THE NEW STATUTORY RIGHT OF APPEAL IN SOUTH AUSTRALIAN CRIMINAL LAW: PROBLEMS FACING AN APPLICANT – UNANTICIPATED INTERPRETIVE DIFFICULTIES

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For over a century, the criminal appeal rights in Australia have been in 'common form' across all states and territories. They have allowed for only one appeal after conviction. Recently, the Australian Human Rights Commission ('AHRC') expressed the view that they failed to protect the right to a fair trial or to provide an adequate process for a person who has been wrongfully convicted to challenge their conviction. South Australia responded by enacting legislation to create a right to a second or further appeal. However, the statutory formulation of the new right of appeal gives rise to a number of problems. It only has effect for cases involving 'fresh and compelling' evidence. Cases involving other forms of wrongful conviction (such as unreliable jury verdicts or legal error at trial) must still depend upon a petition procedure which has been identified as problematic by the South Australian Attorney-General and many others. The recent case of *R v Keogh* [2014] SASCFC 20 queries (but does not resolve) whether the evidential requirement is directed to the threshold issue of permission to appeal or whether it affects the substantive rights on a second or further appeal. We suggest it is the former and not the latter. We suggest broadening the new right of appeal to encompass all of the grounds of appeal. If that were done, it could replace the petition referral procedure. Such an extended appeal right could provide a model for national common form provisions in this important area of criminal appeal rights.

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I OVERVIEW

This is the last in a series of four articles on the criminal appeal legislation in Australia.

The first article explained that after a first appeal, the appeal courts could not re-open an appeal or hear a second appeal even where compelling evidence of wrongful conviction emerged.[1] The High Court could not admit any fresh evidence which demonstrated the existence of a wrongful conviction unlike the Supreme Courts of Britain and Canada. This was said to be problematic from a human rights and rule of law perspective.

The second article explained that the petition procedure, which gave a statutory power to an Attorney-General to refer a case to the Court of Appeal, was seriously deficient.[2] It was said to give rise to an 'unfettered discretion' on the part of an Attorney-General, and to no legal rights on the part of the petitioner. This too was said to be problematic from both a human rights and rule of law perspective.

The third article examined the statutory grounds of appeal (unreasonable jury verdicts, error of law and other miscarriages of justice) and the proviso (which allows the court to disregard certain types of errors) in the context of Neil MacCormick's institutional theory of law.[3] The statutory provisions and case law were found to involve aspects of incoherence, inconsistency and non-compliance. It was suggested that they should be simplified.

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1 Bibi Sangha and Robert Moles, 'Post-Appeal Review Rights, Australia, Britain and Canada' (2012) 36 *Criminal Law Journal* 300.

2 Bibi Sangha and Robert Moles, 'Mercy or Right? Post-Appeal Petitions in Australia' (2012) 14 *Flinders Law Journal* 293.

3 Bibi Sangha and Robert Moles, 'MacCormick's Theory of Law, Miscarriages of Justice and the Statutory Basis for Appeals in Australian Criminal Cases' (2014) 37 *University of New South Wales Law Journal* 244.

This article examines the new statutory right of appeal which came into effect in South Australia in May 2013. Part One explains the new right of appeal and how it arose. Part Two examines interpretive difficulties which arise. Part Three considers reasons why the wording of the new appeal right ought to be changed. Part Four concludes with suggestions as to how a simplified form of words could be adopted to overcome these difficulties.

II PART ONE – THE NEW RIGHT OF APPEAL

A *Introduction*

The Australian criminal appeal provisions are based upon the *Criminal Appeal Act 1907* (UK) which set up a right to appeal and the grounds of appeal. The legislation met with resistance at that time because there were many who said it would undermine confidence in the system of trial by jury.[4] Soon after 1907, the Australian states and territories passed legislation adopting the wording from the UK Act.[5] They are known as the 'common form' rights of appeal.[6]

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4 See Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Irwin Law, 2010) 56 citing Richard Nobles and David Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65 (5) *Modern Law Review* 676; Ken Whiteway, 'The Origins of the English Court of Criminal Appeal' (2008) 33 *Canadian Law Library Review* 309; Leon Radzinowicz and Roger Hood, *A History of English Criminal Law* (Clarendon Press, 1986); Rosemary Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996).

5 Justice Peter McClellan AM, CJ at CL, *A Matter of Fact: The Origins of the Court of Criminal Appeal*, Centenary of the Court of Criminal Appeal Dinner (3 December 2012), <http://www.supremecourt.lawlink.nsw.gov .au/agdbasev 7wr/_assets/supremecourt/m670001l4/mcclellan031212.pdf>.

6 *Cesan v The Queen; Mas Rivadavia v The Queen* (2008) 236 CLR 358, 382 [72] French CJ: 'it must be accepted that the question will ordinarily fall for consideration in the application of statutory language, in this case the common form provision for criminal appeals reflected in s 6(1) of the Criminal Appeal Act'; *R v Keogh* [2014] SASCFC 20, [6] Nicholson J: referred to '[c]ommon form provisions available throughout the Commonwealth'.

For the next 90 years, Australia and the UK interpreted the right of appeal to mean one appeal only, although this was not expressly stated to be so in the legislation.[7] The judges thought that legal finality was important and that exceptional cases could be remedied through the petition referral procedure.[8] Others have taken the view that the principle of finality has no place in the criminal law and should never be used to prevent the re-examination of a case where it is claimed that a wrongful conviction has occurred.[9]

In Australia, a statutory petition procedure enables an Attorney-General to refer a case to the appeal court for further consideration.[10] The availability of that procedure has often been referred to by the appellate judges to explain why it was unnecessary to allow for a second or further appeal.[11] The existence of the petition procedure has had strong justificatory value for the restriction on further appeals. The problem is that previously in the UK, and currently in

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7 Sangha and Moles, above n 1, 49: '[a]s is pointed out in relation to the British cases, the legislation does not state in terms that there is to be only one appeal. The reference in the legislation to "an appeal" could as easily be interpreted to mean "an *effective* appeal". This is particularly relevant where the defect in the trial, such as a significant non-disclosure, is not revealed until after the appeal has been heard and rejected'.

8 See, eg, *Burrell v The Queen* (2008) 238 CLR 218; *The Queen v GAM* (No 2) [2004] VSCA 117.

9 Graham Zellick, 'The Causes of Miscarriages of Justice' (2010) 78 (1) *Medico-Legal Journal* 11, 12.

10 *Criminal Law Consolidation Act 1935* (SA) s 369. Corresponding provisions in the other States and Territories are contained in *Crimes (Appeal and Review) Act 2001* (NSW) s 77; *Crimes Act 1958* (Vic) s 584; *Criminal Code 1899* (Qld) s 672A; *Sentencing Act 1995* (WA) s 40; *Criminal Code 1924* (Tas) s 419; *Criminal Code 1983* (NT) s 431; *Crimes Act 1900* (ACT) s 475; See Sangha and Moles, above n 2.

11 See Sangha and Moles, above n 1, 54 citing *R v Grierson* (1937) 54 WN (NSW) 144a: '[t]his does not mean that injustice must necessarily occur when new substantial evidence pointing to a prisoner's innocence is discovered, after his appeal has been finally disposed of. In such a case recourse may be had to [the petition procedure] … There is no reason to suppose that the procedure provided … is not adequate for the consideration of any matter which it may now be sought to raise on behalf of the prisoner'.

Australia, those vested with the discretion have been reluctant to exercise it in favour of a referral.

