RETAINING THE ROYAL PREROGATIVE OF MERCY IN NEW SOUTH WALES

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This article argues that the prerogative of mercy should be retained in New South Wales as a necessary and appropriate power of the Executive. Historically, pardons have provided opportunities for redemption. Currently, the statutory appeals process is limited to cases involving a miscarriage of justice where there is considerable doubt as to a person's guilt. In cases where a person is guilty but is nevertheless deserving of mercy, the prerogative of mercy is the only avenue available. As a purely executive power, the prerogative of mercy can achieve the aims of the criminal justice system by tempering justice with mercy. The role of the sovereign involves maintaining order, but also enacting some conception of the good, driven by compassion, love, and mercy. Finally, this article argues that grants of mercy should be a matter of public record, for transparency and as a means of demonstrating this compassion to the public.

'Mercy is not the subject of legal rights. It begins where legal rights end'.[1]

'Without such a power of clemency, to be exercised by some department or functionary of a government, [that government] would be most imperfect and deficient in its political morality'.[2]

I INTRODUCTION

This article argues that the royal prerogative of mercy is a necessary power of an executive government and continues to have value in a democratic society. The royal prerogative of mercy is a broad discretionary power that is exercisable by the Governor-General of the Commonwealth, the Governor of a state, or the Administrator of a territory (on advice of the Executive Council of the respective

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1 *De Freitas v Benny* [1976] AC 239, 247 (Lord Diplock).

2 *Ex parte Wells*, 59 US 307, 310 (Wayne J for the Court) (1855).

governments) to pardon an offender who has been convicted of a criminal offence. Recent commentary on the royal prerogative of mercy has suggested that the power is opaque and contrary to fundamental principles of the separation of powers and constitutional democracy.[3] In particular, the majority of commentators have focused on new legislative developments that have introduced second or subsequent appeals in cases where fresh and compelling evidence indicates there has been a wrongful conviction, and argued that these developments have rendered the prerogative irrelevant. However, some have acknowledged that completely removing the power from the executive would deny offenders a vital historical reprieve from a sometimes harsh criminal justice system.[4] Focusing on New South Wales ('NSW'), this article argues that the royal prerogative of mercy is fundamentally an executive power rather than judicial in nature, and is a necessary component in criminal law architecture. The current reviews process in NSW will be contrasted with the legislative developments in Tasmania and South Australia to demonstrate that the prerogative of mercy is different in principle and practice from the statutory post-conviction review processes in NSW and other Australian jurisdictions, therefore serving a unique and necessary function.

In February 2018, NSW Attorney-General Mark Speakman requested that the Department of Justice review the procedures involved in the applications and exercises of the prerogative of mercy, and the consideration of petitions for the review of convictions and sentences under statute.[5] Specifically, the Department of Justice was asked to review whether petitions and their outcomes should be a matter of public record. Following public consultation, in November 2018, the Attorney-General formally announced[6] a new policy in favour of the release of information in relation to petitions for mercy. Where petitions have been declined, the information that may be released will be: general information as to the nature of the offence; the grounds on which a statutory review or exercise of the prerogative was sought; and the date the petition was declined.[7] No identifying information will be released for those petitions which have been declined. Where petitions have been granted, the information that may be released will be: general information as to the nature of the offence; the name of the petitioner; brief reasons for the decision; and the date the petition was granted.[8] In respect of all petitions, the names of any victims will not be released, and the Attorney-General maintains absolute discretion to partially or wholly release information, including where the

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3 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, 312.

4 See generally Joseph Azize, 'The Prerogative of Mercy in NSW' (2007) 1 *Public Space: The Journal of Law and Social Justice* 1; 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; Bibi Sangha and Robert Moles, 'Mercy or Right? Post-Appeal Petitions in Australia' (2012) 14(2) *Flinders Law Journal* 293 ('Mercy or Right?').

5 Department of Justice (NSW), *Royal Prerogative of Mercy Review* (Fact Sheet, February 2018) 1.

6 Department of Justice (NSW), 'Delivering Transparency to Mercy Decisions' (Media Release, 9 November 2018).

7 Department of Justice (NSW), *Release of Information Relating to Applications for the Exercise of the Royal Prerogative of Mercy and Petitions Submitted under Section 76 of the Crimes (Appeal and Review) Act 2001* (Policy Document No D18/278224/DJ, 5 October 2018) 2.

