decision about the wrongfulness of Ross's conviction was *finally* made by the executive. The Court's opinion has no characteristic of finality.<sup>211</sup> The court may act judicially in arriving at its opinion, but it exercises no judicial power, no final declaration, in furnishing the Attorney with that opinion. Clearly, the executive needed assistance on the *Ross* case. There was considerable new evidence: its reliability had to be ascertained; its effect had to be weighed against the evidence presented at the original trial; its satisfaction or not of the applicable legal tests had to be determined. This further undermines the SOP by confusing public perception as to which arm of government is accountable for pronouncements on criminal responsibility. It sees the court's declarations of criminal responsibility lack the characteristic of finality, leaving final outcomes to the executive.

### 3 *Independent Authorities to Advise on the POM*

The answer to the SOP issues identified in other Commonwealth nations has been to charge independent authorities with the tasks of the IOM.<sup>212</sup> The *Trendle Report* suggested a particular advantage in establishing an independent authority was that applications for mercy 'would be assessed independently of the Executive, thus avoiding any constitutional or separation of powers issues'.<sup>213</sup> But establishment of such authorities (independent of the executive) to conduct the inquiries into petitions and recommend on pardons does not change the fact that the executive remains the final decision-maker. That critical element of finality for judicial power remains with the executive. The independent body is

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209 Alvey and Ryan, above n 183.

210 *Martens* (2009) 174 FCR 114, 121.

211 *Ross* (2007) 19 VR 272, 293 (Teague, Cummins and Coldrey JJ).

212 See Pattenden, above n 16, 405–10.

213 *Trendle Report*, above n 38, 'Options'.

simply the new body with responsibility for advising the minister. The power of investigating and recommending is not judicial power: for example, a Royal Commission lacks the primary characteristic of judicial power, the power to decide or determine.<sup>214</sup> Similarly, the power to recommend a course of action to a minister is not judicial,<sup>215</sup> because it is a recommendation: it is not a final determination. Independent authorities in other Commonwealth nations leave the final decision on the POM to the minister and the executive.

### C Summing Up on the Prerogative of Mercy and Opinion Power

The POM involves executive exercise of a power, the nature and character of which is often judicial. This is impermissible at federal level. It is proscribed by constitutional convention at state level and, furthermore has no justification in principle at state level. As such, the SOP principles eschew the POM being an executive function. That is supported by the history of the prerogative as a responsibility of the judiciary. The differences of the POM from the other prerogative powers, with which it is often grouped to demonstrate its immunity from review, also demonstrates its character as a judicial rather than administrative power. The opinion power, which is most likely to be used as a precursor to the grant of a pardon, requires the judiciary to act as an advisor, contrary to its usual independent role, which further contravenes the principles the SOP is designed to protect.

### D The Reference Power: The Fundamental Choice

The reference power is preferred to the prerogative by the executive, in the spirit of adherence to the SOP.<sup>216</sup> Justice Lander recognised that the policy behind the full statutory reference power was to ensure, so far as practicable, that no person is the victim of a miscarriage of justice.<sup>217</sup> There has been some judicial comment about when the reference procedure is appropriate.<sup>218</sup> Former Home Secretary, Roy Jenkins' explanation of when a reference would be made depended on there being fresh evidence<sup>219</sup> and the time for ordinary appeal lapsed.<sup>220</sup> Fresh evidence may take the form of new DNA evidence,<sup>221</sup> evidence

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214 *Lockwood v Commonwealth* (1954) 90 CLR 177, 181 (Fullagar J).

215 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation [No 2]* (1982) 152 CLR 179; *Minister for Immigration and Ethnic Affairs v Pochi* (1981) 149 CLR 139, 143–4 (Gibbs CJ, Mason, Aickin and Wilson JJ).

216 Pattenden, above n 16, 359.

217 *Von Einem* (1998) 72 SASR 110, 138.

