THE NEW POST-APPEAL REVIEW PROVISIONS IN VICTORIA: HOW APPEALING ARE THEY REALLY?

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In 2019, the Victorian Parliament adopted the Justice Legislation Amendment (Criminal Appeals) Act 2019 *(Vic), affording convicted persons a second or subsequent appeal in limited circumstances. The new provisions aim to strike a balance between finality in criminal matters and the correction of substantial miscarriages of justice that become uncovered after existing appeals are exhausted. This article examines the emergence of this new procedure in the context of disturbing findings made by the Independent Broad-based Anti-corruption Commission and the Royal Commission into the Management of Prison Informers, which revealed systemic misconduct by various actors in the criminal justice system, including Victoria Police. An analysis of the early operation of the new regime shows that it guards effectively against frivolous appeals but that the underlying challenges associated with the uncovering of miscarriages of justice remain to be addressed.*

I INTRODUCTION

Until recently, under Victorian law a convicted person was only entitled to a single appeal to the Court of Appeal,[1] after the determination of which their case was closed. The process changed fundamentally in November 2019 with the *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) introducing a second or subsequent appeal process into the *Criminal Procedure Act 2009* (Vic) ('*CPA*').[2] Subject to strict conditions and the grant of leave to appeal, the new provisions allow for a second or subsequent appeal for an indictable offence where the Court of Appeal is satisfied that there has been a substantial miscarriage of justice.[3] This new regime formed part of a suite of reforms to appeals in Victoria. Whilst, on the

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1 Even this appeal is not as of right. Leave must be granted by the Court of Appeal under s 274 of the *Criminal Procedure Act 2009* (Vic) ('*CPA*').

2 Ibid pt 6.4, as inserted by *Justice Legislation Amendment (Criminal Appeals) Act 2019* (Vic) s 35 ('*Justice Legislation Amendment Act*').

3 *CPA* (n 1) s 326D.

one hand, a new appeals process opened in relation to convictions for indictable offences, on the other hand, de novo appeals against convictions recorded in summary proceedings were abolished, replaced with appeals by way of rehearing.[4]

The second or subsequent appeal seeks to enhance the capacity of the Victorian criminal justice system to correct substantial miscarriages of justice. The intention of these reforms is to mitigate the harshness of the principle of finality that governs the post-appeal review framework by providing 'recourse to an appeal avenue that is robust, transparent and fair'.[5] As the Attorney-General noted in her second reading speech for the Bill containing these amendments, 'in rare circumstances — for example, where evidence is uncovered that the defendant did not know about at their trial and which shows that there may have been a substantial miscarriage of justice — a defendant may not have an appeal avenue where fairness dictates that their case be reconsidered'.[6] At the same time, the new provisions aim to effectively guard against incessant or unmeritorious attempts to have previously determined cases reviewed once again on appeal.[7]

This article examines the extent to which the new provisions have achieved the fine balance between finality and the need to correct wrongful or fundamentally flawed convictions. It considers the unique socio-legal context in which the second or subsequent appeal provisions were adopted in Victoria and how that context has shaped the early operation of the new regime. It is contended that the new provisions offer a transparent judicial pathway that was not previously available. By setting a high threshold for review, they ensure that the principle of finality is not unduly fettered, although an analysis of the appeals so far determined reveals that few have succeeded. Those that have did so on the basis of evidence that emerged from ad hoc inquiries conducted by external bodies enjoying significant powers of investigation and coercion. In the absence of a permanent mechanism to uncover fresh and compelling evidence to demonstrate that a conviction may be wrongful or fundamentally tainted by misconduct, there remains a significant gap in the Victorian arsenal to uncover and correct substantial miscarriages of justice.

II THE LEGAL CONTEXT TO THE REFORMS

This part begins by exploring the pre-existing framework for addressing miscarriages of justice in the Victorian legal system, with a focus on wrongful convictions. In particular, it outlines the existing appeals process, including the process by which special leave may be sought to appeal a matter to the High Court.

4 *Justice Legislation Amendment Act* (n 2) s 1(c)(i). The reforms to summary appeals were first attempted to be introduced in the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4052 (Benjamin Carroll, Minister for Crime Prevention, Minister for Corrections, Minister for Youth Justice, Minister for Victim Support).

5 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3688 (Jill Hennessy, Attorney-General).

6 Ibid.

7 Ibid 3689.

Alongside these strictly legal mechanisms, the role that the executive can play in addressing miscarriages of justice through the exercise of the prerogative of mercy or its statutory equivalent is also considered, as is the broader legal context for the introduction of a second or subsequent appeal process. To this end, this part also considers the introduction of such processes in other jurisdictions in Australia, namely South Australia and Tasmania.

A The Need for a Second or Subsequent Appeal

The right to appeal against a conviction in criminal proceedings was first recognised in Australia in the early 20th century in legislation modelled on the *Criminal Appeal Act 1907* (UK).[8] The right stems, therefore, from statute rather than common law, and Australian courts have traditionally taken a conservative approach to the interpretation of its scope in criminal proceedings. Most relevantly, the right to appeal has consistently been interpreted as confined to a single appeal.[9] To proceed otherwise would lead, courts have held, to 'manifest inconvenience and, possibly, great absurdity'.[10] The reasoning for limiting appeals in this way was that an appeal court should not extend its authority beyond that given by Parliament.[11] That said, Kirby J has voiced strong concern about this narrow interpretation,[12] particularly where the words of the relevant statutory provisions do not expressly preclude a second or further appeal.[13] This interpretation by Australian courts, his Honour has argued, was open to be reviewed, but perhaps reflected a 'judicial distaste for the expansion of the appellate rights for convicted prisoners'.[14] The new legislation — in Victoria and elsewhere — allowing second or subsequent appeals can be seen as clarifying the position in this respect, providing an express statutory basis for further appeals while ensuring that such processes are read narrowly.

A convicted person has also always been able to (and still can) seek special leave to appeal to the High Court.[15] That said, special leave to appeal is only granted on very narrow grounds.[16] Significantly, the High Court has ruled that it does not have the jurisdiction to consider fresh evidence that was not put before a criminal appeal

8 For a discussion of the history of the right of appeal in Australia, see Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis Butterworths, 2015), 69–76 ('*Miscarriages of Justice*').

9 *Burrell v The Queen* (2008) 238 CLR 218.

10 *R v Edwards [No 2]* [1931] SASR 376, 380 (Angas Parsons J).

11 Ibid, quoting *Flower v Lloyd* (1877) 6 Ch D 297, 301 (James LJ). See also Michael Kirby, 'A New Right of Appeal as a Response to Wrongful Convictions: Is It Enough?' (2019) 43(5) *Criminal Law Journal* 299, 300.

12 See *Eastman v The Queen* (2000) 203 CLR 1, 65–96 [199]–[288] ('*Eastman*').

13 Ibid 81–90 [248]–[269].

14 Kirby (n 11) 300.

15 *Judiciary Act 1903* (Cth) s 35(2).

16 Ibid s 35A.

court.[17] The unfairness of this limitation was noted by Kirby J in *Re Sinanovic's Application*.[18] In refusing an application for leave to reopen a special leave application, his Honour noted that even where fresh evidence emerged indicating a person's innocence, the High Court in exercising its appellate jurisdiction cannot hear this evidence — a person's only recourse is to the executive.[19] This gap was acknowledged by the Victorian Attorney-General in her second reading speech for the new Victorian provisions.[20] On the whole, the appeals process 'pursues finality and does not aim for comprehensive error correction',[21] raising the very real risk that wrongful convictions may be allowed to stand in the pursuit of this aim. As a result, implicit in the procedural framework of the criminal justice system is a degree of tolerance around the possibility that innocent defendants will sometimes be convicted.

Victoria is not the first Australian jurisdiction to introduce a second or subsequent criminal appeal process. Indeed, the Victorian provisions (which are set out in Part IV below) are largely modelled on reforms introduced in South Australia in 2013. At that time, South Australia enacted the *Statutes Amendment (Appeals) Act 2013* (SA), which introduced a second or subsequent criminal appeal process, in circumstances where an appeal court 'is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal'.[22] This was the first major reform to appeal rights in Australia in a century, before which the appeal rights in all states and territories had been in common form.[23]

At first glance, the requirement that there be 'fresh and compelling' evidence mirrors the double jeopardy exceptions earlier introduced in both South Australia[24] and Victoria.[25] Under these reforms, the Director of Public Prosecutions can apply to the Court of Appeal to have a person who has been acquitted of certain serious offences retried for the offence, but must satisfy the court that there is 'fresh and

17 *Mickelberg v The Queen* (1989) 167 CLR 259 ('*Mickelberg*'). See also *Eastman* (n 12); *R v Condren; Ex parte A-G (Qld)* [1991] 1 Qd R 574. For a discussion of this limitation, see Sangha and Moles, 'Miscarriages of Justice' (n 8) 75–8.

18 (2001) 180 ALR 448.

19 Ibid 451 [7].

20 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3688 (Jill Hennessy, Attorney-General).

21 David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37(1) *University of New South Wales Law Journal* 270, 286 ('Wrongful Convictions'). See also Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203, 207 ('Pardon Me').

22 *Criminal Procedure Act 1921* (SA) s 159.

23 See Bibi Sangha and Robert Moles, 'Mercy or Right: Post-Appeal Petitions in Australia' (2012) 14(2) *Flinders Law Journal* 293, 293–5 ('Mercy or Right').

24 *Criminal Law Consolidation Act 1935* (SA) pt 10, as at 23 January 2018. This is now contained in the *Criminal Procedure Act 1921* (SA) pt 6.

25 *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic).

compelling evidence' of guilt.[26] In effect, these provisions (which have their equivalents in all other states in Australia)[27] provide the possibility for the prosecutor to have a second attempt at prosecuting an accused.

The new appeal process places a convicted defendant substantially on the same footing as prosecution authorities seeking to challenge a previous acquittal. The equivalence was highlighted in the second reading debates on the second or subsequent appeal by Martin Pakula.[28] As has been observed, '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*'.[29] Elsewhere, however, this has been critiqued as a 'false equivalence'.[30] Bibi Sangha, Robert Moles and Kim Economides query whether the very high standard required for a second prosecution is appropriate when considering the process for correcting a wrongful conviction.[31] This may 'be politically popular, but it could undermine fundamental principles of restraint in the use of the criminal law including the presumption of innocence'.[32] Such an equivalence does not sit well with the longstanding aphorism of Sir William Blackstone: 'Better that 10 guilty persons go free than one innocent suffer.'[33]

As with the double jeopardy exception, the second or subsequent appeal is not an appeal as of right; in South Australia, for instance, the convicted person requires the permission of the South Australian Court of Appeal to bring the appeal and the Court of Appeal 'may' allow an appeal 'if it thinks that there was a substantial miscarriage of justice' and it is 'in the interests of justice' that the appeal be heard.[34] As David Hamer notes, these provisions are somewhat peculiarly phrased, as the court retains a discretion not to allow the appeal even if it finds that there has been

26 *Criminal Procedure Act 1921* (SA) s 147. See also *CPA* (n 1) ch 7A.

27 Similar reforms have also been introduced in New South Wales and Queensland: David Hamer, 'The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exception to Double Jeopardy' [2009] (2) *Criminal Law Review* 63, 63. For a discussion of these reforms, see Marilyn McMahon, 'Retrial of Persons Acquitted of Indictable Offences in England and Australia: Exceptions to the Rule against Double Jeopardy' (2014) 38(3) *Criminal Law Journal* 159, 162–3.

28 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4058.

29 Bibi Sangha, 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' (2015) 17(2) *Flinders Law Journal* 471, 510 (emphasis in original) ('Statutory Right').

30 Kent Roach, 'Comparative Reflections on Miscarriages of Justice in Australia and Canada' (2015) 17(2) *Flinders Law Journal* 381, 417.

31 Bibi Sangha, Robert Moles and Kim Economides, 'The New Statutory Right of Appeal in South Australian Criminal Law: Problems Facing an Applicant' (2014) 16(1) *Flinders Law Journal* 145, 160, quoted in ibid 417.

32 Roach (n 30) 417.

33 Malcolm McCusker, 'Miscarriages of Justice' (2015) 42(9) *Brief* 14, 14.

34 *Criminal Law Consolidation Act 1935* (SA) s 353A, as at 23 January 2018. This is now contained in the *Criminal Procedure Act 1921* (SA) s 159.

a substantial miscarriage of justice.[35] The Victorian provisions are substantially the same in this respect.[36]

The South Australian reforms were an attempt to depoliticise post-conviction review by establishing a transparent public process.[37] They emerged in response to the wrongful conviction of Henry Keogh, sentenced to life imprisonment for the murder of his fiancée.[38] His application for leave to appeal under the new provisions was successful and a retrial was ordered, although it never proceeded.[39] Notably, the introduction of a second or subsequent appeal in South Australia was the product of compromise. It followed the Inquiry into the Criminal Cases Review Commission Bill 2010 by the Legislative Review Committee in 2012, which considered whether South Australia ought to establish a Criminal Review Commission, of the kind that has existed in the United Kingdom since 1997.[40] However, the committee ultimately recommended against establishing such a commission, due to considerations of time, cost and judicial workload.[41] For David Caruso and Nicholas Crawford, the South Australian approach demonstrates that

35 Hamer, 'Wrongful Convictions' (n 21) 296.

36 See *CPA* (n 1) ss 326A, 326C–326D.

37 South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4315 (John Rau, Attorney-General), quoted in Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36(1) *Adelaide Law Review* 211, 212.