8 Ibid.

release of information may jeopardise the safety of the petitioner, disclose personal or confidential information, or prejudice any ongoing investigations or prosecutions.[9] This article supports the policy change in favour of making exercises of the prerogative of mercy a matter of public record where it is in the public interest to do so. This increase in transparency of both the decision-making process and the decisions themselves would instil greater public awareness of and confidence in the exercise of the royal prerogative of mercy.

Under Australian criminal law, generally there is no legal right to further review of a conviction following an unsuccessful appeal. In NSW, following a conviction in the District or Supreme Court, a convicted person has an appeal as of right on an issue of law,[10] or an appeal requiring leave on an issue of law and fact.[11] A further appeal to the High Court of Australia requires special leave to appeal,[12] but the High Court cannot admit fresh evidence.[13] Following an unsuccessful appeal, there is no right to a further appeal.[14] The only remaining avenue available at that point is to apply to the executive for a pardon, either via the prerogative of mercy which is exercised by the Governor on advice from the Executive Council, or a review of conviction or sentence under part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) ('*Appeal and Review Act*'). South Australia and Tasmania, too, have established a statutory review framework to allow for a review of conviction on the ground of 'fresh and compelling evidence'.[15] The legislation fails to address cases where guilt is not in doubt, but a convicted person is nevertheless deserving of mercy. Such cases could only be addressed by the prerogative of mercy. Therefore, this article will highlight that the prerogative of mercy remains a distinct, separate avenue of review to the statutory power of review, and that the prerogative of mercy proper retains significant and unique residual value.

Australia's post-conviction review procedures since Federation have remained relatively unchanged across the different jurisdictions, with South Australia a notable exception. This is despite considerable reform in other Commonwealth countries, such as the United Kingdom and Canada.[16] In Australia, the Commonwealth, state, and territory executive branches are empowered to review criminal convictions within their own jurisdiction, either upon application or at their own behest. They are empowered to do so through statute, and through the royal prerogative of mercy.

9 Ibid 2–3.

10 *Crimes (Appeal and Review) Act 2001* (NSW) s 52 ('*Appeal and Review Act*').

11 Ibid s 53.

12 *Judiciary Act 1903* (Cth) s 35A.

13 *Mickelberg v The Queen* (1989) 167 CLR 259, 274 (Brennan J).

14 *Burrell v The Queen* (2008) 238 CLR 218, 228 (Kirby J). See also Bibi Sangha and Robert Moles, 'Post-Appeal Review Rights: Australia, Britain and Canada' (2012) 36 *Criminal Law Journal* 300, 305 ('Post-Appeal Review Rights').

15 Introduced in South Australia by the *Statutes Amendments (Appeals) Act 2013* (SA), and now found in s 159 of the *Criminal Procedure Act 1921* (SA), and introduced in Tasmania by the *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tas) and now found in s 402A of the *Criminal Code Act 1924* (Tas).

16 Sangha and Moles, 'Post-Appeal Review Rights' (n 14) 300–4. See also Milne (n 4).

In Part II, this article reviews the introduction of the prerogative of mercy to the Australian colonies, and notes the economic, political, and social utility of the prerogative of mercy to the development of the colony of NSW. In order to understand a particular legal concept, such as the prerogative of mercy, analysis of legal doctrine alone is incomplete as an approach.[17] The prerogative of mercy cannot be divorced from its historical and social development because it demonstrates the value of the monarch's, or his/her agent's personal authority to shape a nation, making it a vital and defining function of an executive government. The mercy power meant that pardoned convicts were no longer just an indentured labour force; their opportunity for redemption was a 'second chance' that led to them freely working the lands and building infrastructure in NSW as subjects no longer defined purely by their criminality.[18]

Following on from the discussion of the historical development of the prerogative of mercy in NSW, Part III of this article outlines the current formulation of the prerogative of mercy in NSW. The statutory power to review convictions and sentences on the grounds of a miscarriage of justice, where there is doubt as to the convicted person's guilt is then examined. This article contrasts the statutory power to review convictions ('the statutory post-conviction review') of NSW, South Australia, and Tasmania, with the non-statutory, prerogative power to review convictions ('the prerogative of mercy'). The statutory review powers in all three jurisdictions are only concerned with those cases where there is serious doubt as to guilt, or where there has been a wrongful conviction. While statutory post-conviction reviews have appropriately involved the judiciary in what is in essence an appeals process, the prerogative power of mercy remains a necessary function of the executive branch of government in cases where the offender is guilty of the offence, but is deserving of mercy.