218 Harris, above n 60, 405.

219 'Fresh' evidence is distinguished from 'new' evidence. Fresh evidence is evidence discovered subsequent to the trial (and usually after the appellate processes concluded; hence the petition). Fresh evidence did not exist at the time of trial or could not have been uncovered with due diligence at the time of trial. If evidence was available or could reasonably have been presented but was not presented at trial, then the fresh evidence requirement of due diligence will not be satisfied and the evidence not admitted: see *Ratten* (1974) 131 CLR 510; *Gallagher* (1986) 160 CLR 392.

220 Harris, above n 60, 406–7.

suggesting misidentification,<sup>222</sup> perjury,<sup>223</sup> or false confession.<sup>224</sup> References may follow defence counsel incompetence<sup>225</sup> or Crown non-disclosure.<sup>226</sup> A reference may also be made on purely legal grounds, where a petitioner has exhausted their rights of appeal but a change in the law or its interpretation suggests their case was wrongly decided.<sup>227</sup> Justice Lander spoke of the minister as having an ‘unconfined and uncontrolled discretion’ to refer cases; exercisable as the minister thinks fit.<sup>228</sup> The practical difficulties in regarding the IOM powers as so unrestricted have been discussed. But, regardless of the breadth of the discretion, on every petition, the executive has a basic, but fundamental, choice. It can refer the case or refuse the petition (the POM aside).

### **1 *The Petition Declined: Judicial Power***

If an appeal is dismissed or an application for leave to appeal refused, that is an exercise of judicial power. Logically, the same applies to an executive decision to refuse to refer a petition.<sup>229</sup> When the minister indicates the petition has been declined after ‘careful consideration of all the issues raised in the Petition’,<sup>230</sup> that indicates that the case petitioned is without merit, legal or evidential. The decision to decline further action finally dissolves the matter. It has a judicial character. The same process and approach, in terms of the consideration of the matter against specific tests and standards that determine whether the prerogative will be exercised or not, even though those standards may differ from those applied to pardon applications,<sup>231</sup> informs the refusal to refer a petition. For like reasons as discussed in respect of exercise of the POM, the decision to take no action with respect to a petition by way of referral, is controlled by judicial-type considerations, finally resolves the matter and has a direct effect on the petitioner’s rights.

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221 See generally Lynne Weathered, ‘Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia’ (2003) 12 *Griffith Law Review* 64; Lynne Weathered, ‘A Question of Innocence: Facilitating DNA-Based Exonerations in Australia’ (2004) 9 *Deakin Law Review* 279.

222 See, eg, *Foster* [1985] QB 115.

223 See, eg, *Davies v The King* (1937) 57 CLR 170; *Mickelberg v The Queen* (1989) 167 CLR 259.

224 See, eg, *Van Beelen* (1974) 9 SASR 163; *R v Condren; Ex parte A-G* [1991] 1 Qd R 574.

225 See, eg, *Re Knowles* [1984] VR 751.

226 See, eg, *Easterday v The Queen* (2003) 143 A Crim R 154; *Mallard v The Queen* (2005) 224 CLR 125; *Von Einem* (1998) 72 SASR 110.

227 See, eg, *R v Moyle* (2007) 96 SASR 287. See also Robert Lindsay, ‘Punishment without Finality: One Year in the Life and Death of Alan Egan’ (2009) 33 *Criminal Law Journal* 45.

228 *Von Einem* (1998) 72 SASR 110, 130.

229 See Pattenden, above n 16, 366.

230 Letter from the Honourable Jim McGinty MLA, A-G for the State of Western Australia, to Counsel for Alan Egan, 2 November 2007.

231 See *Martens* (2009) 174 FCR 114, 133–4 (Logan J).

## 2 *The Petition (Case) Referred: Judicial Interference*

No pardons have been issued in England for indictable offences on the ground of wrongful conviction since 1982.<sup>232</sup> The policy before the establishment of the Criminal Cases Review Commission ('CCRC') was to refer matters to the CACD, even if the petitioner was clearly innocent, in all but exceptional cases. The policy was the same in New Zealand. The English Home Office adopted the policy because it did not want to make the *final decision*,<sup>233</sup> which supports the characterisation of the other IOM options as judicial. But a decision to refer the case in full to the court is not in any way final as it leaves that finality to the court. Why then should it be a breach of the SOP? Why should it not be for the executive?