38 Milne (n 37) 214, citing South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4307 (Vickie Chapman).

39 Tim Dornin, 'Anna-Jane Cheney Family Make New Call for Henry Keogh Retrial', *The Advertiser* (online, 26 September 2018) <https://www.adelaidenow.com.au/news/law-order/annajane-cheney-family-make-new-call-for-henry-keogh-retrial/news-story/add2b079b1df60112120a503c0879ec7>.

40 Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (Report, 18 July 2012) 58.

41 Ibid 81, quoted in David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 344. Whilst the South Australian Parliament decided against establishing a Criminal Cases Review Commission, such a body was formally established in the United Kingdom on 1 January 1997, with the mandate of reviewing applications from alleged victims of miscarriages of justice who had previously failed in criminal appeals: Michael Naughton, 'Introduction' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 1, 1. Similar commissions have since been introduced in New Zealand, Norway, Scotland and some states of the United States of America: see Lissa Griffin, 'International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission' (2013) 21(4) *William and Mary Bill of Rights Journal* 1153, 1154–5; Carolyn Hoyle, 'The Shifting Landscape of Post-Conviction Review in New Zealand: Reflections on the Prospects for the Criminal Cases Review Commission' (2020) 32(2) *Current Issues in Criminal Justice* 208. In 2021, the Canadian government committed to establishing a Criminal Case Review Commission: Department of Justice Canada, 'Minister of Justice and Attorney General of Canada Takes Important Step toward Creation of an Independent Criminal Case Review Commission' (Media Release, 31 March 2021) <https://www.canada.ca/en/department-justice/news/2021/03/minister-of-justice-and-attorney-general-of-canada-takes-important-step-toward-creation-of-an-independent-criminal-case-review-commission.html>. Work is currently underway as to what form the Canadian commission will take.

effective reforms may be achieved via statutory modifications of existing rules relating to post-conviction appeal rights.[42]

Tasmania similarly passed legislation allowing a second or subsequent appeal in October 2015.[43] Explaining the rationale for this reform, Attorney-General Vanessa Goodwin stated that the prerogative power of mercy had been 'criticised by legal commentators on a number of grounds, including the lack of formal process and transparency, and a perception that political rather than legal matters may be determinative'.[44] More recently, on 25 June 2019, the Criminal Appeals Amendment Bill 2019 (WA) passed the Western Australian Legislative Assembly. This Bill introduced a second or subsequent appeal process, again in response to specific wrongful convictions including that of Andrew Mallard.[45] In the second reading speech, Leader of the House Sue Ellery noted that the amendment 'strikes an appropriate balance between the public interest in correcting substantial miscarriages of justice, and the public interest in the finality of litigation'.[46] At the time of writing, however, these provisions have still not been passed by the Legislative Council.

The South Australian and Tasmanian provisions have been used very rarely since they were passed: fewer than 10 times in South Australia, and only once in Tasmania.[47] These numbers suggest that any concern that these provisions might open a 'floodgate' of further appeals would be unfounded. As discussed below, the thresholds set are high and likely to effectively guard against any such predictions.[48]

Although no second or subsequent appeal process exists there, New South Wales was the first jurisdiction to adopt an additional review procedure for criminal appeals, offering the possibility of an inquiry into conviction as far back as 1883 (when no appeals process existed).[49] Under s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW), a convicted person may apply for an inquiry into a

42 Caruso and Crawford (n 41) 348.

43 *Criminal Code Act 1924* (Tas) s 402A.

44 Matt Smith, 'Attorney-General Vanessa Goodwin Releases Draft Appeal Rights Bill', *The Mercury* (online, 31 March 2015) <https://www.themercury.com.au/news/scales-of-justice/attorneygeneral-vanessa-goodwin-releases-draft-appeal-rights-bill/news-story/e4040d585cb6751329ae27e58dc8c11e>, quoted in Sangha, 'Statutory Right' (n 29) 480.

45 Tim Clarke, 'Andrew Mallard's Legacy: Appeal Law Offers New Hope', *The West Australian* (online, 2 June 2019) <https://thewest.com.au/news/wa/andrews-legacy-appeal-law-offers-new-hope-ng-b881215495z>.

46 Western Australia, *Parliamentary Debates*, Legislative Council, 27 June 2019, 4815.

47 See Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4048 (Stephen McGhie). Two applications under the South Australian provisions have been refused since then, bringing the total to nine: *MJJ v The Queen* [2021] SASCFC 36; *Helps v The Queen [No 3]* [2021] SASCFC 10.

48 See below Part IV(A).

49 David Brown and Jillian Orchiston, 'Review of Section 475 of the *Crimes Act* 1900: The Attorney General's Issues Paper' (1993) 5(1) *Current Issues in Criminal Justice* 85, 85.

conviction or sentence. Whilst such a process offers some possibility for opening an allegedly wrongful conviction, these provisions have been read narrowly and rarely lead to the correction of wrongful convictions.[50] What remains in New South Wales, as with other jurisdictions in Australia, is the ability to petition the executive to exercise its pardoning power.[51]

B The Crown Prerogative of Mercy

At the time of the introduction of the new second or subsequent appeal in Victoria, as noted above, very limited avenues existed to remedy a substantial miscarriage of justice. The primary option available to a wrongfully convicted person who had exhausted the appeal process was to rely on the Crown's prerogative of mercy. The Crown's power in this regard reflects an ancient royal prerogative according to which a person may be pardoned or have their sentence commuted,[52] although the power to acquit a person remains exclusively with the courts.[53] The prerogative power has its statutory equivalent in the criminal statutes of Australian states and territories alongside specific statutory mechanisms for the review of convictions, namely the appeals process. In Victoria, for instance, s 327 of the *CPA* provides for the Attorney-General to refer petitions for mercy to the Court of Appeal for rehearing,[54] or to the Trial Division of the Supreme Court in relation to a specific point. The existence of the statutory parallel to the prerogative of mercy does not abrogate the prerogative, with express words preserving this power.[55] Referrals to the Court of Appeal under either process are rare.[56]

50 Hamer, 'Wrongful Convictions' (n 21) 288–92. From 2007 to 2014, NSW also had a DNA Review Panel, but Hamer suggests that this did not, in fact, lead to any 'corrections': at 292–5. A similar procedure for inquiry into convictions is available in the ACT in pt 20 of the *Crimes Act 1900* (ACT). The ACT inherited the NSW provisions under the operation of the *Seat of Government Acceptance Act 1909* (Cth) and subsequently the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

51 *Crimes (Appeal and Review) Act 2001* (NSW) s 76 allows for a convicted person to petition the Governor to review a conviction or sentence, or to exercise the Governor's pardoning power.

52 *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350–1 [98] (Heydon J), quoting *R v Cosgrove* [1948] Tas SR 99, 106 (Morris CJ) and *R v Foster* [1985] QB 115, 130 (Watkins LJ for the Court); Caruso and Crawford (n 41) 313.

53 Sangha and Moles, 'Mercy or Right' (n 23) 301–2.

54 In an appeal referred to the court by the Attorney-General following a petition for mercy, the Court of Appeal may engage in a full review of all admissible evidence, whether new, fresh or already considered in the previous proceedings, meaning that the hearing is more expansive than the special leave process in the High Court: see Lynne Weathered, 'The Criminal Cases Review Commission: Considerations for Australia' (2012) 58(2) *Criminal Law Quarterly* 245, 253 ('The Criminal Cases Review Commission'), quoting *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

55 Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3(1) *Journal of Commonwealth Law* 55, 94–5, discussing *CPA* (n 1) s 327.

56 Christopher Corns, *Criminal Investigation and Procedure in Victoria* (Lawbook, 3rd ed, 2019) 599–600.

Importantly, the process is entirely discretionary.[57] The Crown's prerogative power to grant mercy is exercised by the Attorney-General in a manner that is subject to minimal oversight or transparency to the public. The Attorney-General has ultimate and non-reviewable decision-making power in matters where the prerogative — or its statutory equivalent — is relied upon.[58] Moreover, 'courts in Australia have also been reluctant to interfere with the statutory alternatives, such as referral to a court for a rehearing, because they are regarded as adjunct or ancillary to the exercise of a prerogative power'.[59]

There are a number of criticisms of this process. Given that the Attorney-General, whilst making the decision within their capacity as a member of the executive, is also a politician, the decision may be influenced by the prevailing political climate, community expectations or media pressure.[60] Indeed, former Attorney-General Martin Pakula acknowledged that this is a process which 'by its very nature, even though it should not be, can become political'.[61] Certainly, there is some evidence that the Attorney-General is less likely to refer matters back to the courts if they might 'reflect poorly on the prosecution or the state itself'.[62] Other criticisms of petitions for mercy include that the applicant has no right to be heard on the matter, the Attorney-General is not required to provide reasons for refusing (or granting) a referral and there is no time limit within which the decision must be made.[63] In addition, the process is arguably inefficient. The Attorney-General must review the material provided in support of a petition for mercy in order to determine whether and how to exercise their power to refer the matter to the Court of Appeal.[64] The Court of Appeal must then, where the matter comes before it, consider the material itself. The new process 'effectively removes the middleman'.[65]

57 Weathered, 'Pardon Me' (n 21) 212.

58 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3688 (Jill Hennessy, Attorney-General).

59 Twomey (n 55) 95.

60 Weathered, 'Pardon Me' (n 21) 212.

61 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4058.

62 Sangha, 'Statutory Right' (n 29) 480. See also Rosemary Pattenden, *English Criminal Appeals 1844–1994: Appeals against Conviction and Sentence in England and Wales* (Clarendon Press, 1996); Hannah Quirk, 'Prisoners, Pardons and Politics: R (On the Application of Shields) v Secretary of State for Justice' [2009] (9) *Criminal Law Review* 648.

63 See McCusker (n 33) 20.

64 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4058 (Martin Pakula).

65 Ibid.

The exercise of the Attorney-General's discretion on these matters is generally not subject to judicial review.[66] However, Anne Twomey's analysis of recent case law suggests that, increasingly, there are aspects which may be subject to judicial review, even if the merits of the ultimate decision are not.[67] For instance, the Full Court of the Federal Court noted in 2015 that the law on the reviewability of the prerogative of mercy was 'unsettled' and, moreover, that the 'clear trend of authority is towards some degree of judicial supervision of, at least, the process by which the mercy prerogative is exercised'.[68] In line with this, Lander J, in *Eastman v Attorney-General (ACT)*, concluded that he was 'entitled to inquire into whether the decision maker in the Executive discharged its obligations at law in reaching its decision'.[69] His Honour noted that the decision itself is not reviewable, but 'if the Executive has not conducted itself in accordance with the law in reaching that decision and, in particular, not observed the rules of natural justice, the decision must be set aside'.[70] Whilst it is not entirely beyond the remit of the courts to consider questions of procedural fairness, the prerogative of mercy remains a less than fully transparent process.[71]

C A Fine Balance: Finality versus Correcting Errors

The new Victorian provisions are extremely stringent, with a view to preventing unmeritorious repeat appeals.[72] As Attorney-General Jill Hennessy acknowledged in the second reading speech for the Justice Legislation Amendment (Criminal Appeals) Bill 2019 (Vic), the Bill was designed to avoid appeals succeeding on purely technical grounds, with the attendant distress to victims and their families.[73] Such outcomes would also have the potential to undermine broader confidence in the criminal justice system.[74] That said, allowing miscarriages of justice to persist

66 *Horwitz v Connor* (1908) 6 CLR 38, 40 (Griffith CJ for the Court); *Von Einem v Griffin* (1998) 72 SASR 110. That said, in the application for special leave to appeal the decision in *R v Keogh [No 2]* (2014) 121 SASR 307 ('*Keogh*'), Gummow J inquired whether this extended to *Wednesbury* unreasonableness: Transcript of Proceedings, *Keogh v The Queen* [2007] HCATrans 693, 13. Counsel for the Crown responded to the effect that it would need to consider the matter further.

67 Twomey (n 55) 99.

68 *Yasmin v A-G (Cth)* (2015) 236 FCR 169, 189–90 [88].

69 (2007) 210 FLR 440, 459 [79].

70 Ibid.

71 In the recent decision of *Zhong v A-G (Vic)* [2020] VSC 302, Croucher J found that although the prevailing position is that the exercise of the prerogative is not reviewable at all, recent decisions have allowed that 'at least the process by which the Attorney's decision to decline to refer a case to the Court of Appeal is reviewable': at [10]. In the circumstances of that case, however, his Honour did not have to determine this point so the matter remains unsettled in Victorian law.

72 See *Roberts v The Queen* (2020) 60 VR 431, 433 [5] (Osborn and T Forrest JJA, Taylor AJA) ('*Roberts' Leave Application*').

73 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3689.