Part IV addresses the criticisms of David Caruso and Nicholas Crawford, who argue that the prerogative of mercy is contrary to the separation of powers and antithetical to constitutional democracy due to its judicial nature.[19] Part IV then

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17 See Peter Gerangelos, 'Section 61 of the Commonwealth Constitution and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43(2) *University of Western Australia Law Review* 103, 104; Azize (n 4) 2.

18 For an analysis of the treatment of convicts in colonial Australia, see generally Richard Tuffin et al, 'Landscapes of Production and Punishment: Convict Labour in the Australian Context' (2018) 18(1) *Journal of Social Archaeology* 50; Kris Inwood and Hamish Maxwell-Stewart, 'Introduction: Health, Human Capital, and Early Economic Development in Australia and New Zealand' (2015) 55(2) *Australian Economic History Review* 105; David Plater and Sue Milne, '"All That's Good and Virtuous or Depraved and Abandoned in the Extreme"? Capital Punishment and Mercy for Female Offenders in Colonial Australia, 1824 to 1865' (2014) 33(1) *University of Tasmania Law Review* 83; David Plater and Penny Crofts, 'Bushrangers, the Exercise of Mercy and the "Last Penalty of the Law" in New South Wales and Tasmania 1824–1856' (2013) 32(2) *University of Tasmania Law Review* 294; David Plater and Sue Milne, '"The Quality of Mercy Is Not Strained": The Norfolk Island Mutineers and the Exercise of the Death Penalty in Colonial Australia 1824–1860' [2012] *Australian and New Zealand Law and History Society e-Journal* 1; Hamish Maxwell-Stewart, '"To Fill Dishonoured Graves"? Death and Convict Transportation to Colonial Australia' (2011) 58(1) *Papers and Proceedings: Tasmanian Historical Research Association* 17.

19 Caruso and Crawford object to the prerogative of mercy completely: Caruso and Crawford (n 3). However, other authors only take issue with the prerogative of mercy not being judicially reviewable:

examines the historical and theological origins of the prerogative of mercy power as a necessary personal power of the monarch, where a strict adherence to the law would fail to see justice done according to mercy. This article argues that the prerogative of mercy power is not offensive to Australia's system of government, not only because it is a political power rather than a judicial power, but because it requires the consideration of moral principles that are beyond the capacity of those institutions limited to considerations of legal rules and principles. Finally, in Part V this article argues that the concerns expressed in the commentary that the power is opaque and secretive have now been addressed by the new NSW Government policy to release information regarding petitions for mercy, thereby increasing transparency in the exercise of the prerogative of mercy, allowing for greater public and academic scrutiny and confidence in the process.

II THE DEVELOPMENT OF THE PREROGATIVE OF MERCY IN NEW SOUTH WALES

A The Executive Powers of New South Wales

Upon Federation, the executive powers of the Australian colonies were distributed between the Commonwealth Government, and the governments of the States and Territories. The Commonwealth executive power is set out in section 61 of the *Australian Constitution*, which states simply: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth'.

However, NSW has no section 61 equivalent in the *Constitution Act 1902* (NSW) ('*NSW Constitution*') defining the executive power of NSW. In fact, the *NSW Constitution* is largely silent on the source of NSW executive powers.[20] Anne Twomey notes that the original source for executive power in the colony of New South Wales was the commissioning of the Governor and the granting of Letters Patent and Royal Instructions conferring powers, including the prerogative powers, on him.[21] Today, the executive power of NSW is sourced in legislation, constitutional implications derived 'from the system of responsible government, the common law, and long established convention'.[22] Further guidance is provided by including the Queen as part of the NSW executive,[23] which means that the

Sangha and Moles, 'Post-Appeal Review Rights' (n 14); Sangha and Moles, 'Mercy or Right?' (n 4); Milne (n 4).

20 Selena Bateman, 'Constitutional Dimensions of State Executive Power: An Analysis of the Power to Contract and Spend' (2015) 26 *Public Law Review* 255, 256.