The SOP issue, which a full reference raises, is that whilst the court hears and determines the case referred as an ordinary appeal, the rules of evidence and procedure it applies on that reference are often relaxed so as to accommodate evidence and material the executive considers relevant, but which the court would not admit or take into account if applying its own and usual rules of appellate litigation. The SOP is contravened because on a reference, 'justice takes off her blindfold': she accords weight to evidence and material based not on an assessment of the material itself but based on its source. Indeed this option, the full reference back to the court, which seems least problematic, can be the most damaging to the institutional integrity of the judiciary and the maintenance of public confidence in it: the fundamental principles the SOP aims to protect.<sup>234</sup>

On the reference of a matter, the court supposedly deals with it as it would an ordinary appeal against conviction.<sup>235</sup> However the words of the legislation grant the court a wider scope to take account of new, fresh or other properly admissible evidence.<sup>236</sup> In *R v Collins*,<sup>237</sup> Goddard LCJ stated:

We allowed the evidence to be called in this because the reference had been made to the Court by the Home Secretary, who wanted the Court to deal with it. The Home Secretary had sent forward the evidence which had been placed before him, and it therefore seemed right to the Court in those circumstances to depart from the rule which it otherwise would have applied, and to hear the evidence and consider it together with the other evidence in the case.<sup>238</sup>

Exactly how far the courts will relax the rules of evidence is unclear.<sup>239</sup> The decisions do not indicate the limits to which the court would go in receiving evidence on a reference which would be unacceptable on an ordinary appeal. But these comments show the extent to which curial reception of evidence and

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232 See Pattenden, above n 16, 381.

233 Pattenden, above n 16, 392–3; for criticism of that reluctance: *R v Home Secretary; Ex parte Hickey* [1995] 1 All ER 490 (Simon Brown LJ).

234 *Kable* (1996) 189 CLR 51.

235 See, eg, *R v Young [No 2]* [1969] Qd R 566; *Van Beelen* (1974) 9 SASR 163.

236 See *Van Beelen* (1974) 9 SASR 163, 191 (Walters, Wells and Jacobs JJ).

237 (1951) 34 Cr App R 146 ('*Collins*').

238 *Ibid* 149.

239 See Smith, above n 8, 406.

ordinary screening processes are skewed on such references. In *R v Irvine*,<sup>240</sup> confessional evidence from a third party, receipt of which had been previously refused on appeal, was taken into account when referred back. Mr Dougherty was refused leave to appeal because the alibi witnesses he wished to produce could have been called at the trial; he was subsequently allowed to rely on those witnesses when the case was referred back.<sup>241</sup> In *R v Stafford*,<sup>242</sup> Lord Widgery CJ made explicit the sentiments expressed by Goddard LCJ:

It is a general rule of this Court that evidence which was available at the trial cannot be called here unless there is a good excuse for not calling it before. But we do not apply that restriction on a reference of the present kind, and we hope and believe that all the evidence that anybody has wished to put before us has been duly put.<sup>243</sup>

This was despite the statute saying there should be no difference in approach.<sup>244</sup>

The New Zealand position is that the court is assisted by being informed of the considerations that caused the reference to be made.<sup>245</sup>

We are not suggesting that a relaxation of rules is inappropriate and that rigid appellate approaches to the reception of fresh or new evidence justified. The point is that the usual practice of the appellate court changes on a reference by reason of *who* is invoking the court's jurisdiction: a relaxation of the rules, out of consideration for why the matter has come before the court. That is contrary to public confidence in 'blind justice'.

The Australian approach was originally circumspect with regard to the English authorities dealing with the reception of evidence on a reference. In *Aylett v The Queen*,<sup>246</sup> the Tasmanian Court of Criminal Appeal distinguished both *McGrath*<sup>247</sup> and *Collins*<sup>248</sup> and decided that the Court would proceed on the same principles as if the reference was an appeal. The Attorney-General referred the case so that fresh evidence could be placed before the court, some of which had been obtained in an enquiry since the prisoner's trial. The Court had difficulty grasping where its discretion lay if it was bound to accept everything in the ministerial file on the case.<sup>249</sup> The Court held that the reference power

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240 [1965] Crim LR 610.