74 Ibid.

could equally undermine faith in the system.[75] Great effort was made in the drafting of these new processes to strike the appropriate balance between preventing claims without merit, whilst at the same time restoring transparency and providing an avenue to address miscarriages of justice,[76] albeit in limited circumstances. In addition, Hennessy emphasised the need to balance these considerations against the need for victims to

> have a sense of finality and certainty that a criminal case is over … But this must be balanced against the risk that a person has been wrongfully convicted or has not received a fair trial, which is the right of every accused person.[77]

The current test is also intended to prevent unmeritorious claims from causing delays or undermining public confidence in the criminal justice system.[78]

The general principle of finality is a significant guiding principle of the appellate system. As stated by Dixon J in *Grierson v The King*, finality in this context means that the 'determination of an appeal is evidently definitive, and a conviction unappealed is equally final'.[79] Sue Milne explains that the principle of finality aims 'to avoid the spectre of repeated efforts at re-litigation'.[80] This can be understood in terms of improving the efficiency of the criminal justice system (whether in terms of cost or other resources), as well as providing closure to victims and broader society.[81] It is also intended to bolster the jury's role in the criminal justice system.[82] If various rules of evidence and criminal procedure serve to militate against the risk of a wrongful conviction, once a conviction has been entered, there is a fundamental shift from the presumption of innocence to the presumption of guilt.[83] The principle of finality is reflected in the fact that a convicted person has generally only had recourse to a single appeal. Moreover, the principle has been articulated as potentially at odds with the 'truth', suggesting that the interests of justice require certainty over potentially endless disputes as to the 'truth' of a given matter.[84] In this respect, the second or subsequent appeal is an acknowledgement that in certain limited circumstances, the principle of finality ought to yield to allow a review of a case in which evidence of a miscarriage of justice has emerged.

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid.

79 (1938) 60 CLR 431, 436 ('*Grierson*').

80 Milne (n 37) 229.

81 David Hamer, 'The *Eastman* Case: Implications for an Australian Criminal Cases Review Commission' (2015) 17(2) *Flinders Law Journal* 433, 434 ('The *Eastman* Case').

82 Hamer, 'Wrongful Convictions' (n 21) 270.

83 Ibid.

84 See *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson CJ and Hayne J), quoting *The Ampthill Peerage* [1977] AC 547, 569 (Lord Wilberforce).

III THE SOCIO-LEGAL CONTEXT TO THE VICTORIAN PROVISIONS

As with the South Australian provisions, the introduction of the second or subsequent appeal into the *CPA* was framed as offering protection against miscarriages of justice. Indeed, the provisions were described by various Labor Members of Parliament during the parliamentary debates as a means of 'modernising Victoria's safeguards against wrongful conviction'.[85] Yet again, as in the case of the South Australian reforms, the Victorian legislation did not emerge in a vacuum. These reforms were prompted by the findings of two significant inquiries which revealed disturbing and systemic misconduct by various agents in the criminal justice system, particularly Victoria Police and former barrister Nicola Gobbo. Members from both major political parties referred to the case of Jason Roberts and to Ms Gobbo, as well as to the Independent Broad-based Anti-corruption Commission ('IBAC') and Royal Commission inquiries that investigated the relevant events, during the second reading of the Justice Legislation Amendment (Criminal Appeals) Bill 2019 (Vic).[86]

Whilst celebrated as a modernisation of the criminal justice system, the reforms were also characterised as a manoeuvre intended to absolve the government (particularly the Attorney-General) of responsibility for responding to the growing list of petitions arising from these inquiries. In his contribution to the debate, David Southwick suggested that the reforms were 'a means by which the Andrews Labor government will be able to deflect claims of procrastination'.[87] Despite his concern that the Bill served to 'deflect from the government' and that it might lead to unmeritorious 'get-out-of-jail cards' for convicted offenders linked to Gobbo,[88] Southwick did not oppose the reforms.[89] Both sides of politics acknowledged that the reforms emerged in the context of the Royal Commission into the Management of Police Informants and the case of Jason Roberts.[90] In this sense, the introduction of a second or subsequent appeal in Victoria was a political response to serious misconduct within the police force and legal profession, which nonetheless improves on the politicised process of a petition for mercy discussed earlier. It was shaped by the extraordinary circumstances of these two inquiries.

85 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2019, 4028 (Michaela Settle), 4033 (Christine Couzens), 4048 (Stephen McGhie), 4052 (Paul Hamer), 4062 (Chris Brayne), 4064 (John Kennedy), 4066 (Nicholas Staikos). See also at 4046 (Jackson Taylor), 4050 (Katie Hall).

86 Ibid 4022–67.

87 Ibid 4002.

88 Ibid 4003.

89 Ibid 4004.

90 See also ibid 4032 (Darren Cheeseman), 4058–9 (Martin Pakula).

A Jason Roberts: A Conviction Tainted by Police Misconduct

Jason Roberts was the first person to make an application for leave under the new provisions. On the basis of evidence that emerged from an IBAC investigation into the case against him, the Court of Appeal granted him leave to appeal, upheld the appeal and ordered a retrial.[91]

1 *The Crime and Trial*

In the early hours of 16 August 1998, Victoria Police officers Sergeant Gary Silk and Senior Constable Rodney Miller were fatally shot whilst engaged in a surveillance operation in Cochranes Road, Moorabbin.[92] Sergeant Silk was shot at close range and died almost immediately, whilst Senior Constable Miller was still conscious when the first responders arrived at the scene.[93] Multiple officers gave evidence that Miller's dying declaration described two offenders — crucial to the case against Roberts because he was alleged to have been Bandali Debs' accomplice in the murders.[94] At the time, Roberts was 17 years old and dating Debs' daughter.[95] The Lorimer Taskforce was established to investigate the incident and,[96] in 2002, Debs and Roberts were charged and subsequently convicted of the murders.[97] Since then, the evidence against Roberts has been brought into question, leading initially to an IBAC investigation into police conduct and, ultimately, to major law reform and the Court of Appeal granting Roberts leave to appeal a second time.[98]

Throughout his trial, Roberts maintained his innocence, although this was described at various points in the sentencing decision as feigning ignorance, lying and falsely denying involvement.[99] He has since claimed that he has an alibi for the night of the murders,[100] and that the police stripped, tied and beat him upon his

91 *Roberts' Leave Application* (n 72).

92 Ibid 435 [18].

93 *Roberts v The Queen* [2020] VSCA 277, [62]–[67] (T Forrest and Osborn JJA, Taylor AJA) ('*Roberts' Second Appeal*').

94 Ibid [92]–[97].

95 Ibid [68].

96 Ibid [136].

97 Ibid [1]–[2].

98 Ibid [284].

99 *DPP (Vic) v Debs* [2003] VSC 30, [13], [18], [40] (Cummins J).

100 Anthony Dowsley, 'One Shooter or Two: Fatal Question behind Silk-Miller Murders', *Herald Sun* (online, 25 August 2018) <https://www.heraldsun.com.au/truecrimeaustralia/behindthescenes/one-shooter-or-two-fatal-question-behind-silkmiller-murders/news-story/3788e33e7f5d5a4d9e1fbcc152073762>.

arrest.[101] Neither claim was raised at trial. During that proceeding, a key issue was whether the prosecution could prove that there was more than one shooter.[102] Central to the evidence on this were witness statements from the first responders to the scene of the crime.[103] Roberts and Debs appealed their convictions.[104] In denying the joint appeal against conviction in April 2005, Vincent JA characterised the evidence against each defendant as 'overwhelming'.[105] In November of the same year, the High Court refused an application for special leave to appeal.[106] At that time, Roberts had exhausted his legal avenues for appeal.

Between August 2016 and November 2019, Roberts lodged three petitions for mercy with the Attorney-General of Victoria.[107] Each of these was accompanied by sworn statements in which Roberts confessed to being involved in armed robberies with Debs, but deposed that the latter acted alone in the killings of Silk and Miller. This was supported by alibi evidence and expert reports which challenged the case against him.[108] On 6 August 2018, the Attorney-General referred a point arising out of the second petition regarding the credibility of Roberts' new alibi evidence to three judges of the Supreme Court under s 327(1)(b) of the *CPA*.[109] This referral ultimately did not proceed because Roberts sought further evidence, including evidence arising out of IBAC's ongoing investigations into the police evidence at trial, in particular the way in which police statements were prepared and altered.[110] The third petition, which drew upon material obtained from IBAC, was lodged around the time that the Victorian Parliament passed legislation permitting second or subsequent appeals for indictable offences.[111] Roberts immediately lodged an application for leave to appeal under this new provision, and this 'effectively overtook the petition for mercy process'.[112]

101 Anthony Dowsley, 'Police Pledged Lesser Charge for Jason Roberts' Evidence in Silk-Miller Shootings', *Herald Sun* (online, 19 December 2018) <https://www.heraldsun.com.au/news/law-order/true-crime-scene/case-files/police-pledged-lesser-charge-for-jason-roberts-evidence-in-silkmiller-shootings/news-story/c461a686ba68c5c5d2a16d87455ac270>.

102 *Roberts' Second Appeal* (n 93) [94] (T Forrest and Osborn JJA, Taylor AJA).

103 Ibid [207]–[232].

104 Ibid [4].

105 *R v Debs* [2005] VSCA 66, [280].

106 *Roberts' Leave Application* (n 72) 433 [3] (Osborn and T Forrest JJA, Taylor AJA), citing Transcript of Proceedings, *Debs v The Queen* [2005] HCATrans 971.

107 *Roberts' Second Appeal* (n 93) [6] (T Forrest and Osborn JJA, Taylor AJA).

108 Ibid.

109 Ibid [7].

110 Ibid [8].

111 Ibid [9], [11].

112 Ibid [11].

2 *The Independent Broad-based Anti-corruption Commission Investigation*

In 2015, just before Roberts' first petition for mercy, IBAC initiated Operation Gloucester, charged with investigating allegations that some officers from the Lorimer Taskforce had engaged in misconduct.[113] This investigation was prompted by the discovery of a second statement by first responder Senior Constable Glenn Pullin dated the night of the murders, which had not been disclosed to Roberts' defence.[114] This was in fact Pullin's original statement, and did not mention a second offender.[115] Significantly, this statement was inconsistent with Pullin's trial evidence to the effect that Miller had described two offenders. Although it was presented at trial as a contemporaneous recollection of the events, evidence to IBAC revealed that the statement of Pullin relied upon in the trial was in fact made 10 months after the officers' deaths and contained a number of matters which had not been included in his initial statement, which had been made within four hours of the relevant events.[116]

Whilst the investigation was at first discontinued due to lack of evidence, in July 2020, IBAC published its Special Report on Operation Gloucester, which identified a pattern of improper practices employed by Victoria Police during the Taskforce Lorimer investigation of Debs and Roberts.[117] The misconduct related primarily to the manner in which witness statements were prepared and altered, including in relation to Miller's dying declaration.[118] For instance, relevant information was at times deliberately omitted from statements where it might not assist in the ultimate prosecution, such as where the description of the offenders did not match the accused (namely Debs and Roberts).[119] In other cases, officers omitted relevant information that was perceived as inconsistent with other evidence in the possession of the police.[120] As concluded by IBAC, all of these practices amounted to misconduct because they concealed relevant information.[121] Again, none of these matters were disclosed to Roberts' defence at trial.

113 Independent Broad-based Anti-corruption Commission, *Operation Gloucester: An Investigation into Improper Evidentiary and Disclosure Practices in Relation to the Victoria Police Investigation of the Murders of Sergeant Gary Silk and Senior Constable Rodney Miller* (Special Report, July 2020) 10.

114 Ibid 23–4.

115 Ibid 42.

116 *Roberts' Leave Application* (n 72) 433–4 [9]–[10] (Osborn and T Forrest JJA, Taylor AJA); Independent Broad-based Anti-corruption Commission (n 113) 40–2.

117 Independent Broad-based Anti-corruption Commission (n 113).

118 Ibid 27–43.

119 Ibid 27.

120 Ibid.

121 Ibid 27.

IBAC found that improper conduct was widespread within the Lorimer Taskforce, as were failures to adhere to correct procedures around the taking and handling of statements.[122] This led to statements being contaminated, ultimately compromising the investigation.[123] These findings provided Roberts with 'fresh and compelling' evidence, as required to satisfy the Court of Appeal in his application for leave to bring a second or subsequent appeal.[124] At the hearing of this application, Roberts' counsel argued that the evidence that emerged from IBAC demonstrated the manipulation of police evidence, particularly around the preparation and amendment of witness statements; the destruction of evidence relating to original witness statements; and the discrediting of the senior officer who oversaw the investigation.[125] Had the circumstances of the police investigation and prosecution of the case against him not been the subject of an IBAC investigation, it is highly doubtful that Roberts' defence would have been able to uncover the evidence of police misconduct.

B Nicola Gobbo: Counsel Turned Police Informant

The second inquiry that prompted the adoption of the second or subsequent appeal was that sparked by the now well-publicised role of Nicola Gobbo, also known as 'Lawyer X', as a human source for Victoria Police.

1 *A Brief Background*

In 1993, whilst she was a law student, former criminal barrister Gobbo's property was searched by Victoria Police under a warrant. Following this, Gobbo maintained contact with Victoria Police, 'cultivating opportunities to meet with police officers and give them information'.[126] Information that Gobbo provided on her then partner led to Victoria Police registering her as a human source in 1995, and over the next 14 years, Gobbo provided information to Victoria Police about her clients, their associates and other people,[127] as well as encouraging her clients to themselves provide evidence against their associates and manipulating her

122 Ibid 79.

123 Ibid 59.

124 *CPA* (n 1) s 326C.

125 *Roberts' Leave Application* (n 72) 434 [14] (Osborn and T Forrest JJA, Taylor AJA).

126 *Royal Commission into the Management of Police Informants* (Final Report, November 2020) 18 ('*Royal Commission*').