21 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 584.

22 Ibid. See also *Egan v Willis* (1998) 195 CLR 424, 473 (McHugh J) where his Honour noted that the *NSW Constitution* 'plainly assumed a body of constitutional and political practice which would give meaning to its very sparse provisions … [to be] administered in accordance with the principles of responsible government'.

23 The NSW executive is comprised of: the Queen; the Governor; the Executive Council; the Ministers of the Crown; public servants; and the Cabinet: see Twomey (n 21) 583–4.

executive power of NSW incorporates those royal prerogatives of the Crown relevant to the polity of the State.[24]

Prerogative powers have been described as necessary discretionary powers of government for the purpose of good governance. Thus, Sir William Blackstone stated that the prerogative was 'the discretionary power of acting in the public good where the positive laws are silent'.[25] Agreeing with Blackstone, Lord Denning defined the prerogative as 'a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision'.[26] The prerogative is subject to abrogation, modification, or regulation by statute. However, it is generally accepted that the prerogative power cannot be broadened.[27]

HV Evatt classified the prerogative powers of the Crown into three categories. The 'immunities and preferences' powers referred to those powers which gave the Crown a priority not enjoyed by ordinary subjects, such as granting Crown debts priority over other creditors.[28] The 'property rights' powers conferred on the Crown certain rights over vital resources and 'common' property, such as granting the Crown ownership over royal minerals, royal fish and swans, and the seabed.[29] The category of 'executive prerogatives' concerned those powers possessed solely by the monarch in his or her personal capacity, such as the power to declare war and peace, enter into treaties, appoint representatives, confer honours, and pardon offenders under the prerogative of mercy.[30]

The powers to declare war and peace, being at one time Imperial powers, are now powers of the Commonwealth Government.[31] However, the other 'executive powers' that are not obviously powers of the Commonwealth by virtue of 'nationhood and international personality'[32] are distributed amongst the Commonwealth and the states, depending on the 'relevant connection with the particular polity'.[33] The states are responsible for their own criminal laws, and the Commonwealth is responsible for laws pertaining to federal crimes.[34] Therefore,

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24 Mason J defined the prerogative as being 'the powers accorded to the Crown by the common law': *Barton v Commonwealth* (1974) 131 CLR 477, 498. See also George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 27–8.

25 Sir William Blackstone, *Commentaries* (8th ed, 1778) vol 1, cited in *Ruddock v Vadarlis* (2001) 110 FCR 491, 539 [181] (French J).

26 *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643, 705.

27 'It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative': *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ). See also *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Walker v The Queen* [1994] 2 AC 36.

28 HV Evatt, *The Royal Prerogative* (Law Book, 1987) 30–1.

29 Ibid.

30 Ibid.

31 By way of resolutions of the Imperial Conferences in the 1920s and 30s, and by virtue of Australia's status as a sovereign international State: see *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 362 (Barwick CJ).

32 Ibid 362 (Barwick CJ). See also ibid 379 (Gibbs J), 396 (Mason J).

33 Twomey (n 21) 661.

34 This is understood by a reading of ss 51, 106–8 of the *Australian Constitution*, whereby the *Constitution* saves the Parliaments and powers of the states and denies the Commonwealth Parliament the power to make criminal laws for the states. See *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ).

both the Commonwealth and state governments may exercise the royal prerogative of mercy with respect to offenders convicted within their respective jurisdictions.

Historically, the mercy power has always existed in some form, and how it was exercised has always varied. In ancient Athens, 6,000 signatures were required before mercy decisions could be made.[35] From the Christian Bible, as part of a Passover tradition of granting clemency, Pontius Pilate released Barabbas instead of Jesus Christ at the urging of the crowd.[36] Religious traditions of mercy emphasise the power and mercy of God, and virtues of compassion and forgiveness.[37] And the divine link between King and God authorised the King to exercise God's mercy and justice on Earth. However, the power gradually moved away from being a divine one, to one rooted in the common law, and so the mercy power was secularised.[38] Nevertheless, the power traditionally attaches to the monarch such that it is a personal power possessed by the monarch as an individual, rather than attaching to the Crown in the abstract sense as symbolising the executive.[39] 'Because the King was the sovereign, crime against the state was crime against the King himself, and he alone had the power to reprieve it'.[40] Most countries now have something akin to the prerogative of mercy, whether it is exercised by an individual, or under an open committee structure.[41] But at its core, the prerogative of mercy is a right or power to pardon an offender, belonging to the sovereign.