This problem was recognised much earlier in the UK, where the initial resistance to having an appeal in the first place had shifted to resisting demands for a second or further appeal. Confidence in this position was shattered when the convictions in the IRA bombing cases from the 1970s were eventually overturned by the appeal courts in the 1990s. It was revealed that the convictions had been based upon false and sometimes fraudulent expert evidence and police misconduct sometimes amounting to torture.[12] Mindful that they may be facing serious systemic problems, the UK government set up an independent statutory body called the Criminal Cases Review Commission ('CCRC') with the power to investigate and to refer appropriate cases to the appeal court for a second or further appeal.[13] Since 1997 over 350 convictions which had otherwise exhausted all avenues of appeal have been overturned.[14]

Australia has continued to rely upon the petition procedure for post-appeal reviews. A leading case on the interpretation of the petition provisions has stated that they do not give rise to any legal rights on the part of the petitioner, it being assumed that all legal

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[12] *R v McIlkenny and Others* (1991) 93 Crim App R 287 [Birmingham Six]; *R v Richardson, Conlon, Armstrong and Hill* Court of Appeal (Criminal Division) 20 October 1989 [Guildford Four]; *R v Maguire and Others* (1991) 94 Crim App R 133 [Maguire Seven]; *Judith Ward v The Queen* (1991) 96 Crim App R 1 [M62 Bombing]. The police torture cases included the foregoing and *R v Derek John Treadaway* [1996] EWCA Crim 1457; *R v Keith Twitchell* EWCA, 26 October, 1999.

[13] See Sangha, Roach and Moles, above n 4, ch 7; Establishment of the CCRC was a recommendation of: United Kingdom, *The Report of the Royal Commission on Criminal Justice,* Cm 2263 (1993) which is known as the Runciman Royal Commission; See also Walter Garrison Runciman, 'An Outsider's view of the criminal justice system' (1994) 57 (1) *Modern Law Review* 1.

[14] For updated figures see, <http://www.justice.gov.uk/about/criminal-cases-review-com mission>.

rights have been exhausted.[15] The statutory power granted to an Attorney-General is said to involve an 'unfettered discretion' and that a petition could be rejected for arbitrary reasons or for no reason at all. The AHRC has indicated that the petition procedure may well be in breach of the provisions of the *International Covenant on Civil and Political Rights*.[16]

The Attorney-General for South Australia spoke of the deficiencies of this procedure when introducing the new right of appeal:

> … the present process for people who have been convicted and exhausted their [appeal] rights is very, very mysterious. It is mysterious because what happens is that they are languishing in gaol, *they have no right of appeal*. What they do is write to the Governor and they say, 'Governor, please let me out, I'm a good person'. The Governor then seeks advice from the Solicitor-General, who has to read a lot of material and form an opinion and inform the Governor, and then ultimately the Governor makes a decision.
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> None of that process occurs in any way in a public forum. It is all happening behind closed doors, as it must because it involves the Governor. However, what we are doing here is bringing that to a public forum, which is a court. So, *anybody* who believes they have one of these cases is able to appeal, take the matter to a court in a public forum and say whatever they want to say in public, hear whatever anyone else wants to say about it in public, and we have that marvellous disinfectant of sunshine just covering the whole circumstance — magnificent. I am starting to feel quite warm about it right now.[17]

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15 *Von Einem v Griffin and Anor* (1998) 72 SASR; See Sangha and Moles, above n 2.

16 See Australian Human Rights Commission, Submission to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 2011, 5 [29]: in respect of the practice not to provide written reasons for rejecting a petition, <http://www.hreoc.gov.au /legal/submissions/2011/20111125_criminal_case_review.html>.

17 South Australia, House of Assembly, 7 February 2013, *Statutes Amendment (Appeals) Bill 2013* (SA) (emphasis added).

It is not correct to say that 'anybody' can have access to the courts to resolve their concerns about a wrongful conviction. As we will see, there are certain categories of people whose cases may come within the traditional ground(s) of appeal but are still unable to exercise this additional right of appeal. It is not correct to say that the Governor seeks advice from the Solicitor-General or makes any decision in respect of the referral power. The Governor must seek the advice of the Government on any petition. The petition is referred by the Governor to the Premier's office which will refer it to the Attorney-General. Whilst the Attorney-General may in turn seek advice from the Solicitor-General, the statutory discretion as to whether to refer the matter to the Court of Criminal Appeal is vested in the Attorney-General and not the Governor.

At this time, a number of other jurisdictions in Australia are considering whether or not to adopt the South Australian change.[18]

[18] Amanda Banks and Colleen Egan, 'Bid to Take Politics out of Appeals', *The West Australian* (Perth), 14 August 2013: 'Mr Quigley revealed yesterday that he would draft changes to legislation, similar to a South Australian model'; Tim Barlass, 'Juries Found Guilty of Failing Too Frequently to Get it Right', *The Sydney Morning Herald* (Sydney), 4 August 2013: 'Recognising the fallibility of juries, South Australia in April introduced a statutory right of appeal where compelling evidence suggests a wrongful conviction has occurred'; Michael Kirby, 'Welcome New Hope for the Wrongly Convicted', *The Australian Financial Review*, 2 May 2013: 'I hope that other jurisdictions in Australia will take steps to enact legislation for the same purpose. Wrongful convictions and miscarriages of justice haunt the conscience of a civilised society'; Nino Bucci, 'Murder Law Reform Considered', *The Age* (Melbourne), 28 May 2013: '[a] new South Australian law, which gives convicted criminals a statutory right of appeal in the event of compelling evidence, will be "closely monitored" in Victoria'; Letter from Tasmanian Attorney-General Brian Wightman MP to Civil Liberties Australia, 11 February 2014: '[t]here is much to be said for a national approach to this issue and the development of national model provisions as was the case when the double jeopardy rules relating to persons acquitted were reformed some years ago'.

B *Background to the South Australian Amendment*

Under the *Australian Constitution*, each state and territory has jurisdiction over the enactment and enforcement of its own criminal law.[19] The statutory grounds of appeal state that the court shall allow an appeal if:

> it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence … or [there was] a wrong decision on any question of law, or that on any ground there was a miscarriage of justice.[20]

This can be paraphrased by saying that the substantive ground for allowing an appeal is that there has been a miscarriage of justice:

> Although the third ground speaks of miscarriage of justice specifically, each of the first and second grounds is also concerned with the occurrence of such a miscarriage. For an error of law or a verdict which is unreasonable or cannot be supported on the evidence will amount to a miscarriage of justice.[21]

If the appellant can persuade the court that any of the above grounds apply, the prosecution then has an opportunity to persuade the court that it may dismiss the appeal because of the provision called 'the proviso':

> notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant … if it considers that no *substantial miscarriage of justice* has actually occurred.[22]

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19 *Australian Constitution* s 51.

20 *Criminal Law Consolidation Act* 1935 (SA) s 353; *Criminal Appeal Act 1912* (NSW) s 6; *Crimes Act 1958* (Vic) s 568; *Criminal Code Act 1899* (Qld) s 668E; *Criminal Code* (NT) s 411; *Criminal Code Act Compilation Act 1913* (WA) s 689; *Criminal Code Act 1924* (Tas) s 404(1).

21 *Whitehorn v The Queen* (1983) 152 CLR 657; See Sangha and Moles, above n 3, 251.

22 Above n 20 (emphasis added).

So, the issue of 'miscarriage of justice' becomes one of a 'substantial miscarriage of justice'. This gives rise to a number of difficulties.[23]

It should be noted that in Victoria, the proviso has been deleted and the requirement to show a substantial miscarriage of justice has been incorporated into the substantive grounds of appeal for the second and third grounds of appeal:

> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice: or, (c) for any other reason there has been a substantial miscarriage of justice.[24]

This increases the burden on the appellant who now has to establish a 'substantial' miscarriage of justice. It also alters the burden on the prosecution if they wish to resist the appeal. This is taken up in our discussion of 'analogies' in Part Two.

On 5 May 2013, the *Statutes Amendment (Appeals) Act 2013* came into effect in South Australia.[25] This was in response to a recommendation of the Legislative Review Committee ('LRC') of the South Australian Parliament.[26] The LRC had been asked to consider and report on a Bill to establish a Criminal Cases Review Commission ('CCRC') in South Australia.[27] That Bill had been

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[23] See Sangha and Moles, above n 3.

[24] *Criminal Procedure Act 2009* (Vic) s 276. Where it is established that the verdict of the jury is unreliable or cannot be supported, it does not need to be further classified as a substantial miscarriage of justice; See Sangha and Moles, above n 3, 251.