127 Ibid 11–12.

clients' evidence to assist the police.[128] As a renowned 'gangland' barrister, Gobbo's clients were a 'rogue's gallery of Melbourne's underworld'.[129]

Gobbo's role came to light during the case against former Victoria Police officer Paul Dale in 2011, when she was due to give evidence against him. Dale subpoenaed Victoria Police seeking documents that could have revealed Gobbo's role as a police informant.[130] As a result, Victoria Police sought legal advice on the matter and was warned that the use of a lawyer as a police informant could lead to criminal convictions being overturned.[131] This, in turn, led to the first of three confidential reviews into the use of Gobbo as a human source.[132] Around this time, the Herald Sun began writing about these issues, publishing articles alleging that Victoria Police had recruited 'Lawyer X'.[133] In 2015, a confidential report was written on behalf of IBAC, which identified nine people whose prosecutions may have been affected by Gobbo's role as an informant.[134] These included Tony Mokbel and six of his associates.[135] The Director of Public Prosecutions proposed to disclose some of this information to the affected people, which Victoria Police (and in turn Gobbo, who joined the proceedings) resisted on the basis of public interest immunity.[136] The Supreme Court dismissed Victoria Police and Gobbo's claims, a decision which was upheld by the Court of Appeal.[137] In both instances, the Court placed significant weight on the 'very great importance of ensuring that the court's processes are used fairly and of preserving public confidence in the court', which ultimately outweighed the public interest in immunity.[138]

The Chief Commissioner of Police subsequently sought, and was granted, special leave to appeal this decision to the High Court.[139] In rejecting the appeal, the High Court described Gobbo's actions as 'fundamental and appalling breaches of [her]

128 Nino Bucci, 'Nicola Gobbo: Special Investigator Will Examine whether "Lawyer X" or Victoria Police Committed Crimes', *The Guardian* (online, 30 November 2020) <https://www.theguardian.com/australia-news/2020/nov/30/nicola-gobbo-special-investigator-will-examine-whether-lawyer-x-or-victoria-police-committed-crimes>.

129 Tammy Mills, 'The Nicola Gobbo, Lawyer X Scandal Explained', *The Age* (online, 30 November 2020) <https://www.theage.com.au/national/victoria/the-nicola-gobbo-lawyer-x-scandal-explained-20201124-p56hh9.html>.

130 *Royal Commission* (n 126) 12.

131 Mills (n 129).

132 *Royal Commission* (n 126) 12.

133 Ibid; Mills (n 129).

134 *Royal Commission* (n 126) 12.

135 *AB (A Pseudonym) v CD (A Pseudonym)* (2018) 362 ALR 1, 3 [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

136 Ibid 3 [1]–[2].

137 Ibid 3–4 [4]–[5].

138 Ibid 3–4 [5].

139 Ibid 4 [6].

obligations as counsel to her clients and of [her] duties to the court'.[140] It similarly described Victoria Police as 'guilty of reprehensible conduct in knowingly encouraging [Gobbo] to do as she did'.[141] As a result of this misconduct, the High Court found that 'the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system'.[142] The High Court's decision meant that the suppression order on Gobbo's identity was lifted. She was subsequently struck off the Supreme Court's roll of legal practitioners and is no longer entitled to practise law.[143]

2 *The Royal Commission into the Management of Police Informants*

In 2018, following the High Court decision, the Victorian Government established a Royal Commission to inquire and report on, amongst other things, the number and extent of cases affected by Gobbo's role as a human source.[144] The Commission heard from 82 witnesses over 129 days of hearings, ultimately issuing some 111 recommendations.[145] Key amongst its findings was that during her time as a police informant, Gobbo's conduct potentially affected the convictions or findings of 1,011 people.[146] Of these, 887 were 'potentially affected in a broad way', being people who Gobbo represented and who were not informed that she was providing information to the police.[147] One hundred and twenty-four people were more specifically impacted.[148] The cases include both those where Gobbo 'was acting as the person's lawyer, and cases where she was not, such as where the person was a co-accused of one of her clients'.[149] The impact on some was that they 'were not represented by an independent lawyer acting in their best interests', whilst others 'may have been affected by Gobbo's conflicts of interest or tainted evidence arising from her conduct'.[150]

The evidence that emerged from the Royal Commission about the impact of Gobbo's role as a police informant has, like the evidence that emerged out of Operation Gloucester in relation to Roberts' prosecution, also been deemed fresh in the relevant sense. As noted below, *Mokbel v Director of Public Prosecutions (Cth)* ('*Mokbel*') is the only Gobbo-related appeal that has been determined so far

140 Ibid 4 [10].

141 Ibid.

142 Ibid.

143 *Royal Commission* (n 126) 20.

144 Ibid 7.

145 *Royal Commission* (n 126) 14, 38–64.

146 Ibid 17.

147 Ibid 18.

148 Ibid.

149 Bucci (n 128).

150 Ibid.

under the new provisions.[151] That said, a number of further applications for 'Gobbo appeals' are expected to follow.[152] Without the Royal Commission, it is unlikely that these individuals would have learnt of the issues that affected their convictions. Again, a significant, well-resourced public inquiry seems to have been necessary to provide 'fresh and compelling' evidence to support an application for leave to bring a second or subsequent appeal.

The Roberts and Gobbo inquiries discussed above have shaken the criminal justice system and shed light on the need for increased police accountability.[153] It is in this extraordinary context that the post-appeal review provisions entered into force in Victoria. Unsurprisingly, these circumstances have also profoundly shaped the early operation of the new regime.

IV AN ANALYSIS OF THE EARLY OPERATION OF THE NEW APPEAL PROVISIONS

The newly inserted pt 6.4 of the *CPA* sets out the regime governing second or subsequent appeals against a criminal conviction. A person convicted of an indictable offence who has exhausted all existing avenues of appeal may now, in certain circumstances, seek the leave of the Court of Appeal to launch a second or subsequent appeal against their conviction.[154] Echoing the words of the High Court in the South Australian case of *Van Beelen v The Queen* ('*Van Beelen*'),[155] the Victorian Court of Appeal has unequivocally stated that these provisions are intended to serve as an exception to the principle of finality:

> [T]he section manifests an intention that the finality of the criminal process yield in the face of fresh and compelling evidence which, taken with the evidence at trial, satisfies an appellate court that there has been a substantial miscarriage of justice.[156]

The second or subsequent appeal is designed to be a deliberately narrow process that is subjected to strict conditions with a view to guarding against unmeritorious, repetitive applications.[157] In this respect, the new Victorian provisions are likely to, and indeed have, achieved their aim. First, the applicant must receive leave,

151 See *Mokbel v DPP (Cth)* (2021) 289 A Crim R 1, 7 [26] (Beach and Osborn JJA) ('*Mokbel*').

152 Adam Cooper, 'Former Gobbo Clients Wait on Key Documents Ahead of Appeal Hearings', *The Age* (online, 18 February 2021) <https://www.theage.com.au/national/victoria/former-gobbo-clients-wait-on-key-documents-ahead-of-appeal-hearings-20210218-p573m6.html>.

153 Jude McCulloch and Michael Maguire, 'Lawyer X Inquiry Calls for Sweeping Change to Victoria Police, but Is It Enough to Bring Real Accountability?', *The Conversation* (online, 30 November 2020) <https://theconversation.com/lawyer-x-inquiry-calls-for-sweeping-change-to-victoria-police-but-is-it-enough-to-bring-real-accountability-147836>.

154 *CPA* (n 1) ss 326A–326E.

155 (2017) 262 CLR 565 ('*Van Beelen*').

156 *Roberts' Leave Application* (n 72) 440–1 [40] (Osborn and T Forrest JJA, Taylor AJA), citing ibid 576–7 [27] (Bell, Gageler, Keane, Nettle and Edelman JJ).

157 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3689 (Jill Hennessy, Attorney-General).

which may be granted where the Court of Appeal 'is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal'.[158] Second, once leave is granted, the applicant must satisfy the Court of Appeal that 'there has been a substantial miscarriage of justice'.[159] There is therefore a demanding screening process of leave before an appeal may be heard on its merits. However, the measure of overlap between the concepts of 'fresh and compelling evidence', 'interests of justice' and 'substantial miscarriage of justice' means that in practice, the hearing of the leave application and that of the substance of the appeal is likely to become somewhat conflated, if not combined.

The Victorian Court of Appeal issued landmark decisions in what was the very first application brought under the new provisions in the cases of *Roberts v The Queen* ('*Roberts' Leave Application*')[160] and *Roberts v The Queen* ('*Roberts' Second Appeal*').[161] They provide some indication of how the regime is likely to operate in Victoria and formulate a number of guiding principles, drawn in part from the High Court's decision in *Van Beelen* in relation to a similar legislative scheme operating in South Australia.[162]

At the time of writing, six applications for a second or subsequent appeal — including that of Roberts — have been determined by the Victorian Court of Appeal.[163] Of those, two led to the quashing of the applicant's conviction,[164] one having been conceded by the prosecution.[165] A review of these cases offers an initial insight into the operation of the new provisions. What this early jurisprudence reveals is that the second or subsequent appeal is a demanding judicial pathway that is not unduly displacing the principle of finality. It is likely to effectively screen unmeritorious applications and remedy already uncovered fundamental errors that can be established by fresh evidence, whether these relate to the outcome of the trial or its fairness. In allowing for an open and transparent judicial assessment of applications for review, the new process is therefore a

158 *CPA* (n 1) s 326C.

159 Ibid s 326D.

160 *Roberts' Leave Application* (n 72).

161 *Roberts' Second Appeal* (n 93).

162 *Van Beelen* (n 155). A significant proportion of the second appeals determined in South Australia concerned the reliability of expert evidence: see *R v Drummond [No 2]* [2015] SASCFC 82 ('*Drummond*'); *Van Beelen* (n 155); *Keogh* (n 66).

163 *Roberts' Second Appeal* (n 93); *Donohue v The Queen [No 3]* [2020] VSCA 302 ('*Donohue*'); *Taylor v The Queen* [2021] VSCA 131 ('*Taylor*'); *Meade v The Queen* [2021] VSCA 74 ('*Meade*'); *Mokbel* (n 151); *Lewers (A Pseudonym) v The Queen [No 2]* [2021] VSCA 351 ('*Lewers*'). A further two applications have been launched before the Court of Appeal, but are yet to be determined: *Polimeni v The Queen* [2021] VSCA 329; *Higgs v The Queen* [2021] VSCA 90. Two additional cases related to the activities of Nicola Gobbo were also successful on appeal, albeit not under the second or subsequent appeal provisions. The appeals in *Orman v The Queen* (2019) 59 VR 511 ('*Orman*') and *Cvetanovski v The Queen* [2020] VSCA 272 ('*Cvetanovski*') were brought through the petition for mercy pathway and as a first appeal respectively.

164 *Roberts' Second Appeal* (n 93); *Mokbel* (n 151).

165 *Mokbel* (n 151).

significant improvement on the secretive petition model that previously stood as the sole pathway for review (and now coexists with the new provisions).

In practice, however, the initiation of such an appeal remains dependent on the capacity of the applicant to uncover or secure the fresh evidence that will form its basis. The absence of a permanent independent body empowered to investigate claims of miscarriages of justice in Victoria means that such evidence may not necessarily be detected. Early experience in Victoria testifies to this. Indeed, the two cases that have seen successful appeals have both relied on fresh evidence that emerged, many years after the commission of the offences, in the context of external inquiries by bodies enjoying significant investigative powers.[166] It remains to be seen therefore how the new provisions will operate in relation to cases that have not been the subject of inquiries and in which the discovery of fresh evidence has been left to the applicant. No such case has been successful in Victoria to date; instead, all have succumbed at the leave stage.[167]

A A High Threshold for Leave

A second or subsequent appeal is not an appeal as of right. Section 326C of the *CPA* provides that leave may only be granted if two preconditions are satisfied — there is fresh and compelling evidence, and it is in the interests of justice to allow the appeal to be heard:

> **326C Determination of application for leave to appeal under section 326A**
>
> (1) The Court of Appeal may grant leave to appeal under section 326A if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.
>
> (2) The Court of Appeal may grant leave to appeal under section 326A against a conviction for a related summary offence only if it grants leave to appeal under subsection (1) in relation to the indictable offence.
>
> (3) In this section, evidence relating to an offence of which a person is convicted 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) it is reliable; and
>
> (ii) it is substantial; and
>
> (iii) either—
>
> (A) it is highly probative in the context of the issues in dispute at the trial of the offence; or
>
> (B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

166 See above Part III.

167 *Meade* (n 163); *Taylor* (n 163); *Donohue* (n 163).

> (4) Evidence that would be admissible on a second or subsequent appeal is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the conviction.