B The History of the Royal Prerogative of Mercy in NSW Pre-Federation

An examination of the historical development of the prerogative of mercy in NSW is necessary for a contemporary understanding of the role that the prerogative of mercy should continue to play as a crucial function of government. The Crown prerogatives were necessary to the establishment and development of the colonies of the British Empire.[42] Upon the establishment of a new British colony by way of settlement, the common law prerogative powers formed part of the laws of that new colony.[43] As the monarch could not physically rule in the colonies, royal powers were delegated to the representatives of the Crown, being

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35 Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge, 2016) 6 ('*Comparative Executive Clemency*'). Novak notes that this practice effectively reserved mercy decisions for those who had 'celebrity status'.

36 Jeffrey Crouch, *The Presidential Pardon Power* (University Press of Kansas, 2009) 11. See specifically John 18:39–40.

37 Novak, *Comparative Executive Clemency* (n 35) 6–7.

38 Ibid.

39 Plater and Milne (n 18) 7.

40 Novak, *Comparative Executive Clemency* (n 35) 4, citing CH Rolph, *The Queen's Pardon* (Cassell and Collier, 1978) 16–17.

41 Andrew Novak, 'Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States' (2016) 49(4) *University of Michigan Journal of Law Reform* 817, 826 ('Transparency and Comparative Executive Clemency').

42 JM Bennett, 'The Royal Prerogative of Mercy: Putting in the Boots' (2007) 81 *Australian Law Journal* 35, 35. In the United States, the pardon power survived and is now enshrined in the US Constitution: see Novak, *Comparative Executive Clemency* (n 35) 5.

43 Milne (n 4) 216, citing *Jurisdiction in Liberties Act 1535*, 27 Hen 8, c 24, s 1, where the prerogative powers were delegated to the Governors of the British colonies, including the power to pardon.

colonial governors. As the Queen's representative in the Colony, the Governor was empowered by the Governor's Royal Instructions and Commission to exercise the prerogative powers, including the prerogative of mercy.[44] As a result, the mercy power was 'completely and solely exercisable by the Dominion Executives'.[45]

In 1786, NSW was designated a suitable colony for transportation,[46] and so NSW became a penal colony of Great Britain. Many of the convicts were then utilised as a labour force within the colony to settle the lands. According to Gregory Woods, of the 788 convicts of the First Fleet, about one third had been sentenced to death, with that penalty being commuted to transportation.[47] During the formative years of the colony, pardons were granted to many convicts as rewards for good behaviour, for special skills, or for undertaking special responsibilities.[48] Tickets of leave excused convicts from compulsory labour, allowing them to work for themselves, provided they remained in a designated area. Convicts who were granted conditional pardons were free to move within the colony, but they could not return to Britain. Absolute pardons resulted in the complete remittance of a sentence, freeing the individual to remain in the colony or return to Britain. The absolute pardon then was the 'fullest exercise of the prerogative of mercy'.[49]

Woods notes that 'cruelty, principle and mercy are inescapable and recurring elements in the story of the criminal law in colonial New South Wales'.[50] This reflected the perceived need for punishment and deterrence on the one hand, and the exercise of mercy in a new self-governing society attempting to move on from its penal roots on the other.[51] The prerogative of mercy served a vital role in the development of the colony of NSW. In a practical sense, there were wide economic, policy, and social considerations as to why the prerogative of mercy should be exercised in the colony of NSW. The colony was faced with 'demands for sustainability and commercial prosperity', and convict labour was vital to

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44 The Hon Robert French, 'Executive Power in Australia: Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 25.

45 Evatt (n 28) 119.

46 By way of a declaration made by Order in Council in 1786 pursuant to the *Transportation etc Act 1784*, 24 Geo III, c 56: see *Historical Records of New South Wales: Vol 1, Part 2 – Phillip 1783–1792* (Charles Potter, Government Printer, 1892) 30–1, archived at <https://ia800200.us.archive.org/19/items/historicalrecord1pt2sidnuoft/historicalrecord1pt2sidnuoft.pdf>.