[25] In this article, references will be to the provisions of the *Criminal Law Consolidation Act 1935* (SA), as amended by the *Statutes Amendment (Appeals) Act 2013* (SA); For legislative provisions, debates, reports and media comments see, <http://netk.net.au/AppealsHome.asp≥.

[26] South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill*, Parl Report No 12 (2012), <http://www.netk.net.au/CCRC/CCRCReport.pdf>.

[27] Criminal Cases Review Commission Bill 2010 (SA).

modelled on the Act which established the CCRC for England, Wales and Northern Ireland.[28]

As part of its deliberations, the LRC called for public submissions. The AHRC provided a submission in which it said that it was concerned that the criminal appeal system 'throughout Australia' failed to comply with international human rights obligations.[29] It said that the appeal system was not adequate to ensure the right to a fair trial or to enable wrongfully convicted people to challenge their conviction.[30]

No doubt this was based upon the combined effect of the following:

1. There is no second appeal for a person who has been wrongfully convicted.
2. The High Court cannot admit fresh evidence which shows a person has been wrongfully convicted.
3. The petition procedure provides no legal rights to a person wrongfully convicted.

There are some additional inquiry procedures in NSW and the ACT but they are regarded as administrative and not judicial procedures.[31] As Michael Kirby, former Justice of the High Court of Australia, pointed out, '[j]ustice in such cases is truly blind. The only relief available is from the Executive Government or the media - not from

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[28] *Criminal Appeal Act 1995* (UK). A separate CCRC has been established in Edinburgh to deal with cases from Scotland. The South Australian Bill was introduced by Ann Bressington, Independent Member of the Legislative Council.

[29] Above n 16, [15].

[30] Ibid [2.6]; See Sangha and Moles, above n 1, 314.

[31] Sangha and Moles, above n 1, 310; *Varley v Attorney-General (NSW*) (1987) 8 NSWLR 30.

the Australian judiciary'.[32] It follows that the Australian appellate system has been defective in this regard since Australia ratified the *International Covenant on Civil and Political Rights* ('ICCPR') in 1980.[33]

As mentioned, the initial focus had been on establishing a CCRC in South Australia. The AHRC, the Law Society of South Australia, the Law Council of Australia, the Australian Lawyers Alliance and Michael Kirby, all supported the idea of a CCRC being set up, and some specifically advocated that it be done on a national basis.[34] When the LRC issued its report it did not recommend the establishment of a CCRC as such.[35] It recommended that consideration be given to:

1. The introduction of a new statutory right of appeal.
2. The establishment of an inquiry into the use of expert evidence in criminal trials.
3. The establishment of a Forensic Science Review Panel to enable the testing or re-testing of forensic evidence, and for appropriate results to be referred to the appeal court.

The South Australian government decided to implement the first recommendation but not the other two. The Statute Amendment (Appeals) Bill 2012 was published for consultation as a government Bill and the previous CCRC Bill was withdrawn. The new Bill was passed by the Parliament and it came into effect on 5 May 2013. Not a single dissenting voice was raised during the passage of the Bill through the Parliament. As an alternative to a CCRC this is a minimalist reform. It grants a further right of appeal in certain narrowly-defined circumstances. It does not provide any case review procedure or any access to police and prosecution files. Most

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[32] Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195, 206 cited in AHRC Submission, above n 16, 5.2 [22].

[33] AHRC Submission, above n 16, [4.9].

[34] For submissions and media articles see, <http://netk.net.au/AppealsHome.asp>.

[35] LRC Report, above n 26.

applications for legal aid have been refused. The comparison with the UK position is quite striking.

C *The UK CCRC*

This is an independent non-departmental government body with responsibility for investigating alleged miscarriages of justice, and where appropriate referring them to the appeal court for review.[36] It has a right to access any information relating to a conviction which is held by a public body. Its review of files held by the police and the prosecuting authorities has led to the discovery of information which ought to have been disclosed at the time of the trial.[37] Its appointment of independent experts has allowed it to identify errors in evidence given at trials.[38] Its analysis of trial transcripts has identified judicial misdirections and other errors which has rendered jury verdicts unsafe.[39]

The legal criterion for the CCRC and the appeal court is the safety of the conviction and not factual innocence and this has been the cause of some concern in the UK.[40] The statute provides that the CCRC may refer a case to the appeal court if there is a 'real possibility' that the conviction would be quashed, or a sentence reduced.[41] There is no leave to appeal requirement. Every case referred by the CCRC must be heard as an appeal.

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[36] For the CCRC and its procedures see Sangha, Roach and Moles above n 4, ch 10.

[37] *R v George Kelly (hanged) and Charles Connolly (dec'd)* [2003] EWCA Crim 2957; *R v John Kamara* [2000] EWCA Crim 37; *R v Michael Davis, Raphael Rowe and Randolph Johnson* [2000] EWCA Crim 109.

[38] *R v Bowman* [2006] EWCA Crim 417; *R v Patrick Nicholls* [1998] EWCA Crim 1918.

[39] *R v Derek Bentley* (Deceased) [1998] EWCA Crim 2516.

[40] Michael Naughton, 'The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System', (2012) 58 *Criminal Law Quarterly* 207.

[41] *Criminal Appeal Act 1995* (UK) s 13.

The CCRC has been in operation since 1997.[42] Cases referred by it have resulted in more than 350 convictions being overturned, including some 70 murder convictions and over 35 rape convictions. The causes of such wrongful convictions include false confessions, false and perjured evidence from police and other witnesses, incorrect scientific evidence and errors of judgment by prosecutors, defence counsel and judges. Relatively few cases have been overturned based upon DNA evidence alone. By contrast, the Innocence Project in the United States which focuses mainly upon DNA cases has secured over 300 exonerations.[43]

D *The New Right of Appeal*

The new right of appeal in South Australia provides for a second or further appeal where there is 'fresh and compelling' evidence which might give rise to a finding that there has been 'a substantial miscarriage of justice':

> (1) 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 interests of justice, be considered on an appeal.
> (3) The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.[44]

The South Australian Attorney-General said that there is a legitimate concern about the possibility of undeserving applicants clogging up the court processes with unmeritorious appeals:

> It is important to guard against the potential misuse of any new model by vexatious applicants. The spectre of endless untenable efforts to

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[42] Laurie Elks, *Righting Miscarriages of Justice? The First Ten Years of the CCRC* (Justice, 2009).

[43] Innocence Project, <http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php>.

[44] *Criminal Law Consolidation Act 1935* (SA) ss 353A(1), (3).

> reopen old convictions should be avoided. A robust threshold is necessary to deter or deny untenable applications.[45]

Presumably, it is the requirement for fresh and compelling evidence which constitutes that robust threshold.

However, the suggestion that a higher threshold is necessary in order to *deter* unmeritorious appeal applications is incorrect. Unmeritorious applicants can apply whatever the test. The idea that a higher threshold is necessary in order to *deny* unmeritorious applications is also incorrect. Judges regularly reject such applications for a first appeal which does not have that higher threshold. There can be no doubt that unmeritorious applications should be identified and dismissed by the most economical method available. However, *increasing the threshold* for access to the appeal court will only ensure that otherwise meritorious applications will be denied.

People can lodge applications whatever the test. The experience in the UK is that 96% of all applications to the CCRC are *rejected*. In effect, the CCRC is a procedural filter to prevent the courts and judges being tied up with unmeritorious applications. The CCRC has an initial screening process which allows a Commissioner to issue a letter stating that, for the reasons set out in the letter, the matter is not to be taken further.[46]

The South Australian procedure requires such assessments to be made by appeal court judges, and possibly on two separate occasions.

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[45] Report by Attorney-General of South Australia, *Statutes Amendment (Appeals) Bill 2012* (27 November 2012), < http://netk.net.au/Appeals/Report.pdf>.

[46] See Sangha, Roach and Moles, above n 4, ch 10.