The threshold for leave differs in substance from that which applies to an original appeal under s 274 of the *CPA*.[168] The applicant bears the onus of satisfying the court.[169] It is clear that the process of leave serves as a demanding and rigorous screening mechanism that is likely to be highly effective in excluding vexatious or unmeritorious applications. Further, in requiring that an applicant satisfies the court that the evidence exhibits the prescribed qualities, the Victorian legislation sets the bar higher than its South Australian equivalent, which demands that this claim be reasonably arguable.[170]

It should also be noted from the outset that, unlike their South Australian counterparts,[171] the Victorian provisions are essentially restricted to indictable offences, although related summary offences may form part of the appeal.[172] The provisions set out in *CPA* pt 6.4 only apply to cases originally heard in the County Court or the Trial Division of the Supreme Court,[173] which in effect also excludes indictable offences that have been tried summarily.[174] This approach mirrors the procedure for original appeals against convictions.[175] Much weight is given to the principle of finality, the displacement of which is seemingly only warranted in circumstances where the error alleged and sought to be reviewed relates to a serious criminal matter and the consequences of any such 'serious injustice' are undeniably significant on the convicted person.[176] There are, of course, practical resource implications associated with limiting the availability of a second or subsequent appeal to the most serious criminal matters. As a principle, however, it is difficult to argue that one of the stated purposes of such an appeal, namely to

168 *Roberts' Leave Application* (n 72) 441 [42] (Osborn and T Forrest JJA, Taylor AJA), citing *CPA* (n 1) s 274. Under *CPA* (n 1) s 274, leave may be granted if one or more grounds of appeal are 'reasonably arguable': Chris Corns, 'Leave to Appeal in Criminal Cases: The Victorian Model' (2017) 29(1) *Current Issues in Criminal Justice* 39, 41, citing *DeSilva v The Queen* [2015] VSCA 290, [73] (Redlich, Whelan and Kaye JJA).

169 *Roberts' Leave Application* (n 72) 441 [44]–[45] (Osborn and T Forrest JJA, Taylor AJA). In the context of first appeals against convictions, the majority of the High Court was of the view that in practice, 'few, if any, appeals governed by s 276 [of the *CPA*] will turn upon which party bears the onus of proof': *Baini v The Queen* (2012) 246 CLR 469, 478 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Baini*').

170 *Roberts' Leave Application* (n 72) 441 [44] (Osborn and T Forrest JJA, Taylor AJA). See Sangha, 'Statutory Right' (n 29), 492, quoting *Keogh* (n 66) 332 [88] (Gray, Sulan and Nicholson JJ).

171 *Criminal Procedure Act 1921* (SA) s 159.

172 *CPA* (n 1) s 326A, discussed in Explanatory Memorandum, Justice Legislation Amendment (Criminal Appeals) Bill 2019 (Vic) 49 ('Explanatory Memorandum').

173 *CPA* (n 1) s 3 (definition of 'originating court').

174 Ibid ss 28–30, sch 2.

175 Ibid s 274.

176 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3689 (Jill Hennessy, Attorney-General).

'restore transparency and faith in the justice system where a miscarriage of justice has occurred',[177] has no application in relation to less serious criminal matters, which represent the very vast majority of criminal convictions in Victoria.[178] The simultaneous abolition of de novo appeals for summary offences may in fact leave persons convicted by the summary jurisdiction all the more exposed.[179]

1 *Fresh Evidence*

As noted above, fresh evidence within the meaning of s 326C(3)(a) of the *CPA* is evidence that 'was not adduced at the trial' *and* 'could not, even with the exercise of reasonable diligence, have been adduced at the trial'.[180] This statutory definition mirrors the distinction made at common law between fresh and new evidence, with only the former being capable of supporting a contention on appeal that a miscarriage of justice has occurred.[181] As stated by Toohey and Gaudron JJ in *Mickelberg v The Queen* ('*Mickelberg*'):

> The underlying rationale for a court of criminal appeal setting aside a conviction on the ground of fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice … There is no miscarriage of justice in the failure to call evidence at trial if that evidence was then available, or, with reasonable diligence, could have been available …[182]

Evidence which was available with the exercise of reasonable diligence is not fresh, but merely new.[183] The effect of the requirement that the evidence is fresh is that deference continues to be paid to the findings of the jury, made as they were on the evidence available at trial. In that sense, there is no undue interference with the principle of finality.

The second or subsequent appeal is therefore not a process designed to remedy the failure by the applicant to adduce evidence that could have been adduced and relied upon at trial. Nor is it an opportunity for re-litigation of issues previously litigated. In *Donohue v The Queen [No 3]*, the Victorian Court of Appeal rejected as an abuse of process what it viewed as the applicant's attempt 'to re-agitate issues that were finally determined' in the course of a previous application for special leave to the High Court against his conviction for perjury and perverting the course of

177 Ibid.

178 In 2019–20, 93% of criminal defendants were finalised in the Magistrates' Court: Australian Bureau of Statistics, *Criminal Courts, Australia* (Catalogue No 4513.0, 25 March 2021).

179 *Justice Legislation Amendment Act* (n 2) s 1(c).

180 *CPA* (n 1) s 326C(3)(a).

181 *Roberts' Leave Application* (n 72) 441 [43] (Osborn and T Forrest JJA, Taylor AJA), quoting *Mickelberg* (n 17) 301 (Toohey and Gaudron JJ). See also *Meade* (n 163) [7] (Beach, Kennedy and Whelan JJA).

182 *Mickelberg* (n 17) 301 (citations omitted).

183 *Ratten v The Queen* (1974) 131 CLR 510, 515–18 (Barwick CJ) ('*Ratten*').

justice.[184] The grounds advanced by the applicant in support of his second appeal were substantially identical, the Court held, to those previously litigated and were, therefore, not fresh.[185] As the matter had been 'fully heard and disposed of on the merits, there simply [was] no jurisdiction to re-open it'.[186]

Rather, the process serves as a pathway to address circumstances where evidence is discovered that could not previously have been reasonably obtained. In *Meade v The Queen* ('*Meade*'), the applicant sought leave to file a second appeal against his conviction for the murder of his wife.[187] The evidence relied upon was that of a fellow prisoner, now deceased but who had stated in an affidavit that at the time of the attack, he had had a brief interaction with the applicant at a camping ground some 100 km away from the place of the murder.[188] The affidavit provided details of the applicant's car and apparel at the time, as well as of a short conversation during which the applicant indicated that he was in the area searching for gold.[189] In essence, this evidence, if it were accepted, provided the applicant with an alibi. There was no dispute that this evidence, which emerged some years after the trial, was fresh within the meaning of s 326C of the *CPA*.[190]

Significantly, fresh evidence in that sense also includes evidence which ought to have been disclosed to the applicant at trial but was not. In *Roberts' Leave Application*, the Court of Appeal reiterated the principles governing the duty of disclosure in criminal matters, which it referred to as the 'golden rule'.[191] Of particular relevance in the case was the concealed manipulation of police statements, which emerged from the IBAC investigation[192] and which bore on the central issue of whether the applicant was in fact present at the crime scene. The Court of Appeal considered the evidence relating to the backdating of a statement made by Senior Constable Pullin, which was, in turn, amplified by evidence of a broader pattern of manipulation of a number of other statements made by various officers.[193] This evidence, the Court held, was fresh evidence within the meaning of s 326C of the *CPA*; it 'disclose[d] a line of defence which was not apparent at trial'.[194] Indeed, Roberts' defence was 'deprived of a legitimate forensic choice' at

184 *Donohue* (n 163) [10], [13] (Priest, Niall and T Forrest JJA).

185 Ibid [8], [14].

186 Ibid [13], citing *Grierson* (n 79), *Postiglione v The Queen* (1997) 189 CLR 295, *R v McNamara [No 2]* [1997] 1 VR 257 and *R v GAM [No 2]* (2004) 9 VR 640.

187 *Meade* (n 163).

188 Ibid [4], [11], [27]–[28] (Beach, Kennedy and Whelan JJA).

189 Ibid [27]–[28].

190 Ibid [73].

191 *Roberts' Leave Application* (n 72) 444–6 [55]–[64] (Osborn and T Forrest JJA, Taylor AJA).

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

193 *Roberts' Leave Application* (n 72) 435 [17] (Osborn and T Forrest JJA, Taylor AJA).

194 Ibid 451 [78], relying on the language used by the High Court in *Van Beelen* (n 155) 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ).

trial to challenge the reliability of the police evidence on the basis of the tampering of statements that emerged from the IBAC findings.[195]

Evidence that emerged from the Royal Commission into the Management of Police Informants in relation to Gobbo's role as a police informer while she legally represented a number of applicants has also been deemed fresh in the relevant sense. That the evidence was fresh and compelling, and that a miscarriage of justice had occurred, has been consistently conceded by the Crown in the relevant appellate proceedings that followed. In *Mokbel*, the fresh evidence revealed that, while she was representing the applicant, Gobbo provided information to Victoria Police about Mokbel's continuing offending, associates and his prospects at trial, and made suggestions as to ways in which further investigation into his activities may be conducted.[196] While *Mokbel* is the sole Gobbo-related appeal determined to date under the new provisions,[197] applications by former clients have also succeeded as a first appeal under s 276 of the *CPA*[198] and following a referral by the Attorney-General in the context of a petition for mercy.[199] All three avenues therefore successfully served to remedy substantial miscarriages of justice in these cases. It is also apparent that a not insignificant number of further applications for 'Gobbo appeals' are expected to follow.[200] The Royal Commission identified 124 persons who were potentially directly impacted,[201] and a new dedicated advice and referral service was recently set up by Victoria Legal Aid to deal with these matters.[202]

While the Victorian Court of Appeal has been called upon to consider fresh evidence of misconduct in *Roberts* and *Mokbel*, as well as fresh evidence, which, if accepted, would be suggestive of innocence in *Meade*, the approach the Court is likely to take in relation to what has been termed new evidence of innocence remains to be seen. On a literal interpretation, this evidence, being 'new', would not be capable of satisfying the test of 'fresh' evidence within the meaning of s 326C of the *CPA*. This creates, Sangha argues, a 'possible conflict between the procedural requirements of a fair trial and the substantive goal of avoiding a

195 *Roberts' Leave Application* (n 72) 451 [79] (Osborn and T Forrest JJA, Taylor AJA).

196 *Mokbel* (n 151) 7 [25] (Beach and Osborn JJA).

197 See ibid 7 [26].

198 *Cvetanovski* (n 163). The appellant's application for a second appeal was grounded on fresh evidence of Gobbo's role as a police informer, as well as on the claim that at the time of his arrest, she was involved in an 'extremely close personal relationship' with an associate of the applicant: at [4] (Maxwell P, Beach and Weinberg JJA); to whom she and Victoria Police provided financial assistance: at [5]; and who became the principal witness against him: at [2].

199 *Orman* (n 163).

200 Cooper (n 152).

201 *Royal Commission* (n 126) 18.

202 'New Advice and Referral Service for Clients Affected by Management of Police Informants', *Victoria Legal Aid* (Web Page, 24 May 2021) <https://web.archive.org/web/20210922182859/https://www.legalaid.vic.gov.au/about-us/news/new-advice-and-referral-service-for-clients-affected-by-management-of-police-informants>.

miscarriage of justice'.[203] At common law, the courts have taken a liberal approach, as evidenced in the following passage in *Ratten v The Queen* ('*Ratten*'):

> Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest 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.[204]

The material issue is whether the statutory framework of the second or subsequent appeal has in fact modified the common law position. In this respect, the South Australian experience provides some guidance. In *R v Keogh [No 2]* and *R v Drummond [No 2]*, the Full Court of the Supreme Court expressly extended the application of the *Ratten* principles to the statutory provisions permitting a second or subsequent appeal.[205] This arguably suggests a more relaxed approach which the Victorian Court of Appeal could follow in its determination of whether evidence relied upon in a leave application for a second or subsequent appeal ought to have been available through the exercise of reasonable diligence, giving the provisions, in turn, their full substantive meaning.

2 *Compelling Evidence*

For the Court to grant leave, the fresh evidence must also be compelling within the meaning of s 326C of the *CPA*. This particular hurdle may well be the most significant for an applicant to overcome, acting, as it does, as a quality control over the fresh evidence, as well as placing it in its broader forensic context. The thresholds are such that unmeritorious appeals based on unreliable or tangential evidence are likely to be effectively screened. *Taylor v The Queen* is perhaps an extreme illustration.[206] In this case, the applicant attempted to file a second appeal against his conviction for a range of dishonesty offences, relying on a couple of notes, one of which related to aliases he had previously used.[207] The evidence, the Court of Appeal held, was 'one step above a "jumble of gobbledygook"' and could not be viewed as compelling, even when taken at its highest.[208]

203 Sangha, 'Statutory Right' (n 29) 494.

204 *Ratten* (n 183) 517 (Barwick CJ).

205 *Keogh* (n 66) 335–6 [99], [101] (Gray, Sulan and Nicholson JJ), quoting ibid 517–18, 520 (Barwick CJ). See also *Drummond* (n 162) [169]–[170] (Peek J), quoting *Re Knowles* [1984] VR 751, 770 (Crockett, McGarvie and Gobbo JJ) and citing *Keogh* (n 66) [101] (Gray, Sulan and Nicholson JJ). For a full overview of these cases, see Sangha, 'Statutory Right' (n 29) 494–9.

206 *Taylor* (n 163).

207 Ibid [4], [7]–[10] (Priest and Beach JJA).

208 Ibid [15], quoting *Bradley v The Queen* [2020] QCA 252, [2] (Sofronoff P, Mullins JA agreeing at [4], Boddice J agreeing at [5]). Consequently, the Court of Appeal affirmed the refusal by the Registrar to file the application, on the ground that it amounted to an abuse of process under r 1A.04 of the *Supreme Court (Criminal Procedure) Rules 2017* (Vic): *Taylor* (n 163) [12], [14] (Priest and Beach JJA).