241 See Pattenden, above n 16, 361; Rolph, above n 59, 57.

242 Unreported, England and Wales Court of Appeal – Criminal Division, Lord Widgery CJ, James LJ and Eveleigh J, 26 February 1973.

243 Ibid, cited in Pattenden, above n 16, 133.

244 See also *R v Lattimore* (1975) 62 Cr App R 53.

245 *R v Morgan* [1963] NZLR 593. See also *Collie v The Queen* [1997] 3 NZLR 653, 657 (Eichelbaum CJ).

246 [1956] Tas SR 74 ('*Aylett*').

247 *R v McGrath* [1949] 2 All ER 495.

248 *R v Collins* (1947) 32 Cr App R 344.

249 *Aylett* [1956] Tas SR 74, 78–9.

would seem to authorise and require the court, on such a reference, to apply the same principles both in deciding on what material to act and in proceeding to its determination as it would have done in the case of an appeal on the same grounds, bearing in mind always that these principles can never be considered as hard and fast rules...<sup>250</sup>

In reaching this conclusion the Court found support in decisions of the Supreme Courts of NSW and South Australia.<sup>251</sup> But despite this and other Australian authority suggesting that the rules of evidence should not be relaxed on a reference,<sup>252</sup> the position is unclear and there is authority that suggests the rules can be relaxed. In *R v Daley; Ex parte A-G (Qld)*,<sup>253</sup> in the Queensland Court of Appeal, Keane JA<sup>254</sup> said:

It may be said that this new evidence might have been obtained with reasonable diligence prior to trial so that it would not satisfy the test for the admission of “fresh evidence” ... *However that may be, it seems that on a reference ... the Court has a broader discretion to ensure that justice is done and is seen to be done.*<sup>255</sup>

In the Northern Territory of Australia, when a case is referred back, the rules of evidence do not apply.<sup>256</sup>

The more willing reception of evidence on a reference has been attributed to judicial impressions that there is less risk of its fabrication.<sup>257</sup> The evidence will have been vetted through the executive.<sup>258</sup> That view only lends credence to the executive’s consideration of petitions as informed by a structured and controlled process based on assessment of evidence in accordance with legal tests for its admissibility and reliability. But further, it undermines public confidence in the judiciary and thereby the SOP because it suggests the courts consider the executive better appraisers of the reliability of evidence than they. A perception which is especially troublesome, given the executive is not in as good a position to make such assessments as a court.<sup>259</sup>

The result of relaxing the rules of evidence on a referred case is either the appearance of collusion between the executive and the judiciary, or deference by the judiciary to the executive. Both directly contradict the system of checks and balances the SOP is designed to uphold. The point was made in *Aylett* when the Court endeavoured to distinguish the decision in *Collins*:

It is perhaps more to the point to note that both *McGrath’s Case* and *Collins’ Case* were unreserved decisions, certainly of the Court of Criminal Appeal, in which *R v Allen* was not referred to. *But we are unable to appreciate why the mere fact that it was forwarded by the executive should oblige the court to receive the alleged*

250 Ibid 79.

251 See *R v Kelly* (1946) 46 SR (NSW) 344; *R v McPherson* [1939] SASR 181, 182–3. See also *R v Allen* (1910) 5 Cr App R 225.

252 *Re Matthews* [1973] VR 199; *R v Johns* (1999) 110 A Crim R 149.

253 [2005] QCA 162.

254 Williams and Muir JJA agreeing. His Honour is now Keane J of the High Court of Australia.

255 *R v Daley; Ex parte A-G (Qld)* [2005] QCA 162 (Keane JA) (emphasis added).

256 *Criminal Code Act* (NT) sch 1 s 433A(5).