E *The Evolution of the Confusion: the Double Jeopardy Provisions*

It can be seen from the LRC's report that the fresh and compelling test is derived from the double-jeopardy provisions which allow for the retrial of a person in respect of an offence for which they had previously been acquitted.[47] It is based upon an argument by analogy. An analogical argument identifies relevant similarities between two distinct situations and then extends the principle applied in one to the other. This is an entirely respectable, indeed, essential component of legal reasoning.[48] One can see the reasoning in the LRC report.

The thought was that if the prosecution was to make an inroad against the principle of finality by having a second *prosecution*, then it would only be fair to allow a convicted person to make a similar inroad against the principle of finality by having a second *appeal*. The wording of both statutory provisions is similar. The double jeopardy provision enables a further prosecution to proceed upon the basis of fresh and compelling evidence of *guilt*.[49] The new right of appeal allows a second appeal where there is fresh and compelling evidence of *wrongful conviction*. However, it is an inappropriate analogy, because the two situations are not comparable. They have quite different presuppositions and contexts.

The rule against double jeopardy was long-established and based upon a fundamental principle of fairness which had to be overcome.[50] It involved a balance of power between the state and the

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47 LRC Report, above n 26, [3.10] referring to *Criminal Law Consolidation Act 1935* (SA) Part 10.

48 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), ch 10, 205-13.

49 *Criminal Law Consolidation Act 1935* (SA) Part 10.

50 James Spigelman, 'The Common Law Bill of Rights' (10 March 2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*. He referred to: 'a common law bill of rights … which operates in the absence of a clear indication to the contrary in the statute': at 23; the presumption that Parliament did not intend 'to permit an appeal from an acquittal' citing *Davern*

citizen. It was to protect the citizen against the possible misuse of state power by being tried more than once for the same offence. The emergence of DNA testing provided an exceptional circumstance which could demonstrate that an acquitted person may in fact be guilty. To guard against any possible abuse of process, a second prosecution for the same offence requires special permission from the court.[51]

However, there is no entrenched principle against correcting a possible wrongful conviction. Lord Igor Judge, Lord Chief Justice of England and Wales described the prospect of an innocent person being convicted of a serious crime as 'a catastrophic failure of the legal system'.[52] Principles of fairness demand that something should be done. There should be no hesitation in addressing that issue.

So whilst a very demanding standard might be required before commencing a second prosecution, the same standard might be quite inappropriate when considering the correction of a wrongful conviction. Indeed, the principle of fairness which demands hesitation regarding the former should demand some alacrity with regard to the latter.

In addition, the simple transference of the statutory provisions from the double-jeopardy context to the miscarriage of justice context has failed to take account of the substantive law and the grounds of appeal which apply to criminal appeals. We shall need to

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v Messel (1984) 155 CLR 21, 30-31, 48, 63, 66: at 23; and the 'conclusive effect of a verdict of acquittal' as an 'ancient and universally recognized constitutional right': at 27.

51 *Criminal Law Consolidation Act 1935* (SA) s 336(1): 'The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a relevant offence to be retried for the offence'.

52 Australian Institute of Judicial Administration Conference, Sydney 7-9 September 2011.

examine these issues first in the context of the leave to appeal and then in the context of the grounds of appeal.

III PART TWO – INTERPRETING THE NEW RIGHT OF APPEAL

In the parliamentary debates on the Bill it was suggested that the leave to appeal hearing could be combined with the substantive hearing of the appeal.[53] That may not be possible for reasons outlined below.

A *Leave to Appeal as a Separate Issue*

Permission from the Full Court is required for a second or further appeal. The Act states: '[a] convicted person may only appeal under this section with the permission of the Full Court'.[54] It adds that the power of the Full Court on an application for leave is exercisable by a single judge of the Supreme Court.[55] The next sub-section allows for an appeal against an adverse decision on this matter to be heard by the Full Court.[56] As was pointed out in *R v Keogh*, 'an applicant has an unfettered entitlement to have any application for permission which has been refused by a single judge reconsidered de novo by

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53 South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4309 (Vicky Chapman, Deputy Leader of the Opposition).

54 *Criminal Law Consolidation Act 1935* (SA) s 353A(2).

55 *Supreme Court Act 1935* (SA) s 48(3): 'where any Act provides that 1 or more of the following powers relating to appeals are exercisable by the Full Court, the power may, instead, be exercised by any judge of the Supreme Court in the same manner as the Full Court and subject to the same provisions: (a) the power to give permission to appeal'.

56 *Supreme Court Act 1935* (SA) s 48(4): 'If a judge refuses an application by an appellant to exercise any power of a kind referred to in subsection (3) in his or her favour, the appellant is entitled to have the application determined by the Full Court'.

the Full Court'.[57] This may well include an unmeritorious applicant. However, if the court was to determine that the application was 'incompetent' then the automatic right to have the permission application reconsidered by the Full Court would not apply, although there could then be an appeal against the finding of incompetency.[58] There is a provision that '[t]he Chief Justice may determine that the Full Court is to be constituted of only 2 judges for the purposes of any appeal to the Full Court under this Act'.[59]

In the parliamentary debate on the Bill, it was said that:

> The bill would allow the Supreme Court to eliminate a step from the criminal appeal process. Currently the appellant must convince a single judge that their case has merit. If successful, the appellant then argues their case before the Court of Criminal Appeal – so, that is three judges. The bill would allow the process to happen in a single hearing before two judges who have the power to make a final determination of the case.[60]

This potentially combines the leave application with the hearing of the substantive appeal. No doubt this is intended to be reflective of the practice in other states. For example, in Queensland:

> Although appeals against sentence and many appeals against conviction may be brought only by leave, the Court's usual practice is to *disregard the requirement for leave* and to deal with such appeals on their merits. The leave requirement has ordinarily been regarded in both cases as a mere formality.[61]

In Victoria it was said that:

> ... the majority of challenges to convictions come before the Court by way of application for leave. Thus, it is the practice of the Court to hear and determine the proposed grounds of appeal in the course of the

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57 *R v Keogh* [2014] SASCFC 20, [2].
58 Ibid [34].
59 *Criminal Law Consolidation Act 1935* (SA) s 357(3).
60 Above n 53.
61 *R v Upson (No 2)* [2013] QCA 149, [11] (Fraser JA) (emphasis added).

> application. If, after full argument, the Court is of the view that the appeal should be allowed, it grants the application and announces that the appeal is treated as having been instituted and heard instanter, and allowed. If, on the other hand, the Court comes to the view that the grounds have no merit, and that the appeal should be dismissed, it simply refuses or dismisses the application.[62]

Combining the leave application with the substantive hearing of the appeal has not previously been problematic, because both require the court to address the same issues – the grounds of appeal - or whether there has been a miscarriage of justice.

On the substantive hearing of the appeal, the operative condition which will trigger the court's intervention is where there is a 'significant possibility' that an error at trial might have affected the jury's verdict. The mere existence of such a possibility means that the verdict of guilty 'must' be set aside:

> If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is *bound to act* and to set aside a verdict based upon that evidence.[63]

> Once the appellate court comes to the conclusion that any of the pre-conditions to the exercise of its statutory jurisdiction is made out … it is *obliged* to ('shall') allow the appeal.[64]

On the ordinary application for leave to appeal, the applicant merely has to satisfy the court that such a possibility is 'reasonably arguable'. Therefore, the test for leave to appeal on a first appeal is:

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62 *R v GAM (No 2)* (2004) 9 VR 640; 146 A Crim R 57 [4] (Winneke P).
63 *M v The Queen* [1994] 181 CLR 487, [9] (emphasis added).
64 *Gipp v The Queen* [1998] 194 CLR 106, [119] (Kirby J) (emphasis added).

'is it *reasonably arguable* that there is a *significant possibility* that there has been a miscarriage of justice?'[65]

The leave application and the substantive hearing of the appeal are both addressing the same issue – the existence or otherwise of a miscarriage of justice. The judge hearing the leave application would have to determine the question at the 'reasonably arguable' level and the judges hearing the substantive appeal would have to determine if the arguments are in fact made out. By-passing the leave to appeal stage and going straight to the substantive hearing of the appeal, on the principle that the greater incorporates the lesser, presents no conflict and may well be more efficient. The same cannot be said about the new statutory appeal right.