To be 'compelling', evidence must be 'reliable'[209] and 'substantial'.[210] It must also be either 'highly probative in the context of the issues in dispute at the trial',[211] or found to 'have eliminated or substantially weakened the prosecution case'.[212] The Victorian provision in this respect is largely modelled on the South Australian definition of compelling evidence, with the exception of its final component (elimination or substantial weakening of the prosecution case), which is not present in the South Australian legislation. One issue that has arisen in the South Australian context is whether the ultimate issue of guilt may inherently be viewed as an 'issue in dispute at the trial', such that exculpatory evidence may be found to be compelling, regardless of whether it could be related to a specifically contested issue.[213] The addition of the elimination or substantial weakening of the prosecution case as an alternative basis in the Victorian legislation is likely to resolve this difficulty.

The Court of Appeal in *Roberts' Leave Application* held that the words 'reliable', 'substantial' and 'highly probative' ought to be given their ordinary meaning.[214] Significantly, the Court echoed the language of the High Court in *Van Beelen* about the interaction between the three concepts:

> [E]ach of the three limbs … has work to do, although commonly there will be overlap in the satisfaction of each. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding. The criterion of substantiality requires that the evidence is of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly 'substantial'. Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression 'the issues in dispute at the trial' will depend upon the circumstances of the case.[215]

In *Roberts' Leave Application*, the Court of Appeal readily accepted that the fresh evidence was reliable[216] and 'a trustworthy basis for fact finding'.[217] That said, the

209 *CPA* (n 1) s 326C(3)(b)(i).

210 Ibid s 326C(3)(b)(ii).

211 Ibid s 326C(3)(b)(iii)(A).

212 Ibid s 326C(3)(b)(iii)(B).

213 *Keogh* (n 66) 339 [113] (Gray, Sulan and Nicholson JJ), quoting South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3166 (Gail Gago). A narrower interpretation was adopted in *Drummond* (n 162) [82]–[92] (Gray J).

214 *Roberts' Leave Application* (n 72) 441 [46] (Osborn and T Forrest JJA, Taylor AJA).

215 *Van Beelen* (n 155) 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ), quoted in ibid.

216 *Roberts' Leave Application* (n 72) 452 [84], 461 [137] (Osborn and T Forrest JJA, Taylor AJA).

217 Ibid 442 [46], quoting *Van Beelen* (n 155) 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ). See *Roberts' Leave Application* (n 72) 452 [86] (Osborn and T Forrest JJA, Taylor AJA).

circumstances in which that evidence came to light, namely in the context of a protracted IBAC investigation, are somewhat unique.[218]

In this respect, the case of *Meade* paints a very different picture. In support of a second appeal application against his murder conviction, as noted above, the applicant sought to rely on what was essentially evidence of an alibi by a fellow prisoner, who had since died.[219] The central issue in the leave application was whether the fresh evidence was reliable within the meaning of s 326C or whether it had, in fact, been orchestrated.[220] The Court of Appeal was not persuaded that the evidence was credible and formed a trustworthy basis for fact-finding. This required more, the Court held, than arguable reliability.[221] In combination, the improbability of the account given, inconsistent details, the 'prison context' in which the evidence was elicited and the applicant's own propensity to confabulate led the Court to conclude that the evidence had not been shown to be reliable.[222] Significantly, for the purpose of so determining, the Court allowed the applicant to call two corrections officers, who were present at the time of the conversation relied upon, to give evidence as to the circumstances in which the alibi evidence emerged. The officers told the Court that the interaction appeared genuine.[223] This signals the Court's willingness to use its general powers to allow evidence to be called in the context of leave applications for second appeals, with a view to testing the evidence relied upon.[224] The leave process, in that sense, is inherently substantive and forensic in nature.

A similar approach was taken in the case of *Lewers v The Queen [No 2]*, in which the applicant unsuccessfully sought a further appeal against his convictions for assaults and incest on his two daughters.[225] In this case, the applicant relied on fresh evidence from NS, a family friend and the daughters' former guardian, that she had overheard the complainants say that they had invented the story about their father because he was overly strict.[226] Emails and a letter to the Children's Court written by one or both daughters, asking that the 'case' be 'dropped' were also adduced by the applicant.[227] The Court of Appeal examined in detail the specific context in which the alleged conversation occurred and the correspondence was

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

219 *Meade* (n 163) [4] (Beach, Kennedy and Whelan JJA).

220 Ibid [13].

221 Ibid [82].

222 Ibid [84]–[90].

223 Ibid [35], citing Transcript of Proceedings, *Meade v The Queen* (Supreme Court of Victoria, Breach, Kennedy and Whelan JJA, 22 March 2018) 18, 26–7.

224 *CPA* (n 1) s 318.

225 *Lewers* (n 163).

226 Ibid [27]–[28], [35] (Priest, Kyrou and Niall JJA).

227 Ibid [29]–[32].

sent, and on that basis, was not satisfied that the evidence was compelling.[228] In particular, it held that the content of the letter and emails did not amount to a recantation of the allegations (noting that even if it did, courts ought to exercise extreme caution before accepting recantation evidence as meaning that a witness' evidence was unreliable).[229]

The requirement of substantiality ensures that a second or subsequent appeal is not brought on the basis of inconsequential or tangential fresh evidence. In other words, the evidence must be 'of real significance or importance' in respect of the particular issue.[230] It need not, however, 'subsist or stand by itself' in the broader evidentiary context of the particular case to be deemed substantial.[231] The Court of Appeal in *Roberts' Leave Application* essentially confirmed this interpretation. The fresh evidence found to be substantial could not strictly 'stand by itself' in the case; rather, it was collateral evidence of credibility and evidence that the trial itself had been corrupted.[232] 'Substantial' under s 326C of the *CPA* is therefore designed to be a flexible concept that may be tailored to the nature and evidentiary context of the particular case.

In this respect, there is arguably a measure of overlap between the requirement that the evidence be substantial and that it be highly probative in the context of the issues in dispute. In *Roberts' Leave Application*, the Court of Appeal was satisfied that the fresh evidence of the undisclosed manipulation of a number of police statements was highly probative in the relevant sense on the basis that it bore directly on a central issue in the trial (that of the presence of a single or two offenders).[233] The evidence needed not be indispensable to the prosecution case.[234] Importantly, the Court added that the concept of 'the issues in dispute at the trial' extended beyond forensic matters to encompass 'the underlying question of whether the applicant received a fair trial according to law'.[235] In these circumstances, the Court did not find it necessary to engage with the final, alternative, component of whether the evidence 'would have eliminated or substantially weakened the prosecution case'.[236] This particular component remains, therefore, to be judicially interpreted, as does its relationship with its alternative. At first blush, if fresh evidence is capable of eliminating or substantially weakening the prosecution case, it is likely to be equally found to be highly probative in the context of the disputed issues at trial. It may well be that

228 Ibid [102].

229 Ibid [91]–[92], quoting *R v AHK* [2001] VSCA 220, [9] (Winneke P). See also ibid [99].

230 *Van Beelen* (n 155) 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ), quoted in *Roberts' Leave Application* (n 72) 442 [46] (Osborn and T Forrest JJA, Taylor AJA).

231 *Van Beelen* (n 155) 573 [18] (Bell, Gageler, Keane, Nettle and Edelman JJ), citing *R v Van Beelen* (2016) 125 SASR 253, 293–4 [159] (Vanstone and Kelly JJ).

232 *Roberts' Leave Application* (n 72) 452 [85], 453–4 [95] (Osborn and T Forrest JJA, Taylor AJA).

233 Ibid 452 [86].

234 Ibid 453 [89].

235 Ibid 453 [91].

236 Ibid 453 [89].

the relevance of this alternative element will be most apparent in cases conducted on a basis inconsistent with the inferences that may be drawn from the fresh evidence. In *Van Beelen*, the High Court illustrated this point. Fresh evidence of identity, the Court said, is unlikely to be highly probative in the context of the issues in dispute 'in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused's act was done in self-defence'.[237] The alternative requirement that the fresh evidence eliminates or substantially weakens the prosecution case might therefore serve as a residual safeguard in such cases, particularly where the defence 'made a proper tactical decision' at trial not to dispute a particular issue.[238]

3 *Interests of Justice*

Judicial consideration of the interests of justice test under s 326C of the *CPA* has typically been succinct. The Court of Appeal in *Roberts' Leave Application* has confirmed what may be viewed as a general presumption that where the evidence relied upon is both fresh and compelling, the interests of justice will generally 'favour considering it on appeal'.[239] In that case, there were no 'supervening circumstances' that would lessen the force of this presumption.[240]

The Court of Appeal further held, significantly in the context of second or subsequent appeals, that the fact that a conviction is longstanding does not militate against a finding that an appeal is in the interests of justice.[241] A different interpretation would indeed arguably defeat the very purpose of these appeals in cases where a substantial miscarriage of justice has been allowed to stand for years, as was the case in the two successful Victorian appeals so far. In relation to the relevant offences, Jason Roberts was convicted in 2002 and Tony Mokbel in 2006.[242]

A public confession of guilt might jeopardise a finding that it is in the interests of justice to hear the appeal.[243] It is not clear whether this would apply to a plea of guilt made by the applicant in the proceedings. In fact, it remains to be seen whether a guilty plea may prevent the operation of the second or subsequent appeal provisions altogether. The common law has long precluded appeals against

237 *Van Beelen* (n 155) 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ).

238 Explanatory Memorandum (n 172) 51–2.

239 *Roberts' Leave Application* (n 72) 453 [93] (Osborn and T Forrest JJA, Taylor AJA), citing *Van Beelen* (n 155) 578 [30] (Bell, Gageler, Keane, Nettle and Edelman JJ).

240 *Roberts' Leave Application* (n 72) 453 [94] (Osborn and T Forrest JJA, Taylor AJA).

241 Ibid 442 [48], quoting *Van Beelen* (n 155) 578 [30] (Bell, Gageler, Keane, Nettle and Edelman JJ), which rejected the majority of the majority's interpretation in *R v Van Beelen* (2016) 125 SASR 253.

242 *Roberts' Leave Application* (n 72) 433 [2] (Osborn and T Forrest JJA, Taylor AJA); *Mokbel* (n 151) 6–7 [22] (Beach and Osborn JJA).

243 *Roberts' Leave Application* (n 72) 442 [48] (Osborn and T Forrest JJA, Taylor AJA), quoting *Van Beelen* (n 155) 578 [30] (Bell, Gageler, Keane, Nettle and Edelman JJ).

convictions following a plea of guilt, except in 'very exceptional circumstances'.[244] The principle of finality has greatest force, it appears, where an accused has conceded guilt. Given the high threshold for leave, however, such a broad restriction appears unnecessary, particularly in light of our growing understanding of the factors, some beyond guilt, that may encourage a criminal defendant to elect to plead guilty, including financial pressure, the desire to protect a co-defendant or the expectation of a more lenient sentence.[245]

Further, mention was made by the Court of Appeal in *Roberts' Leave Application* that the interests of justice in the relevant sense requires an 'intermediate' determination, which may involve consideration of whether a ground of appeal is reasonably arguable.[246] That being so, it should not be conflated with the ultimate determination of whether a substantial miscarriage of justice had occurred.[247]

B Appeal on Merits: Substantial Miscarriage of Justice

Section 326D of the *CPA* governs the determination of the merits of a second or subsequent appeal; it provides that such an appeal must be allowed if the Court of Appeal 'is satisfied that there has been a substantial miscarriage of justice':

> **326D Determination of second or subsequent appeal against conviction**
>
> (1) On an appeal under section 326A, the Court of Appeal must allow the appeal against conviction if it is satisfied that there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal under section 326A.

The phrase 'substantial miscarriage of justice' mirrors the test applicable in Victoria to a first or original appeal against a conviction,[248] and has been the subject of judicial interpretation in that context by both the High Court and the Victorian Court of Appeal.[249] Of particular relevance is the identification by the majority of the High Court in *Baini v The Queen* ('*Baini*') of a number of circumstances that

244 See, eg, *R v Ahmed* (2007) 17 VR 454, 464 [44] (Whelan AJA). See also *Guariglia v The Queen* (2010) 208 A Crim R 49.

245 See, eg, Asher Flynn, 'Plea-Negotiations, Prosecutors and Discretion: An Argument for Legal Reform' (2016) 49(4) *Australian and New Zealand Journal of Criminology* 564, 572–3; Asher Flynn, '"Fortunately We in Victoria Are Not in That UK Situation": Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform' (2011) 16(2) *Deakin Law Review* 361, 377–9; Robert D Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25(2) *Criminal Law Journal* 64, 65–6; Andrew Torre and Darren Wraith, 'The Demand for Sentence Discounts: Some Empirical Evidence' (2013) 37(3) *Criminal Law Journal* 193, 194.

246 *Roberts' Leave Application* (n 72) 442–3 [50]–[51] (Osborn and T Forrest JJA, Taylor AJA).

247 Ibid 443 [51], citing *Van Beelen* (n 155) 578 [31] (Bell, Gageler, Keane, Nettle and Edelman JJ).

248 *CPA* (n 1) s 276. This provision replaced what was previously referred to as the 'proviso' in the *Crimes Act 1958* (Vic) s 568(1), as at 31 December 2009.