257 See D A Thomas, ‘England: Post-trial Procedure’ in J A Coutts (ed), *The Accused* (Stevens & Sons, 1966) 49, 51–52.

258 Pattenden, above n 16, 361.

259 Ibid 365.

*fresh evidence and act upon it in contravention of established principles.* For one thing the court would have no right to expect that the reference would be confined to such evidence as would be admitted as legally probative and relevant in a court of law. Hearsay, opinion, collateral issues as to credit and other such matters will no doubt often be found in a petition for clemency, and the court cannot question and does not desire to be understood as questioning the perfect propriety of the executive in making its decision to accept and act on material which would not be receivable in a court of law. But as the name implies the prerogative of mercy, in its exercise may involve something more than justice.<sup>260</sup>

The Court put forward two policy reasons why it should be governed by the ordinary appellate rules of admitting evidence on a reference. First it pointed out that if the contrary was the case then an appellant could deliberate between appealing in the ordinary way according to the normal rules or applying to the Governor-in-Council on material which the appellant had been advised would not primarily be admissible, but which might be placed before the court by a reference. In *R v Sparkes*, it was observed that it is undesirable to encourage ‘astute’ criminals to bypass ordinary appellate procedures in the hope that fresh evidence, ‘genuine or otherwise’, might be placed before the court as the result of a petition to the Home Secretary.<sup>261</sup> Secondly, the Court was of the view that the main mischief of the argument in favour of latitude in the reception of evidence on a reference arose from a basic misconception of the role of a court on such references. This is the SOP point. The Court held that when a reference is made a court should not be regarded as an adjunct or assistant to the executive. Rather it is exercising an independent statutory function which it should exercise as a judicial and not as an administrative body. The court must exercise a judicial function but it cannot do so in a way inconsistent with its normal practice simply because the executive has referred the matter.

Having the public perceive, rightly according to authority, that the court may bend and relax its usual approach on references from the executive only undermines the propriety of the criminal justice system’s usual processes. At its extreme, the reference can support the perception that the court cannot fix its own mistakes: the court’s processes are exhausted but still issues remain that require attention. The reference power might still be thought the least problematic. It is simply the means by which a second appeal can be brought before the court. But what does that make the executive? At best a judge granting leave to appeal, at worst, a registry sifting through applications and taking advice from senior lawyers. No pardons have been issued in England since 1982 because the Home Office policy is to refer even where there is no doubt of the petitioner’s innocence.<sup>262</sup> The reference power effectively makes the minister the ‘head registrar’ of the court’s ‘Mercy Division’.

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260 *Aylett* [1956] Tas SR 74, 82–3 (emphasis added) (citations omitted).

261 (1956) 1 WLR 505, 514.

262 See the case of Stefan Kiszko in Pattenden, above n 16, 381.



### E Summing Up on the Reference Power

In short, much of the reasoning of review bodies, such as the Runciman Commission, concentrated on undesirable *perceptions* the public may have from the reference power being vested in the executive. Whilst perception is central to the doctrine of SOP, that approach ignores the *actual* ways that the current process in Australia, the old process in other jurisdictions, contravenes the SOP doctrine. It is not simply a matter of perception. The current practice sees the executive and the courts act in ways which are unique in criminal justice and contrary to the way the SOP doctrine would have them properly operate. Sir David Maxwell-Fyfe (later Lord Kilmuir) said he often felt it would be *constitutionally and dramatically* wrong to invoke the prerogative.<sup>263</sup>

### IV THE STATUTES AMENDMENTS (APPEALS) ACT 2013 (SA): A SOUTH AUSTRALIAN MODEL FOR REFORM

The reason why the court cannot be the direct and first port of call for a petitioner is the common law restriction to a convicted person having a single right of appeal<sup>264</sup> and associated restrictions on appellate courts receiving fresh evidence.<sup>265</sup> South Australia has modified these common law restrictions by statute, thereby allowing a petitioner direct access to the court. This ensures the petitioner remains, rightfully in our view, not a petitioner but an appellant.