Under the new appeal right, the court has to consider an issue which is not part of the ground(s) of appeal – whether there exists some fresh and compelling evidence.

The Act provides that the court may hear a further appeal 'if the Court is satisfied' that there is fresh and compelling evidence to be considered. At the leave stage, being 'satisfied' means that the court accepts that it is 'reasonably arguable' that there is fresh and compelling evidence to be considered. The irony is that, upon the substantive hearing of the appeal, the appeal court might well find that the evidence is not actually 'fresh' or 'compelling', but that it does nevertheless indicate that there has been a substantial miscarriage of justice and the appeal could be allowed. It could also be allowed for any other non-evidential reason which is indicative of a substantial miscarriage of justice.

[65] See Sangha and Moles, above n 2, 327 citing *Martens v Commonwealth* (2009) 174 FCR 114, [55] referring to *Von Einem v Griffin* (1998) 72 SASR 110, [138-40] (emphasis added).

It is only where the court is satisfied that it is reasonably arguable that such evidence exists, that it has jurisdiction to consider the appeal.[66] We now need to consider this new leave test in relation to the substantive law on appeals.

B *'Fresh and Compelling' and 'Substantial Miscarriage of Justice'*

The new appeal right defines 'fresh' evidence as being that which was not adduced at the trial and could not, even with the exercise of reasonable diligence, have been adduced at the trial. It defines 'compelling' evidence as being that which is reliable, substantial and highly probative in the context of the issues at trial.[67]

Those concepts are to be contrasted with 'new' evidence which is that which was not known about at the time of the trial, but which could have been found upon reasonable inquiry. The definition of fresh evidence is consistent with existing case law. However, linking it with 'compelling' makes it a more demanding test.

In *Chamberlain v The Queen* it was said that additional evidence on an appeal had to be 'fresh and cogent'.[68] Cogent means that it must be capable of belief.[69] In *Ratten v The Queen* cogency was said to mean that the evidence must be such as to convince the appellate court that if it had been placed before the jury together with the other evidence, a different verdict might reasonably have resulted.[70]

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66 *R v Keogh* [2014] SASCFC 20, [31]: 'the requirements provided for in s 353A(1) are pre-conditions to the conferral of jurisdiction'.

67 *Criminal Law Consolidation Act 1935*(SA) s 353A(6).

68 *Chamberlain v The Queen* (1983) 46 ALR 493, [499].

69 *Ratten v The Queen* [1974] 131 CLR 510, [21] (Barwick CJ); *Gallagher v The Queen* [1986] 160 CLR 392, [4] (Gibbs CJ).

70 *Ratten v The Queen* [1974] 131 CLR 510, [5] citing *Craig v The King* [1933] HCA 41 (Rich and Dixon JJ).

The courts on hearing an appeal have frequently taken the view that technicalities ought not to prevent them from determining if there has in fact been a miscarriage of justice. In *Christie* v *The Queen*, the Western Australian Court of Appeal stated:

> Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interests he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence.[71]

In *Cooley v The Queen*, a doctor had been called by the prosecution to give evidence at a criminal trial. The Medical Board had made adverse findings on his credit some five months before the trial, but five months after the trial his credit was restored. On the appeal, which took place after the restoration of the doctor's credit, it was argued that at trial Cooley was denied the opportunity of challenging the doctor's credibility in his cross-examination, based upon the then existent adverse findings of the Medical Board. The Medical Board had found that the witness deliberately attempted to mislead the tribunal. The appeal court held that this was significant material which may have affected the jury's assessment of the doctor's credibility at trial:

> In this context, it is not enough for the prosecution to say simply that the information was in the public domain, or that the applicant should have made inquiries which would have revealed it. The defence was entitled to assume that a professional expert witness called by the State was a witness of integrity and credibility and that if there was *any material* showing otherwise, the State would disclose it. The failure of the State to do so deprived the applicant of the opportunity to cross-examine Dr Srna on an issue which bore directly on his credibility, in circumstances in which the jury's assessment of that may have led to a different verdict. There was accordingly a miscarriage of justice.[72]

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71 *Christie v The Queen* [2005] WASCA 55, [237] (Le Miere and Jenkins JJ).

72 *Cooley v The State of Western Australia* [2005] WASCA 160, [67] (Roberts-Smith JA) (emphasis added).

The court in both *Christie* and *Cooley* took the view that the categorisation of evidence as either fresh or new was not as important as determining if there had been a miscarriage of justice.

Under the new test in South Australia, a situation like that in *Cooley* might be thought to be less than compelling at the time of the appeal, because of the restoration of the doctor's credit. Leave to appeal may be refused because of a preliminary evidential issue rather than by an overall assessment as to whether there has been a miscarriage of justice as required by the grounds of appeal.

A view similar to that of *Christie* and *Cooley* was taken by the Privy Council in *Lundy v The Queen.*[73] It noted that in *R v Bain* it was said:

> ... the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the evidence is from the appellant's point of view, and thus the greater risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, *or not insist on that criterion being fulfilled.*[74]

The Privy Council noted the observation of Tipping J in *Bain* when he said that the nature of the overriding test is whether the new evidence should be admitted 'if the interests of justice' require it. As we have seen above, the South Australian legislative amendment explicitly links the admissibility of the evidence to what is required 'in the interests of justice'. The advice of the Privy Council in *Lundy* was:

> If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is

[73] *Lundy v The Queen* [2013] UKPC 28.
[74] Ibid 34 citing *R v Bain* [2004] 1 NZLR 638, [22] (Tipping J) (emphasis added).

> excluded, it should be admitted, notwithstanding that the evidence is not fresh.[75]

It also said that the greater the risk of a miscarriage of justice if such evidence is not admitted, 'the more the Court may be inclined to accept that it is sufficiently fresh'.[76]

That approach may not be possible under this new South Australian right of appeal because the court has to consider the fresh and compelling issue before it can address the miscarriage of justice issue. Under the new statutory provision, the test for *hearing* a second or subsequent appeal is that it is reasonably arguable that there is some 'fresh and compelling' evidence. Without the court being satisfied of that, the substantive appeal cannot proceed. However, the test (or the ground) for *allowing* an appeal under this provision is that the court thinks that there was 'a substantial miscarriage of justice'. That does not necessarily require the appeal court to find that there is in fact some fresh and compelling evidence. It could determine that the existence of 'fresh and compelling' evidence is not necessary to a determination as to whether there has been a substantial miscarriage of justice. In doing so, it could retain the flexibility which is evident in relation to a first appeal.

If it were otherwise, it would mean that the substantive law to be applied for second appeals is different to the substantive law on first appeals. If a second appeal requires that the evidence must be compelling but the first appeal requires the less demanding test of cogency, then that would involve a possible element of incoherence or inconsistency in the judicial process.[77]

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75 *Lundy v The Queen* [2013] UKPC 28, 34.

76 Ibid.

77 MacCormick, above n 48 says that coherence is a significant value for law, and is an essential element of the rule of law: at 132; lack of coherence means a failure to make sense: at 189; coherence involves a rational relationship to a set of values: at 192.

If a second appeal requires demonstrably fresh evidence, whereas the substantive law on first appeals focuses more on the issue of the relevancy of the evidence to the existence of a possible miscarriage of justice, then that might involve a further element of inconsistency in the judicial process. Clearly in *Cooley*, the evidence was new and relevant but would not have passed the 'fresh' test.

If the substantive law for second appeals is to be different to that for first appeals, then it might well present a further human rights problem which we discuss in Part Four. However, there is a further argument which indicates that 'fresh and compelling evidence' is not part of the 'substantial miscarriage of justice' test, and that is linked to the need for the court to examine the 'record of the trial'.