249 See, eg, *Baini* (n 169); *Andelman v The Queen* (2013) 38 VR 659 ('*Andelman*').

could give rise to a miscarriage of justice, including: (1) circumstances where the jury's verdict cannot be supported by the evidence; (2) circumstances where an error or irregularity has occurred and the Court cannot be satisfied that the matter did not affect the outcome; and (3) circumstances where there has been a serious departure from the proper processes of trial.[250]

The first scenario differs from the other two in that it contemplates a situation where the verdict is in fact unsafe on the evidence. In other words, the jury must have had a doubt, and it was not open to it to convict.[251] By contrast, the second scenario seeks to address a situation where an error or irregularity, or a combination of errors or irregularities, has occurred in the course of the trial, which may or may not have affected its outcome. In such a case, process and outcome are inherently related and the Court must determine whether, had the error or irregularity not occurred, the jury might have entertained a doubt as to the accused's guilt.[252] Where the conviction was, in fact, inevitable, the Court may not be satisfied that a substantial miscarriage of justice has occurred.[253] The third scenario concerns fundamental departures from proper trial processes, the seriousness of which may be sufficient to amount to a substantial miscarriage of justice without consideration being given to the substantive outcome of the trial.[254]

In *Roberts' Second Appeal*, the Court of Appeal confirmed that the *Baini* principles extend beyond the realm of first appeals and '[provide] authoritative guidance' to the determination of whether a substantial miscarriage of justice has occurred in the context of a second or subsequent appeal.[255] Significantly, the Court held that the new provisions capture 'both procedural and substantive miscarriages of justice', including circumstances where the fresh evidence establishes that the applicant had been fundamentally deprived of a fair trial as a result of one or more errors or irregularities.[256]

250 *Baini* (n 169) 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

251 See, eg, ibid 491–2 [60] (Gageler J), 481 [32], 486 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), quoting *M v The Queen* (1994) 181 CLR 487, 493–4 (Mason CJ, Deane, Dawson and Toohey JJ); *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] (Hayne J), citing *M v The Queen* (1994) 181 CLR 487, 492–3 (Mason CJ, Deane, Dawson and Toohey JJ); and more recently *Conolly (A Pseudonym) v The Queen* [2019] VSCA 125, [7] (Priest, Beach and Kyrou JJA).

252 *Andelman* (n 249) 679 [94] (Maxwell P, Weinberg and Priest JJA), quoting *Baini* (n 169) 481 [31] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

253 *Baini* (n 169) 480 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

254 Ibid 479–80 [27], 481–2 [33]–[34].

255 *Roberts' Second Appeal* (n 93) [40] (T Forrest and Osborn JJA, Taylor AJA), citing *Keogh* (n 66) 341 [124] (Gray, Sulan and Nicholson JJ).

256 *Roberts' Second Appeal* (n 93) [33]–[34] (T Forrest and Osborn JJA, Taylor AJA), quoting *Davies v The King* (1937) 57 CLR 170, 180 (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ). The Court also relied on the second reading speech which contemplated the fairness of the trial as a basis for a potential appeal: *Roberts' Second Appeal* (n 93) [42] (T Forrest and Osborn JJA, Taylor AJA), citing Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3689 (Jill Hennessy, Attorney-General).

In doing so, the Court rejected the Crown's submission that a narrower interpretation of the phrase ought to be preferred.[257] An error or departure from process (in this case, the failure to disclose material evidence to the defence), the Crown argued, was not enough in and of itself for a finding to be made that a substantial miscarriage of justice had occurred.[258] Instead, the Crown invited the Court to rely on the test applied in *Mickelberg*[259] (and subsequently in *Van Beelen*,[260] in the context of the second appeal), and to consider whether there was 'a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial'.[261] The Court declined to follow such a course. It distinguished *Van Beelen* on the basis that the live issue in that case (which related to the reliability of expert evidence) bore directly on the issue of guilt and the fairness of the trial was not actively challenged.[262] In sharp contrast to *Roberts' Second Appeal*, the presumption in *Van Beelen* was therefore 'that the accused has had a fair trial according to law on the available evidence'.[263] The effect of the reasoning in *Roberts' Second Appeal* is that the *Mickelberg* test does not apply to cases where the fresh evidence reveals that the trial was fundamentally unfair and that such cases may succeed regardless of whether there remains a safe evidentiary basis for the conviction.

In taking this approach, the Court of Appeal has opened an avenue for a successful second or subsequent appeal that is essentially independent from the weight of the fresh evidence or its effect on the outcome of the trial. This is a significant development: profound and serious departures from process may constitute a substantial miscarriage of justice within the meaning of s 326D of the *CPA* 'irrespective of the relative weight of the evidence as to guilt'.[264] This finding is consistent with the views expressed by the South Australian Court of Appeal that the *Baini* principles extend to a second or subsequent appeal.[265] The bar, however, was set high:

> The departure from the prescribed processes for trial must be fundamental to that trial; it must go to the essence or root of a fair trial according to law. It cannot be a departure of a lesser nature … After anxious consideration we have concluded that

257 *Roberts' Second Appeal* (n 93) [27]–[28] (T Forrest and Osborn JJA, Taylor AJA).

258 Ibid [28].

259 Ibid [27], citing *Mickelberg* (n 17).

260 *Roberts' Second Appeal* (n 93) [27] (T Forrest and Osborn JJA, Taylor AJA), quoting *Van Beelen* (n 155) 575 [22] (Bell, Gageler, Keane, Nettle and Edelman JJ).

261 *Mickelberg* (n 17) 273 (Mason CJ), quoted in *Van Beelen* (n 155) 575 [22] (Bell, Gageler, Keane, Nettle and Edelman JJ). See also *Mickelberg* (n 17) 288–9 (Deane J), 301 (Toohey and Gaudron JJ), citing *Gallagher v The Queen* (1986) 160 CLR 392, 399 (Gibbs CJ), 402 (Mason and Deane JJ).

262 *Roberts' Second Appeal* (n 93) [31]–[32] (T Forrest and Osborn JJA, Taylor AJA), discussing *Van Beelen* (n 155).

263 *Van Beelen* (n 155) 575 [23] (Bell, Gageler, Keane, Nettle and Edelman JJ).

264 *Roberts' Second Appeal* (n 93) [43] (T Forrest and Osborn JJA, Taylor AJA).

265 *Keogh* (n 66) 341 [124].

> [the] undisclosed misconduct so corrupted the fairness of the appellant's trial as to poison it to its root.[266]

The Court also acknowledged that the effect of irregularities on the outcome of the trial may at times be difficult to ascertain, particularly in circumstances where lines of defence could not be explored and tested as a result.[267] In this respect, the Court noted that 'non-disclosure is a potent source of injustice and that it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance of a case or opened up a new line of defence'.[268]

Importantly, this sends a strong signal that fundamental errors that go to the heart of a fair trial, as opposed to minor errors or irregularities, may infect the proceedings to such an extent as to constitute a substantial miscarriage of justice, regardless of any remaining evidence as to the applicant's guilt. While this interpretation has emerged in the context of the extraordinary findings of systemic misconduct that have formed the basis of many of the second appeals heard to date in Victoria, it may also be of particular relevance to a broader spectrum of cases where the fresh evidence reveals serious misconduct by investigating or prosecuting authorities or by the jury in the exercise of its functions. This is all the more important given the evidence that is emerging from a growing, albeit still limited, body of research suggesting that these forms of misconduct contribute to a significant number of wrongful convictions.[269]

C Outcome of a Successful Appeal: The Preference for a Retrial

Section 326E of the *CPA* sets out the available disposition orders in the case of a successful second or subsequent appeal. These largely mirror the orders available in the context of a first appeal.[270] Of particular relevance is the determination whether, upon a successful second or subsequent appeal, the court ought to enter an acquittal or order a retrial. In this respect, the scope of application of general

266 *Roberts' Second Appeal* (n 93) [257]–[258] (T Forrest and Osborn JJA, Taylor AJA).

267 Ibid [36].

268 *Roberts' Leave Application* (n 72) 461 [138] (Osborn and T Forrest JJA, Taylor AJA), citing *R v Ward* [1993] 1 WLR 619, 642 (Glidewell, Nolan and Steyn LJJ).

269 See, eg, Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors' (2015) 17(2) *Flinders Law Journal* 163, 182, 186, 190–3 ('A Repository of Wrongful Convictions'); Juliette Langdon and Paul Wilson, 'When Justice Fails: A Follow-Up Examination of Serious Criminal Cases since 1985' (2005) 17(2) *Current Issues in Criminal Justice* 179, 186–7, 192.

270 *CPA* (n 1) s 277.

appellate principles[271] has been extended to second or subsequent appeals.[272] The interests of justice are the governing consideration, and involve a dual assessment:

> The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case … Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused.[273]

An examination of the early successful appeals in the cases of *Roberts' Second Appeal* and *Mokbel* reveals what appears to be a strong inclination by the Court of Appeal to order retrials instead of entering acquittals in cases involving, as these were, serious misconduct. In both cases, there remains admissible evidence of guilt.[274] The determinative point was therefore whether the circumstances of the case 'might render it unjust to the accused to make him stand trial again'.[275] Considerations such as the significant time elapsed since the commission of the offence and the fact that the appellant had already served almost the entirety of his non-parole period had persuaded the Court of Appeal in the Gobbo-related appeal in *Cvetanovski v The Queen* ('*Cvetanovski*') that it would be unjust to make the appellant stand trial again.[276] Admittedly, in what was formally a first rather than a second or subsequent appeal (although the applicable principles remain the same), the Crown had conceded that an acquittal was the appropriate order.[277] A similar position was adopted in yet another Gobbo-related appeal in *Orman v The Queen* ('*Orman*'), determined following a referral by the Attorney-General shortly before the adoption of the second or subsequent appeal provisions.[278] In this respect, the application of the new provisions for a second or subsequent appeal appears to have coincided with a shift away from acquittals in cases involving serious misconduct bearing on the fundamental fairness of the trial.

271 See, eg, *DPP (Nauru) v Fowler* (1984) 154 CLR 627 ('*Fowler*'); *R v Taufahema* (2007) 228 CLR 232 ('*Taufahema*').

272 *Roberts' Second Appeal* (n 93) [278]–[280] (T Forrest and Osborn JJA, Taylor AJA), citing *Taufahema* (n 271) 254–5 [49]–[51] (Gummow, Hayne, Heydon and Crennan JJ); *Mokbel* (n 151) 9–12 [36]–[54] (Beach and Osborn JJA).

273 *Fowler* (n 271) 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

274 *Roberts' Second Appeal* (n 93) [279] (T Forrest and Osborn JJA, Taylor AJA); *Mokbel* (n 151) 12 [55] (Beach and Osborn JJA).

275 *Fowler* (n 271) 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

276 *Cvetanovski* (n 163) [12]–[13] (Maxwell P, Beach and Weinberg JJA).

277 Ibid.

278 *Orman* (n 163) 514 [16] (Maxwell P, Niall and Emerton JJA).

Although the considerations of delay and time served that were determinative in *Cvetanovski* and *Orman* equally applied to *Mokbel*, who had in fact served the entirety of the head sentence imposed on the relevant charge of importation, the Crown objected to the entry of acquittal and the majority of the Court of Appeal ordered a retrial.[279] The Court rejected the appellant's submission that the media publicity surrounding the circumstances of his appeal was such that he could no longer receive a fair trial.[280] Significantly, it stressed that a retrial order 'involve[d] the appellate court appropriately delineating between its role and the role of the prosecuting authority'.[281] Such a course of action, it further held, served the 'powerful public interest militating in favour of the question of guilt being determined by a jury'.[282] These are fundamentally structural, rather than individual, considerations; they speak to the system of criminal justice in Victoria and to the role of its various participants rather than to circumstances that are particular to the case at hand. The Court's reliance on them as principles[283] suggests that they may not be readily displaced, even in cases involving serious misconduct at the very heart of the criminal justice system. The majority was not any more persuaded by the argument that, in circumstances where the appellant had served the entirety of their sentence, such that there was effectively no prospect of further punishment if convicted again, it was appropriate for the Court to order an acquittal.[284] President Maxwell's dissent, it should be noted, was primarily on these grounds.[285]

Similarly, in *Roberts' Second Appeal*, the considerable personal hardship suffered by the appellant, including his young age at the time of imprisonment and the two decades already served in the onerous conditions of high security detention, were not considerations held to be capable of overriding the public interest in the adjudication by a jury of the serious offences in the particular case.[286] A retrial was therefore ordered.[287] Roberts' application for bail pending his retrial was subsequently denied, with Beach JA finding that exceptional circumstances had not been established.[288]

279 *Mokbel* (n 151) 7–8 [27], 15 [70] (Beach and Osborn JJA, Maxwell P dissenting at 3 [3]–[4]). The indication by the Crown was that they would not proceed with a retrial: at 7–8 [27].

280 Ibid 12–13 [56]–[57] (Beach and Osborn JJA), quoting *R v Thomas [No 3]* (2006) 14 VR 512, 520–1 [36] (Maxwell P, Buchanan and Vincent JJA) ('*Thomas*').

281 Ibid 15 [65] (Beach and Osborn JJA).

282 Ibid 14 [61] (Beach and Osborn JJA), citing *Thomas* (n 280) 519 [32] (Maxwell P, Buchanan and Vincent JJA).

283 *Mokbel* (n 151) 15 [69] (Beach and Osborn JJA).

284 Ibid 14 [61] (Beach and Osborn JJA).

285 Ibid 3–4 [8].

286 *Roberts' Second Appeal* (n 93) [280]–[281] (T Forrest and Osborn JJA, Taylor AJA).

287 Ibid [284].

288 *Re Roberts* [2020] VSC 793, [20].