47 GD Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Federation Press, 2002) 5.

48 Good behaviour could result in pardons or tickets of leave, extra food or free time, or being given a job with more responsibility, such as a constable. Francis Greenway is an example of a convict with a special skill (he was a trained architect) being granted a pardon so that he might help design new key buildings: see 'How Were Convicts Rewarded for Good Behaviour?', *Sydney Living Museums: Hyde Park Barracks Museum* (Web Page) <https://sydneylivingmuseums.com.au/convict-sydney/rewards-freedom>. Janet BL Chan also notes that granting pardons or tickets of leave as a reward for good behaviour was motivated by economising: Janet BL Chan, 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release' (1991) 13(2) *University of New South Wales Law Journal* 393, 398–9. See also Terry Newman, 'Convicts: Working for Freedom', *Becoming Tasmania* (Companion Website) <http://www.parliament.tas.gov.au/php/BecomingTasmania/ConvictFreedom08.pdf> 1–5.

49 Azize (n 4) 7.

50 Woods (n 47) 6.

51 Plater and Crofts (n 18) 300.

meeting those demands.[52] However, given that such demands could be met by utilising the convict labour force without the granting of pardons, the question arises: why were pardons granted at all? Governor Lachlan Macquarie wrote: 'I found New South Wales a gaol & left it a colony'.[53] During his time in office between 1810 and 1821, Governor Macquarie gave out 2319 tickets of leave, 1365 conditional pardons, and 366 absolute pardons to convicts, many of whom were granted 30 acres of land.[54] The NSW colony did more than simply utilise a convict labour force; by granting pardons, the convicts were woven into the 'social and economic fabric' of the colony.[55]

Two major schools of thought supported the exercise of the prerogative. The first equated mercy with equity. There were considerations of the harsh conditions that may have led a convict to their wrongdoings, and comparing their situation and motives with others who had committed the same crimes. The second conceptualised mercy as an act of grace, derived from religious ideas of God's 'boundless love and suffering for a wrongdoer', whereby mercy provided an opportunity for redemption and penitence.[56] Governor Macquarie favoured this view especially. He believed that through rehabilitation and education, convicts could become an important part of society and contribute to the continuing development of the colony.[57] The exercise of the prerogative of mercy was viewed by some as a virtue in society alongside justice.[58]

By 1900, the Letters Patent Constituting the Office of Governor of New South Wales provided that the Governor could

> grant to any offender convicted in any Court of the State, or before any judge or other magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any

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52 Plater and Milne (n 18) 11.

53 Augusto Zimmermann, 'Constituting a "Christian Commonwealth": Christian Foundations of Australia's Constitutionalism' (2014) 5 *The Western Australian Jurist* 123, 125, citing Niall Ferguson, *Empire: How Britain Made the Modern World* (Penguin, 2003) 107. See also Sydney Living Museums, 'Convict Sydney' Exhibition, Hyde Park Barracks Museum, Sydney.

54 See Chief Justice JJ Spigelman, 'The Macquarie Bicentennial: A Reappraisal of the Bigge Reports' (The Annual History Lecture, History Council of New South Wales, Sydney, 4 September 2009) 12, citing John Ritchie, *Lachlan Macquarie: A Biography* (Melbourne University Press, 1986) 133 <https://historycouncilnsw.org.au/wp-content/uploads/2013/01/2009-AHL-Spigelman.pdf>. Convicts often received more land if they were married: 'The Convicts' Colony', *Sydney Living Museums: Hyde Park Barracks Museum* (Web Page) <https://sydneylivingmuseums.com.au/convict-sydney/convicts-colony>.

55 'Convict Sydney', *Sydney Living Museums: Hyde Park Barracks Museum* (Web Page) <https://sydneylivingmuseums.com.au/convict-sydney>.

56 Plater and Crofts (n 18) 300. See also Carla Ann Hage Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10(1) *Law and Philosophy* 109.

57 State Library of New South Wales, 'The Governor: Lachlan Macquarie, 1810 to 1821' (Exhibition Guide, July 2010) 20 <https://www2.sl.nsw.gov.au/archive/events/exhibitions/2010/governor/docs/the_governor_guide.pdf>. See also 'Convict Sydney – Part 2: 1815–1822 For the Civic Good', *Sydney Living Museums: Hyde Park Barracks Museum* (Web Page) <https://sydneylivingmuseums.com.au/convict-sydney/civic-good>. Sydney Living Museums, 'Convict Sydney' Exhibition, Hyde Park Barracks Museum, Sydney.