C *'Substantial Miscarriage of Justice' and the 'Record of the Trial'*

Australian law has repeatedly stated that the appeal jurisdiction is a creature of statute and the court has no jurisdiction beyond that which Parliament has chosen to give.[78] Clearly an appellant has to establish that it is reasonably arguable that there is fresh and compelling evidence for a second appeal to proceed. The next issue to be addressed once leave is granted is whether there has been 'a substantial miscarriage of justice'.

The court will need to identify what factors may be admissible in making this determination. Is the court to consider only the 'fresh and compelling' evidence which was necessary for the grant of leave to appeal? Or may it now take into account 'fresh and cogent' evidence and the wide range of other factors which might be relevant to a determination of this issue?

[78] See discussion of *Burrell*, *GAM* and *Edwards* in Sangha and Moles, above n 1.

We have seen that factors relevant to whether there had been a substantial miscarriage of justice on a first appeal are whether the jury verdict was unreasonable, or whether there was an error of law. Could those same factors be raised on a second appeal under this new provision despite the fact that they had not been specifically mentioned as sub-grounds of appeal?

There are three analogies which might be drawn upon. The first is the use of the words 'substantial miscarriage of justice' in the proviso to the traditional grounds of appeal. The second is the use of the words 'substantial miscarriage of justice' in the amended grounds of appeal in Victoria, which we noted earlier. The third is the approach to a second appeal under the petition procedure.

1 *Analogy with the Proviso on a First Appeal*

The new appeal provision states that '[t]he Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice', and this reflects the words of the proviso under the pre-existing grounds of appeal, as we noted earlier. In that context, the cases dealing with what amounts to a substantial miscarriage of justice require the appeal court to consider the errors which have occurred in the context of the whole of the record of the trial:

> In *Weiss v The Queen*, a seminal case on the meaning of the proviso, it was emphasised that the appeal court must decide for itself if a substantial miscarriage of justice has occurred, and that it can only do so by examining the record for itself. As the High Court emphasised, 'the appellate court's task must be undertaken on the *whole* of the record of the trial'.[79]

[79] This is discussed in more detail in Sangha and Moles, above n 3 citing *Weiss v The Queen* (2005) 224 CLR 300, 316 [41], 317 [43] (emphasis in original); In *R v Keogh* [2014] SASCFC 20, [1] Nicholson J referred to 'the one ground of appeal permitted pursuant to s 353A(3) - was there a substantial miscarriage of justice'.

It might be suggested that where words have been used in legislation after having been judicially interpreted, the legislature is to be assumed to have approved that interpretation.[80] That presumption is specifically abrogated in South Australia.[81] However, the courts could still follow the previous interpretation of the provision, not because of the presumption, but because it makes good sense.[82]

It follows that it might be necessary for an appellate court under the new statutory provision to consider 'the whole of the record of the trial' when considering the impact of any fresh evidence upon a verdict. That being the case, it would seem inappropriate not to allow the appellant to bring to the attention of the court any deficiencies in that record, whether or not they relate to fresh evidence issues.

2 *Analogy with the Victorian Provision*

As noted earlier, the Victorian provision states:

> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice: or, (c) for any other reason there has been a substantial miscarriage of justice.[83]

The South Australian provision states:

> (3) The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.[84]

One might take the view that when read together, the Victorian provisions are no more restrictive than the unqualified expression in the South Australian Act. In discussing the Victorian provision the

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80 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 2011) 108, [3.43].

81 Ibid; *Acts Interpretation Act 1915* (SA) s 18.

82 Ibid citing *Police v Novak* (2000) 76 SASR 551, [16] (Doyle CJ): 'the settled interpretation has not been seen as giving rise to unsatisfactory results'.

83 *Criminal Procedure Act 2009* (Vic) s 276.

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

appeal court in a recent case pointed to the discussion in *Baini v The Queen* where it was said that it was 'not to be interpreted *solely* by reference to the interpretation given to the common form criminal appeal proviso in *Weiss v The Queen*'.[85]

The court went on to explain (in its elucidation of *Baini*) that the question whether there had been a substantial miscarriage of justice may be affected by the strength of the prosecution case. The prosecution may submit, for example, that there had been no substantial miscarriage of justice because the conviction was 'inevitable'. In assessing 'inevitability', the Court of Appeal must 'decide that question on the written record of the trial'.[86]

We would suggest that once the 'written record of the trial' is in issue, then the appellant would be entitled to make submissions as to the adequacy of that record. That might require submissions to be made on matters which inevitably go beyond any fresh evidence issue.

3 *Analogy with the Petition Procedure*

The introduction of the new statutory right of appeal does not affect the availability of the petition procedure. The legislation dealing with the petition referral power states that the Attorney-General 'may refer the whole case' to the Court of Criminal Appeal, to be dealt with as an appeal.[87] In *Mallard v The Queen*, the High Court said the reference to the whole case, conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. The

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[85] *Benson v The Queen* [2014] VSCA 51, [48] discussing *Andelman v The Queen* [2013] VSCA 25 summarising the High Court in *Baini v The Queen* (2012) 246 CLR 469 (emphasis added).

[86] Ibid. The court also noted that it was said that '[i]f it is submitted that the verdict was inevitable, the appellant need show "no more than that, had there been no error, the jury may have entertained a doubt"'.

[87] *Criminal Law Consolidation Act 1935* (SA) s 369. See above n 10 for the corresponding legislative provisions in the other States and Territories.

words embrace the whole of the evidence properly admissible, whether 'new, fresh or already considered in earlier proceedings, however described'.[88]

In *Mallard*, the court said that it was '*elementary* that some matters may assume an entirely different complexion in the light of other matters and facts either ignored or previously unknown'.[89] The same would be true once fresh evidence is put forward on a second appeal. The implications to arise from that fresh evidence could well cast a new light on much of the other evidence which had been led at trial. That being the case, it would be inappropriate to deal with any fresh and compelling evidence issues in isolation. Although there may be no necessary correlation between a fresh evidence issue and any other type of error which may have occurred at trial, it would clearly be prudent to consider them together, and to evaluate their cumulative effect.

In summary, satisfying the reasonably arguable fresh and compelling evidence test is a condition precedent to the hearing of any second or further appeal. Upon the hearing of the appeal, the court may consider any issues which are relevant to the determination as to whether there has been a substantial miscarriage of justice. That will include, but not be limited to, the reasonably arguable fresh and compelling evidence issues which were put forward at the leave stage.

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88 *Mallard v The Queen* [2005] 224 CLR 125, [6] (Gummow, Hayne, Callinan and Heydon JJ).

89 Ibid [13] (emphasis added).

IV PART THREE – REASONS FOR REVISING THE NEW RIGHT OF APPEAL

A *'Fresh and Compelling' Inappropriate as a Test for Leave*

The fact that a fresh and compelling evidence test for leave is more demanding than the substantive law to be applied on the actual hearing of the appeal was recognised in *Martens v Commonwealth of Australia*. The Federal Minister had refused to refer a case under the petition procedure because it was not thought to involve 'fresh or compelling' evidence.[90] In setting aside the minister's decision, Logan J described this as an 'overly rigorous test in deciding whether or not to refer the case to the Court of Appeal'.[91] He explained that the proper test on an appeal (as we noted above) was whether there was a 'significant possibility' that the jury, acting reasonably, would have acquitted the appellant.[92]

He explained that the applicant on an application for leave to appeal only has to raise an arguable case. He said it would be inappropriate for the person deciding the leave application to apply a higher test than that which the court on hearing an appeal would apply in setting aside the conviction.[93] As we have seen, the substantive test for criminal appeals has not hitherto required fresh and *compelling* evidence. Indeed, many appeals are allowed without the introduction of any additional evidence at all. For example, if it can be shown that there was a misdirection or other legal error[94] by the trial judge, that might be quite sufficient.

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90 *Martens v Commonwealth* (2009) 174 FCR 114, [66]; See Sangha and Moles, above n 2, 327.

91 *Martens v Commonwealth* (2009) 174 FCR 114, [66].