The *Statutes Amendments (Appeals) Act 2013* (SA) was to be based on the existing UK Criminal Cases Review Commission that was established after release of the *Runciman Report*. The Legislative Review Committee on its inquiry into the Criminal Cases Review Commission Bill recommended that the new body not be established as it was not an efficient use of resources:

The Committee is concerned that a permanent CCRC would not be an adequate use of resources given the size of this jurisdiction and the number of matters it would review. It is of the view that reforms should be addressed through amendments to existing legislation, rather than through establishing a CCRC. However, the Committee considers that current mechanisms for the consideration of potential wrongful convictions are in need of reform.<sup>266</sup>

We agree with the recommendation of the Legislative Review Committee in recommending against the establishment of a new body. Briefly, this is primarily for reasons of efficiency, having respect to economic, time and competency factors – by competency we mean the efficiency to be derived from having appellate judges hear and determine what are effectively second appeals. The legislative approach recommended by the South Australian Review also has

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263 Rolph, above n 59, 150.

264 *Grierson v The King* (1938) 60 CLR 431, 435 (Dixon J); *R v Reardon* [2004] NSWCCA 197; *R v MAM* [2005] QCA 323; *R v Nudd* [2007] QCA 40; *R v Ali* [2008] QCA 39.

265 *Re Sinanovic's Application* (2001) 180 ALR 448, 451 (Kirby J).

266 Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (2012) 81.

fidelity to the normative concept of the SOP by maintaining judicial power with the judicial arm of government, insofar as possible, rather than sharing and dividing that critical democratic power amongst pseudo and quasi-judicial bodies. The reason for preferring what came to be the South Australian approach rather than the establishment of an independent body merits further consideration, but is a topic for a future piece as it is beyond the scope of this article.

The *Statutes Amendments (Appeals) Act 2013* (SA) enacted the following three reforms to appellate and post-conviction procedure in South Australia.

### A Second and Subsequent Appeals

The *Act* provides new procedures for renewed defence appeals that enable the Full Court of the Supreme Court to hear second and subsequent appeals against conviction if ‘fresh’ and ‘compelling’ evidence has come to light after the usual right of appeal has been exhausted.

The power lies with the appeal court. Section 369 remains; it has not been abolished. However, a path to a subsequent or second appeal now lies by invocation of the court process *alone*, through the judicial arm of government, exercising a function which as discussed above is properly for it and not the executive.

The insertion of section 353A into the *Criminal Law Consolidation Act 1935* (SA) and section 43A into the *Magistrates Court Act 1991* (SA) provides statutory grounds for second and subsequent appeals. In their operation, both sections provide for the same procedures. Section 353A(1) of the *Criminal Law Consolidation Act 1935* (SA) provides:

The Full Court may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interest of justice, be considered on appeal.

Section 43A(1) of the *Magistrates Court Act 1991* (SA) provides:

A Court to which a particular appeal against conviction lies under section 42 (the *appeal court*) may hear a second or subsequent appeal against conviction if the Court is satisfied that there is fresh and compelling evidence that should in the interests of justice, be considered on an appeal.

In both construction and practical effect sections 353A(1) and 43A(1) provide grounds for the appellate court, however constituted, to hear second and subsequent appeals based upon fresh and compelling evidence. Both sections 353A and 43A adopt the following definitions of fresh and compelling:

For the purposes of subsection (1), evidence relating to an offence is—

(a) *fresh* if—

- (i) it was not adduced at the trial of the offence; and
- (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

- (b) *compelling* if—
- (i) reliable; and
  - (ii) it is substantial; and
  - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

An appeal under sections 353A(1) and 43A(1) can include evidence that was not admissible at the earlier trial for the relevant conviction. Important to both sections 353A and 43A is the inclusion of subsection (7) which provides:

Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

Furthermore sections 353A(3) and 43A(3) provide the appellate courts grounds to hear a second or subsequent appeal if it is satisfied there has been a substantial miscarriage of justice: ‘The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice’.<sup>267</sup> This conclusion will be arrived at and informed by the nature of the fresh and compelling evidence adduced.

Upon allowing that second or subsequent appeal the Full Court has two options available. It may either quash the conviction and consequently direct a judgment and verdict of acquittal be entered or direct a new trial: section 353A(4).

If the appellate court determines that a new trial should be ordered rather than the conviction quashed, section 353A(5) provides that the court may make orders it thinks fit for the safe custody of the person to be retried, including admitting the person to bail: section 353A(5)(a). However the court cannot direct the court that is to retry the person on which charge to convict them on or the sentence that should be imposed.