Of particular relevance in the context of these appeals were the issues of condemnation and deterrence and whether the respective instances of misconduct that came to light had so tainted the proceedings as to warrant an acquittal. In both *Roberts' Second Appeal* and *Mokbel*, the Court of Appeal was invited to enter acquittals as a means to 'condemn and deter such deliberate misconduct and concealment, which undermines the foundations upon which our system of criminal justice stands and depends'.[289] A salient feature of these decisions is the refusal of the Court of Appeal to do so. In *Roberts' Second Appeal*, the Court of Appeal held that the 'need to deter repetitions of such behaviour' was achieved by the quashing of the appellant's convictions and did not warrant an acquittal.[290] In *Mokbel*, the majority of the Court of Appeal took a similar view and held that '[t]he very quashing of the appellant's conviction itself condemns the conduct of Victoria Police in this case and constitutes a significant deterrent to the repetition of such conduct'.[291] President Maxwell was not persuaded that the discretion as to disposition could be exercised for those purposes.[292] Perhaps most tellingly, the Court of Appeal in *Roberts' Second Appeal* viewed the retrial as an opportunity for redemption, holding that '[i]n a fundamental sense, a retrial will vindicate the integrity of the criminal justice system'.[293] This appears somewhat counterintuitive, the implication being arguably that the findings of misconduct militate *against* an acquittal because the criminal justice system ought to be redeemed. At the very least, these findings suggest that future appeals in Gobbo-related cases and in any other cases involving serious misconduct, but where there remains evidence of guilt untainted by the misconduct, will inevitably lead to an order for a retrial. If the condemnation of the practices involved in the cases of *Roberts' Second Appeal* and *Mokbel*, which are undoubtedly at the extreme end of the seriousness spectrum, do not warrant an acquittal, it is unlikely that any appeal based on misconduct ever will.

D The Remaining Gap: Uncovering the Evidence

The second or subsequent appeal provisions are a welcome addition to the Victorian criminal justice process. They offer a much-needed judicial pathway to correct substantial errors that have been uncovered and demonstrated after appeals are exhausted, without the need to resort to the potentially politicised process of petitions for mercy. The formal limitation of appeals to a single application is removed. Substantively, the requirement for leave is an onerous hurdle that guards effectively against unmeritorious applications. Any fear that the new provisions would essentially open the floodgates to the unnecessary or even vexatious review of criminal cases can therefore safely be assuaged. The new appeal does not unduly

289 *Roberts' Second Appeal* (n 93) [275] (T Forrest and Osborn JJA, Taylor AJA). See *Mokbel* (n 151) 6 [20] (Maxwell P), 8–9 [34] (Beach and Osborn JJA).

290 *Roberts' Second Appeal* (n 93) [280] (T Forrest and Osborn JJA, Taylor AJA).

291 *Mokbel* (n 151) 14 [59] (Beach and Osborn JJA).

292 Ibid 6 [21].

293 *Roberts' Second Appeal* (n 93) [280] (T Forrest and Osborn JJA, Taylor AJA).

interfere with the principle of finality on which our criminal justice system ultimately depends.

Since the first application was heard by the Court of Appeal in *Roberts' Leave Application* in early 2020, a jurisprudence has started to develop, from which we can gain a measure of insight as to the operation of the new provisions. Most significantly, the Victorian Court of Appeal has affirmed that profound departures from the standards of a fair trial may, in and of themselves, amount to a substantial miscarriage of justice in the context of a second or subsequent appeal.[294] This is so regardless of their actual or presumed adverse effect on the safety of the verdict.[295] The new provisions therefore have a broad ambit; they aim to correct fundamental errors that are substantive or procedural in nature.[296] Cases involving claims of wrongful convictions and factual innocence may be the subject of a successful second or subsequent appeal, as may cases involving serious misconduct by authorities or other fundamental departures from process. In relation to the latter, the standard outcome is likely to be a retrial and subject to prosecutorial discretion, rather than an acquittal.[297]

The early jurisprudence of the Victorian Court of Appeal has been profoundly shaped by the extraordinary context in which the legislation was adopted. Two separate inquiries by separate bodies (IBAC and the Royal Commission into the Management of Police Informants) have seen revelations of systemic misconduct by actors in the criminal justice system, particularly Victoria Police. These findings not only prompted, or at least coincided with, the adoption of the new provisions, they also directly led to the conduct of the first two successful appeals under the new provisions in *Roberts' Second Appeal* and *Mokbel*. The examination of the early cases reveals a clear pattern: the successful appeals to date have all relied on the findings of these inquiries. It can, in fact, be safely inferred that, *but for* these inquiries, the conduct of these appeals would have been significantly hampered.

One could go so far as to argue that the second or subsequent appeal provisions may not, in fact, have been formally required to remedy these particular substantial miscarriages of justice. The Gobbo-related cases of *Orman* and *Cvetanovski* illustrate how similar outcomes were obtained (and, in fact, acquittals entered) through the traditional pathways that are the petition for mercy and the filing of a first appeal, respectively. Once these fundamental departures from processes were uncovered and evidence of their occurrence was obtained by the relevant inquiries, both enjoying significant investigative powers, their correction was substantially achievable through these other means. The benefits of a second or subsequent

294 See, eg, ibid [19].

295 Ibid [34], quoting *Davies v The King* (1937) 57 CLR 170, 180 (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ). See also at ibid [44], citing *Baini* (n 169) 480 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

296 *Roberts' Second Appeal* (n 93) [33] (T Forrest and Osborn JJA, Taylor AJA).

297 See, eg, *Mokbel* (n 151) 15 [70] (Beach and Osborn JJA, Maxwell P dissenting at 3 [3]); ibid [282], citing *Taufahema* (n 271) 255 [51] (Gummow, Hayne, Heydon and Crennan JJ).

appeal in that context is that it offers a more transparent, consistently available and appropriate process, rather than the sole avenue for a remedy.

The fundamental difficulty lies elsewhere. In these cases, the discovery of the concealed misconduct was the greatest hurdle to overcome. Similar barriers are faced by persons who claim that they were wrongfully convicted, but do not have the investigative resources and powers necessary to uncover evidence of their factual or legal innocence. How many cases of this kind there are in Victoria remains impossible to ascertain. There is a dearth of research pertaining to the true prevalence of wrongful convictions in Australia,[298] although our growing understanding suggests that they occur more frequently than was previously thought.[299] Further, the difficulties associated with such an assessment are well-known; a reliance on documented exonerations, self-reported claims of innocence or surveys of practitioners all carry clear risks of inaccuracies.[300] That few wrongful convictions are unearthed in Australia is therefore not a cause for celebration or complacency. As Hamer has posited, '[w]rongful convictions come to light relatively rarely. This reflects the difficulty of uncovering them, rather than their infrequency'.[301]

Convicted persons face significant challenges in discovering evidence of a miscarriage of justice. Central among those is the absence of powers to compel testimony or the disclosure of documents, which significantly hinders a convicted person's access to potentially fresh and relevant information. The preservation of evidence has also been noted as an obstacle, as has the capacity of convicted persons to obtain the retesting of forensic evidence.[302] The Law Council of Australia commented that 'the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with

298 See, eg, Dioso-Villa, 'A Repository of Wrongful Convictions' (n 269) 164–7, 173–4; Hamer, 'Wrongful Convictions' (n 21); Lynne Weathered, 'Wrongful Conviction in Australia' (2012) 80(4) *University of Cincinnati Law Review* 1391, 1392.

299 Hamer, 'Wrongful Convictions' (n 21) 311.

300 See, eg, Charles E Loeffler, Jordan Hyatt and Greg Ridgeway, 'Measuring Self-Reported Wrongful Convictions among Prisoners' (2019) 35(2) *Journal of Quantitative Criminology* 259, 260–1; Hamer, 'Wrongful Convictions' (n 21) 275–6. See also Samuel Gross, 'How Many False Convictions Are There? How Many Exonerations Are There?' in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 45.

301 Hamer, 'Wrongful Convictions' (n 21) 298.

302 See, eg, Lynne Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Convictions?' (2007) 40(2) *Australia and New Zealand Journal of Criminology* 179, 188–9, 194; Lynne Weathered, 'A Question of Innocence: Facilitating DNA-Based Exonerations in Australia' (2004) 9(1) *Deakin Law Review* 277, 285–8; Rachel Dioso-Villa et al, 'Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 157, 164–5; Hamer, 'Wrongful Convictions' (n 21) 292–5.

the convicted person'.[303] The physical restrictions of imprisonment and the associated loss of support networks may also add to this burden.[304] These challenges are perhaps compounded in cases involving serious departures from process, such as those that prompted the new provisions in Victoria. In cases of this kind, the very existence of the misconduct is unknown, let alone the evidence to demonstrate it.

In announcing the second or subsequent appeal legislation, the Attorney-General praised the creation of 'a judicial pathway to correct injustice that was previously unknown'.[305] Yet, the capacity of the new provisions to correct injustice remains constrained in the absence of a mechanism empowered to investigate claims by convicted persons. There have been calls for Australia to set up a Criminal Cases Review Commission,[306] similarly to those operated in a growing number of jurisdictions, including the United Kingdom, Norway and New Zealand.[307] While concerns have been voiced about the capacity of commissions of this kind to meaningfully review miscarriages of justice,[308] they enjoy investigative powers that far exceed those at the disposal of a convicted person or their legal representatives and that may support the discovery of the fresh and compelling evidence that is, in turn, required to mount a second or subsequent appeal.[309] It may also be preferable to rely on a permanent, specialist body rather than on ad

303 Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (Policy Statement, 21 April 2012) 2 [9] <https://www.lawcouncil.asn.au/publicassets/9b40d8f6-bdd6-e611-80d2-005056be66b1/120421-Policy-Statement-Commonwealth-Criminal-Cases-Review-Comission.pdf>.

304 Hamer, 'Wrongful Convictions' (n 21) 289–90.

305 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3688 (Jill Hennessy, Attorney-General).

306 See Hamer, 'The *Eastman* Case' (n 81) 468; Hamer, 'Wrongful Convictions' (n 21) 311; Lynne Weathered, 'Reviewing the New South Wales DNA Review Panel: Considerations for Australia' (2013) 24(3) *Current Issues in Criminal Justice* 449, 455; Weathered, 'The Criminal Cases Review Commission' (n 54) 264–6.

307 See Carolyn Hoyle and Mai Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (Oxford University Press, 2019); Hoyle (n 41); Ulf Stridbeck and Philos Svein Magnussen, 'Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission' (2013) 80(4) *University of Cincinnati Law Review* 1373; John Weeden, 'The Criminal Cases Review Commission (CCRC) of England, Wales, and Northern Ireland' (2013) 80(4) *University of Cincinnati Law Review* 1415; Malcolm Birdling, 'Correcting Miscarriages of Justice' [2013] (11) *New Zealand Law Journal* 413; Griffin (n 41). The Canadian government has committed to establishing a Criminal Case Review Commission, but its precise form is still to be determined: Department of Justice Canada (n 41).

308 See Kevin Kerrigan, 'Real Possibility or Fat Chance?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 166, 166–7; Naughton (n 41) 2. More broadly, Naughton is critical of the Criminal Cases Review Commission's capacity to fulfil what is widely believed to be its aim: to help allegedly innocent victims of wrongful conviction to overturn their convictions: Naughton (n 308) 3–5.

309 In this respect, in England, Wales and Northern Ireland, the Criminal Cases Review Commission has led to successful appeals in well over 500 cases since it was established in 1997: 'Facts and Figures', *Criminal Cases Review Commission* (Web Page, 2022) <https://ccrc.gov.uk/facts-figures/>.

hoc inquiries to investigate potential miscarriages of justice. Calls for the adoption of a commission of this kind are yet to be answered in Victoria or elsewhere in Australia. In fact, the South Australian legislation, on which the Victorian second or subsequent appeal is largely modelled, was the product of a compromise that involved the rejection of a proposal for such a commission.[310] For now, therefore, a substantive gap remains in the capacity of the post-appeal review framework to uncover and correct miscarriages of justice in Victoria.

V CONCLUSION

The new second or subsequent appeal process in Victoria has offered a clear and transparent judicial pathway to review convictions where fresh and compelling evidence is discovered that is capable of establishing that a substantial miscarriage of justice has occurred. The question remains whether the new provisions have achieved the fine balance between finality and the correction of errors. A review of the early operation of the new provisions reveals that they are likely to be an effective mechanism to correct errors that are already known and that can be demonstrated by fresh evidence. They do not, however, mitigate the challenges faced by convicted persons in uncovering the evidence that may support an appeal of this kind in the first instance. The experience of successful appeals to date shows that the misconduct upon which they were brought remained concealed for a significant period of time. The fresh and compelling evidence came to light in the very particular circumstances of two significant, albeit ad hoc, external inquiries. It is those inquiries that both prompted the adoption of the new provisions in Victoria, but also unveiled the evidence that formed the basis of their successful operation in *Roberts' Second Appeal* and *Mokbel*. Until the challenges of bringing to light evidence that enables miscarriages of justice to be uncovered are addressed on a meaningful and more permanent basis, it may well be that finality continues to be 'pursued at too great a cost'.[311]

310 Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (Report, 18 July 2012), discussed in Bibi Sangha and Robert Moles, 'Post-Appeal Review Rights: Australia, Britain and Canada' (2012) 36(5) *Criminal Law Journal* 300, 315–16.

311 Hamer, 'Wrongful Convictions' (n 21) 311.