92 Ibid [67].

93 Ibid [52].

94 In *Cesan v The Queen* (2008) 236 CLR 538, 384 [82] it was said that the judge had been sleeping at times during the trial. The Chief Justice made reference to a 'material irregularity' which 'of itself' constitutes a miscarriage of justice discussing *TKWJ* (2002) CLR 124, 147 [73].

The point to be taken from *Martens* is that it is irrational to have a test for a permission to appeal which is higher than the test to be applied in the substantive hearing of the appeal. It introduces an element of incoherence or inconsistency into the legal process.[95] As Neil MacCormick explained, the rule of law requires that 'legal argument must conform to conditions of rationality and reasonableness'.[96]

So, if the new statutory requirement for fresh and compelling evidence is merely a threshold test or condition which allows for the appeal to proceed according to the existing substantive law governing appeals, then there may well be an element of irrationality in this requirement.

One response to this might be to say that cases which do not meet the fresh and compelling evidence test can still avail of the petition procedure. However, experience would suggest that their prospects of success would not be high.

Another approach would be to say that the new requirement for fresh and compelling evidence means that it replaces the previous common law provisions relating to fresh or new evidence on appeals. That would then mean that the substantive law on a second or further appeal is different from and more demanding than the substantive law which is to be applied on a first appeal, but no more demanding than the test for leave to appeal. That too will give rise to questions as to whether that is rational, just or fair.

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[95] As to the diagnostic value of the concepts of incoherence and inconsistency, see Sangha and Moles, above n 3, 244-8.

[96] MacCormick, above n 48, 17.

B *Why Limit Appeals to Fresh Evidence Cases?*

There is now an important distinction between the leave to appeal requirement for a second or further appeal and that which applies for a first appeal. The new appeal right is only to be available in the context of reasonably arguable fresh and compelling *evidence* cases and a person applying to the court for a second or subsequent appeal appears to be denied the opportunity to seek leave on the basis that the verdict of the jury was unreasonable; or that it cannot be supported, having regard to the evidence; or the verdict was based upon a wrong decision of any question of law or on any ground (not involving fresh evidence) where there was a miscarriage of justice.

It might appeal to one's intuition to suggest that such issues would have or ought to have been taken up on a first appeal and so the real issue for any subsequent appeal will, as a matter of practicality, be restricted to any fresh evidence which emerges after an initial appeal has been heard. However, on further reflection, one can see that might not necessarily be the case.

1 *The Example of Wood v R*

In the normal course of events, appeals are usually undertaken within a relatively short period of time from when the verdict is pronounced and, not infrequently, by the same lawyers who represented the accused at the trial. It might well be thought to be more cost-effective to use the same trial lawyers on the appeal as it would involve significant additional cost to brief new lawyers.

The drawback to this arrangement is that there might well be appealable issues which relate to the way in which those lawyers handled the case at trial. Evidence might have been allowed in at trial which was not relevant or which was non-probative, but which was not challenged as such at trial. To expect the trial lawyers to identify such issues for appeal would be asking a great deal of them as it would amount to the lawyers pleading issues on the appeal which

could amount to grounds for alleging inadvertence, incompetence or negligence in the way in which they handled the case at trial.

If a fresh team of lawyers is engaged for the appeal there is a greater prospect of such issues emerging as they did in the recent appeal in *Wood v R*. McClellan CJ at CL in considering the adequacy of the directions which had been given by the trial judge said:

> The difficulty facing the applicant is that his defence counsel made no complaint about the directions given by the trial judge at the time. I am satisfied that, most particularly in relation to the evidence of Martin, he should have. Perhaps it was a slip by counsel, as there could be no reason for a conscious decision to let the issue pass.[97]

In relation to another issue, the Chief Justice said: 'if further objection should have been taken it is clear that there was no tactical reason why it was not taken'.[98]

The barrister appearing on the appeal was not the barrister who had conducted the trial. If it had been the same person, then possibly some of those issues would not have emerged as clearly as part of the appeal.

The new South Australian appeal right excludes a second or further appeal where such issues arise in the absence of fresh and compelling evidence. This is problematic, because the Attorney-General of South Australia, in anticipating the introduction of the new appeal right referred to circumstances such as 'errors made by the courts' and 'the representation people have received in court has been inadequate and that hasn't served them well' as being possible circumstances in which a further review might be beneficial.[99] Yet, those very circumstances are not covered by the new right of appeal.

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97 *Wood v R* [2012] NSWCCA 21, [432].
98 Ibid [604].
99 Channel 7, *Today Tonight* (Adelaide), 28 March 2012.

The usual requirement is for an appeal to be lodged within 4 weeks or 28 days of the decision being appealed. Mr Wood's appeal was heard some three years after his trial concluded. In the meantime, the expert witness in the case published a book and some lectures explaining his thought processes and motivations leading up to the trial. The appeal court judge referred to:

> His book about the matter which was tendered and which I would admit as new evidence on the appeal.[100]
>
> He appears oblivious of the serious problems which the book reveals about his own involvement in the police investigations.[101]
>
> My reading of the book and the lecture leads me to the conclusion that if it had been available at the trial, it would have significantly diminished [the expert's] credibility.[102]

Clearly this was a case where the fresh evidence was most significant. In normal circumstances it might well not have come to light until after an initial appeal had been heard. It would then be a classic case for appeal under the new provisions if such were to be made available in NSW.

However, in *Wood*, in addition to the fresh evidence issues, McClellan CJ at CL also found that there were a significant number of other errors which could be classified as legal errors.[103] He found that the prosecutor had made inappropriate submissions and put a series of questions to the jury and invited them to draw adverse inferences regarding the accused if satisfactory answers to them were not forthcoming. The judge said that this approach was 'unreasonably prejudicial',[104] invited the jury to engage in

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[100] *Wood v R* [2012] NSWCCA 21, [27].
[101] Ibid [715].
[102] Ibid [717].
[103] MacCormick, above n 48, 97: '[h]ypotheses come not as single spies, but in battalions'. The same is true of a great many of the errors which are made in the more well-known miscarriage of justice cases.
[104] *Wood v R* [2012] NSWCCA 21, [615].

'impermissible reasoning'[105] and was 'a dangerously wrong approach'.[106] It involved 'a serious breach of the prosecutor's duty to put the Crown case fairly before the jury':[107]

> When a prosecutor fails to comply with the required standards of fairness an accused person may be denied a fair trial. I am satisfied that this occurred in the present case.[108]

There can be no doubt that if the fresh evidence component of the appeal had failed, or had been unavailable, the appeal would have succeeded on the basis of the errors involved in the way in which the prosecution put its case. As the judge said: '[t]he submission should not have been made',[109] and that it had created 'insurmountable prejudice' in the minds of the jury. This was sufficient to uphold the appeal, which on its own would require a new trial.[110] This shows that there is no particular nexus between the existence of such legal or procedural errors and those based upon the existence of fresh evidence. If a *Wood*-type case had arisen in South Australia, without the benefit of the book by the expert witness, then it might well have failed at the leave to appeal stage, although it was otherwise a meritorious case.

C *The UK Position*

An amendment such as that put forward in South Australia has been thought to be unnecessary in the UK for two reasons. The first is that the CCRC provides an effective means of investigation, review and referral in many cases.[111] The second is that the appeal courts in the

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[105] Ibid [616].
[106] Ibid [625-26].
[107] Ibid [631].
[108] Ibid [634].
[109] Ibid [304-5].
[110] Ibid [704-5].
[111] Sangha, Roach and Moles, above n 4, ch 10; Graham Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' (2005) *Criminal Law Review* 937.

UK, at least in some of the more recent cases in Northern Ireland, have said that they have an inherent power to re-open an appeal for any exceptional case which has not been referred by the CCRC.[112] It should be noted that this point has not yet been taken up in the cases in England and Wales and no doubt this accounts for the considerable public pressure which has been put upon the CCRC to refer more cases.[113]

The important point to note is that the statutory provisions in the UK allow the CCRC to refer a case to the Court of Appeal if it involves some *argument* or evidence which amounts to an appealable issue.[114] The test used there is that there should be a 'real possibility' that the appeal will be allowed. This allows for the full range of arguments and issues which it would be proper to put to the appeal court as a basis for allowing the appeal.