58 Plater and Crofts (n 18) 300–1. Here, Plater and Crofts note that mercy has been conceptualised in different ways in colonial Australia, which serves as a reminder that mercy is a valuable addition to law and order.

> respite of the execution of such sentence for such periods as the Governor thinks fit, and further may remit any fines, penalties, or forfeitures due or accrued to the Crown.[59]

During the early years of the colony, there was no limitation on the Governor's discretion to exercise the prerogative of mercy.[60] However, that changed with the establishment of Legislative and Executive Councils, and the establishment of responsible government in the colony in 1856.[61] The instructions were eventually amended such that the Governor was required to consult with and follow the advice of the Executive Council in exercising the prerogative of mercy.[62]

The powers of the Governor were again changed in 1987 when, in giving effect to changes brought about by the introduction of the *Australia Acts*,[63] the *NSW Constitution* was amended such that the Letters Patent of 1900 ceased to have effect.[64] As a consequence, the prerogatives of the Governor of NSW were no longer determined by reference to the Royal Prerogative of the Crown of the United Kingdom; rather, they were now limited by reference to Australian sources of law.[65] Any changes to the prerogative in the United Kingdom would not affect the status of the powers in NSW.

It remains the case that the prerogative of mercy is a power residing with the Governor as the representative of the Queen in NSW, but that power now must only be exercised on the advice of the Executive Council, namely, the Attorney-General.[66] This means that, in contrast to colonial NSW where the power was originally personally exercised by the Governor absent of a need for advice, responsible government has shaped the current formulation of the prerogative of mercy.[67]

III THE CURRENT PARDONS PROCESS – THE PREROGATIVE AND THE STATUTORY FRAMEWORK

The State of NSW is a common law jurisdiction, meaning that the criminal laws of NSW are to be understood by reading the common law and statutes together. Despite the statutory reform of many common law principles,[68] and the

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59 *Smith v Corrective Services Commission (NSW)* (1980) 2 NSWLR 171, 180 [28] (Hope JA, Street CJ agreeing at 176 [11] and Moffit P agreeing at 176 [12]). The Letters Patent were dated 29 October 1900 and were issued with the Letters for the new Federation: see Azize (n 4) 3.

60 Azize (n 4) 3, quoting *State Archives & Records (NSW)* (Web Page) <https://www.records.nsw.gov.au/archives/convict_records_1061.asp>.

61 See *New South Wales Constitution Act 1855* (Imp) ss 1–3. This introduced a bicameral parliamentary system.

62 Bennett (n 42) 46–7; Azize (n 4) 4; Twomey (n 21) 662–4.

63 *Australia Act 1986* (Cth); *Australia Act 1986* (Imp).

64 Achieved by the insertion of s 9F into the *NSW Constitution* by the *Constitution Amendment Act 1987* (NSW).

65 See *Australia Act 1986* (Cth) s 7. See generally Azize (n 4) 5.

66 Twomey (n 21) 665.

67 See Bennett (n 42), on the history of the exercise of the prerogative of mercy.

68 See *Crimes Act 1900* (NSW) pt 16, sch 3. Some of the abolished common law offences and rules include arson, forgery, riot, penal servitude, and hard labour.

introduction of statutory provisions allowing a convicted person to petition to have their conviction or sentence reviewed,[69] the prerogative of mercy is preserved in NSW.[70] As a result, where a person has been convicted in either the District or Supreme Court of NSW, and all appeal avenues have been exhausted, that person has three options in seeking a review of their conviction or sentence: they may apply directly to the Governor for an exercise of the prerogative of mercy; they may petition the Governor under the legislative framework to exercise the Governor's statutory pardoning and inquiry powers;[71] or they may apply to the Supreme Court under the statutory framework for a judicial inquiry into their conviction or sentence.[72]

There are three key differences between the prerogative of mercy and the statutory review process: (1) the officials who may exercise the powers; (2) the considerations relevant to the exercise of the powers; and (3) the resulting consequences of exercising the powers.[73] Determining whether the prerogative of mercy remains an integral element of the modern criminal justice system requires assessing the operation and effectiveness of the prerogative of mercy as compared to the statutory review process.[74]