## B Finality: Pardons Quash Convictions

The *Act* also deals with the issues of finality, as we discussed above. Similarly to section 85ZR of the *Crimes Act 1914* (Cth), section 369(2) has been inserted so that if a person is granted a pardon under the POM, the Attorney-General may refer the matter to the court and the court may quash the convictions. Section 369(2) provides:

If a full pardon is granted to a convicted person in the exercise of Her Majesty’s mercy in relation to a conviction of an offence, the Attorney-General may refer the matter to the Full Court and the Full Court may, if it thinks fit, quash the conviction.

The insertion of section 369(2) bridges the gap between public perception and the operation of the law as discussed above. This brings the appellate back into the fold as the final dispenser of justice, having the final say as to whether or not to expunge the successful petitioner’s record. The court is not being directed by the executive in this instance as discretion is preserved by ‘the Full Court

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267 *Criminal Law Consolidation Act 1935* (SA) s 353A(3).

may, if it thinks fit'. The key difference then between section 369(2) and section 85ZR is that the latter automatically removes the offence for a person pardoned rather than referring the matter to the court.

### C Constitution of Appellate Courts

The *Act* inserts section 357 into the *Criminal Law Consolidation Act 1935* (SA); sections 42(2a) and (2b) in the *Magistrates Court Act 1991* (SA) and section 5(1)(b) in the *Supreme Court Act 1935* (SA) to provide that the Full Court may be constituted by two judges rather than three. This amendment is designed to preserve court resources in light of potential, additional work appellate courts may now need to perform on account of the reforms implemented by the amending legislation.

The first two matters we have discussed are critical to the proper vesting of the power to review criminal convictions, at all and any stage, in the judicial arm of government and for providing legal certainty in respect of the outcome of that review process. The third matter is an important measure to, at least, endeavour to prevent court resources from being unduly burdened by the additional appeals appellate courts may now be called upon to hear.

### D Application across Australia

Whether or not these reforms will be adopted across Australia remains to be seen. What we have said in favour of the South Australian reforms is obviously not to suggest they are without fault with respect to concept, drafting and effect. These matters will be considered and monitored and the subject of future report. However, as we noted from the outset, the IOM in Australia has been static yet it is an area where persistent vigilance, monitoring and determination for improvement is demanded. As the Hon Michael Kirby observed in endorsing the South Australian reforms:

it is the first step for Australia. Judges, lawyers and administrators throughout Australia will be studying the operation of the South Australian law with vigilance. Any law that helps society to avoid serious miscarriages of justice is to be welcomed. The new South Australian law is such a measure. I welcome it and praise the Parliament of South Australia. I also praise Ms Bressington for her initiative and the lawyers and the civil society organisations who have been urging the adoption of such a law for so long. Their success is an instance of democracy in action and of principle triumphing over complacency and mere pragmatism. I hope that other jurisdictions in Australia will take steps to enact legislation for the same purpose.<sup>268</sup>

## V CONCLUSION

Smith said of the IOM, ‘the system contains a number of contradictions, anachronisms and areas of uncertainty’.<sup>269</sup> Post-conviction review practice in Australia suggests that the executive is better placed than the judiciary to scrutinise evidence, to determine whether a case is worthy of further judicial consideration, to apply legal standards and to determine whether justice may have miscarried. The different status of pardons and acquittals, given the wide reasons for which a pardon may issue, is confusing. The statutory powers of referral undermine the tenets of a constitutional democracy informing the criminal justice system.

Current post-conviction review procedures around Australia violate the legal constitutional law and doctrinal frameworks operating at the federal and state level, and, thereby and more emphatically, undermine the very normative concept and principles of SOP theory. The executive government has a mandate to enforce the law, not to be the repository of punitive power.

South Australia has demonstrated that principled reform may be implemented efficiently and effectively by statutory modification of the common law restrictions and uncertainties adhering to post-conviction processes. Separate commissions or bodies of inquiry are unnecessary. The task is the province of the courts and the law should facilitate the court in this task.

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269 Smith, above n 8, 398.