In the case of *R v Derek Bentley*, the accused had been convicted of the murder of a policeman and following an unsuccessful appeal was executed in January 1953. In 1993, he was granted a posthumous pardon as to sentence. In 1998, following a reference back to the Court of Appeal by the CCRC, his conviction was set aside. On the appeal, the court determined that the directions of the trial judge were more like those of an advocate pressing for a conviction. The effect was to deprive him of the protection which a jury trial should have afforded: 'In our judgment the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every citizen'.[115]

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[112] Sangha and Moles above n 1, 302 discussing *R v Maughan* [2004] NICA 21, 22 and related cases.

[113] Michael Naughton, 'Why "safety in law" may fail the innocent - the case of Neil Hurley', *The Guardian*, 11 February 2010.

[114] *Criminal Appeal Act 1995* (UK) s 13(b)(i).

[115] *R v Derek Bentley* [2001] 1 Cr App R 307, 334.

As the appeal judge noted, the judge conducting the trial was a very senior and well respected judge, and the killing of the policeman had aroused a great deal of anger and public indignation, yet '[t]he above complaints formed no part of Mr Bentley's appeal against his conviction'.[116] It is clear that they should have done. They were certainly found to be persuasive in the subsequent appeal.

Mr Bentley's appeal against his conviction was initially dismissed by the appeal court before he was hanged. Forty years later, after a further review, he was granted a pardon in respect of the sentence of death passed upon him and carried out. It was only in a further review by the appeal court, 45 years after the conviction, that the nature and extent of the legal error at trial was acted upon.[117]

If such a situation had arisen in South Australia, it would not have satisfied the new criteria for permission to appeal. Yet, it is equally clear that such an error would be recognised as satisfying the substantive law upon which to allow the appeal. There clearly had been a substantial miscarriage of justice.

V PART FOUR – RECOMMENDATION – A SIMPLE SOLUTION

Part of the purpose of our analysis in this article is to address the question raised by Nicholson J in *R v Keogh*: '[t]he questions of whether each of the requirements under s353A(1) of the Criminal Law Consolidation Act 1935 bear on the issue of permission or the

[116] Ibid 333.

[117] In *George Davis v R* [2011] EWCA Crim 1258 the court said there were 'successive refusals to refer, by Home Secretaries when the decision was theirs, and subsequently by the CCRC itself in 2005'. Mr Davis's conviction was eventually overturned by the Court of Appeal 35 years after the original conviction.

issue of jurisdiction'.[118] Our view is that the provision for fresh and compelling evidence, as the legislation currently stands indicates the following:

1. The requirement for fresh and compelling evidence operates as an exclusionary rule at the leave to appeal stage.
2. The requirement for fresh and compelling evidence does not operate as an exclusionary rule at the substantive hearing of the appeal.

Obviously, the judges have to apply the legislation which is passed by Parliament. However, where it leads to difficulties, such as we have identified here, and which it is thought were not intended by those who sought its passing, it can and should be amended.

If the intention of the legislative amendment is to bring about compliance with international human rights obligations and the rule of law, then the procedures for leave and the substantive test for the granting of an appeal on a second or subsequent application should be the same as those which apply to a first appeal.

As seen above, the concern of the Human Rights Commission was that the system of criminal appeals in Australia may not adequately protect the right to a fair trial or provide a proper means for a wrongly convicted person to challenge their conviction. The new South Australian statutory appeal provision could be an important corrective for this situation in terms of fresh and compelling evidence cases. However, the amendment does nothing to correct the situation for the other cases which involve unreasonable jury verdicts, error of law or any other non-evidential issues when not accompanied by a fresh evidence issue.

[118] [2014] SASCFC 20, [1].

The Commission also stated in respect of the ICCPR that:

> Article 14(5) does not impose on States an obligation to provide more than one level of appeal. However, where the law does so, a convicted person is entitled to have effective access to each level of appeal with the procedural protections of article 14 applying *equally* at each level of appeal.[119]

If the test for a permission to appeal for a second or subsequent appeal is more demanding than that for the first appeal, it might be thought that the right to effective access to each level of appeal is not being equally applied. If the substantive law is more restrictive on a second or subsequent appeal, then again, the effective access protections of article 14 are not being equally applied.

The Commission further stated that:

> 12. The relevant procedural protections in article 14(5) of the ICCPR include:
> • the right to a review of conviction and sentence on *law* and *facts.*[120]

The new statutory right of appeal does not allow for a second or further appeal on the basis of error of law, which is available on a first appeal.

In these respects the appeal rights in South Australia may be said to be still in breach of international human rights obligations. It may also be in breach of the rule of law which requires compliance with international human rights obligations, except where explicitly derogated from, which is not the situation here.

The Australian Human Rights Commission states that the United Nations Human Rights Committee has made it clear that prisoners

[119] AHRC Submission, above n 16, [13] (emphasis added).
[120] Ibid [12] (emphasis added).

enjoy all the rights in the ICCPR and that Australian law has held that:

> It has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.[121]

It adds, speaking generally of Australian domestic law: 'the content of Australia's international obligations will therefore be relevant in determining the meaning of these provisions'.[122]

It could be said that the main issue here is to allow for a second or further appeal. It can be seen that the reasoning which prompted the new evidential test is flawed and based upon a series of misunderstandings. If one wanted to create a right to a second or further appeal without those additional complications, then the only legislative change which is required is to make a change to the wording of the section granting the right of appeal. So, where the current wording states that 'the convicted person may appeal against the conviction …',[123] it should be amended to read, 'the convicted person may appeal *or have a further appeal* against the conviction'.

That would be sufficient to overcome the interpretation by the courts that the words 'may appeal' mean a single appeal. There would then be no need to make any differentiation between the way in which the court can allow an appeal as between a first or a further appeal.[124]

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[121] Citing *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [97] (Gummow and Hayne JJ). The website of the Australian Human Rights Commission is at, <www.hreoc.gov.au>.

[122] Citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264–65 (Brennan J).

[123] *Criminal Law Consolidation Act 1935* (SA) s 352(1)(a)(i) in respect of 'a question of law' and in s 352(1)(a)(ii) in respect of 'any other ground'.

[124] As set out in *Criminal Law Consolidation Act 1935* (SA) s 353.

A further consequence of such an amendment would be that it would allow for the repeal of the statutory referral power by the Attorney-General following upon a petition for mercy. The new broader statutory appeal right would be a sufficient replacement for it. Those simplified amendments would be sufficient to ensure coherence and consistency with the existing appeal rights and also between the international human rights obligations and the rule of law principles.

As for an intermediary filter to deal with unmeritorious applicants, the most efficient model is a national CCRC which would have the power to make referrals for a number of different state and territory jurisdictions. The states and territories in Australia could pass common-form legislation to confer powers upon a single Australian CCRC to enable it to make the appropriate assessments and to refer meritorious cases to the respective appeal courts.[125]

The LRC referred to possible complexities in such an arrangement because of the different laws in each state and territory. They said this was a reason for not proceeding to recommend such a solution. In doing so, they may have misread the complexities involved. After all, the UK CCRC provides such a service for the jurisdictions of England, Wales and Northern Ireland.

Irrespective of any such variation in detail, an important aspect of their power is the ability to investigate and to be able to access files and materials held by public bodies such as the police and prosecutors. The potential complexities of any difference in jurisdictional or administrative arrangements has not emerged there as a significant issue.

[125] Sangha and Moles, above n 1.

The Australian law dealing with miscarriages of justice is derived mainly from principles established by the High Court of Australia. They are of general application across all states and territories. It is likely that the new right of appeal will lead to further cases being identified which will reveal a greater problem with miscarriages of justice than has previously been recognised. It might then be appropriate to give some further consideration to the recommendations and reasoning contained in the LRC Report. The Report's recommendation not to proceed with a CCRC, or indeed its recommendations to consider establishing a forensic inquiry process or an inquiry into the use of expert evidence in criminal trials, might need further consideration.