A Applying for the Royal Prerogative of Mercy

By convention, a convicted person may apply to the Governor for the exercise of the royal prerogative of mercy (which may take the form of a pardon or a remission of sentence).[75] Once the Governor has received a petition, he or she then refers the matter to the NSW Attorney-General, who in turn seeks the advice of the Office of General Counsel. The Attorney-General then makes a recommendation to the Governor, and the Governor considers that recommendation along with the advice of the Executive Council.[76] There are no legal restrictions on the matters that the Attorney-General may take into account 'when advising the Governor [on] whether or not to exercise the prerogative'. However, the convention dictates that the Attorney General typically only advises the Governor to exercise the prerogative where there are circumstances of hardship or other compassionate grounds.[77] The Governor may then respond to the petition for an exercise of the prerogative of mercy by: pardoning the offender (sometimes

69 *Appeal and Review Act* pt 7.

70 *Crimes Act 1900* (NSW) ss 19A, 19B, 25B, 61JA, 66A; *Crimes (Administration of Sentences) Act 1999* (NSW) s 270; *Appeal and Review Act* s 114; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102; *Criminal Appeal Act 1912* (NSW) s 27. Also, the power to remit fines and the prerogative of mercy with regards to a person imprisoned for non-payment of a fine is preserved in the *Fines Act 1996* (NSW) ss 123–4.

71 *Appeal and Review Act* s 76.

72 Ibid s 78.

73 Sangha and Moles, 'Mercy or Right?' (n 4) 302.

74 Milne (n 4) 213.

75 Ibid 219.

76 Department of Justice (NSW), 'Review and Annulment of Convictions *(Crimes (Appeal and Review) Act 2001)*' (Web Page, 17 October 2017) <http://www.justice.nsw.gov.au/lsb/Pages/review-annulment-of-convictions/rev-and-ann-of-conv-crimes-app-and-rev-act-2001.aspx>.

77 Ibid.

posthumously),[78] remitting the sentence, or taking no action in regards to the application.[79] Significantly, the prerogative of mercy is not restricted to cases where the convicted person is innocent of the crime, as it may be exercised in cases where the convicted person is guilty.

In cases where the convicted person is deemed innocent of the offence, a pardon does not have the effect of quashing a conviction, as the criminal conviction is not expunged.[80] A pardon only serves to remove or reduce the consequences of the conviction. If a person has been granted a full pardon, they may apply to the Court of Criminal Appeal for the conviction to be quashed, but a full pardon does not entitle the person to an automatic quashing of the conviction.[81] This stems from the idea that the prerogative of mercy is intended to 'temper justice with mercy' to alleviate the consequences of a conviction, rather than to do away with the conviction itself.[82]

From this we can see the defining characteristics of the prerogative of mercy: it is a power that may only be exercised by the Governor in Council and does not extend to courts or judicial officers; it is exercisable in cases where the convicted person is guilty or deemed to be innocent of the crime, regardless of whether the convicted person is deceased; and it is capable of removing the punishment for the offence only, rather than the conviction itself. In all of these aspects, the prerogative of mercy differs from the statutory post-conviction review process.

B Applications for Review under the NSW Statutory Review Process

In NSW, applications can be made for a review of a conviction or sentence under part 7 of the *Appeal and Review Act* and they can be directed to either the Governor under division 2,[83] or to the Supreme Court under division 3.[84] Given that section 14 of the *Interpretation Act 1978* (NSW) stipulates that a reference to the Governor in any Act or instrument of NSW means the 'Governor with the advice of the Executive Council,' this means that the Governor is required to receive advice from the Executive Council when considering a petition under the statute.

The Governor is empowered under the statute to instruct a judicial officer to conduct an inquiry into the conviction or sentence.[85] Interestingly, where a petition

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78 See *Re Ross* (2007) 19 VR 272, 275 [7] (Teague, Cummins and Coldrey JJ).

79 Milne (n 4) 219–20.

80 Only the Court of Criminal Appeal has the power to remove a conviction. See Milne (n 4) 217. See also *R v Cosgrove* [1948] Tas SR 99; *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364, 371 (Wilson J); *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350–1 (Heydon J).

81 *Appeal and Review Act* s 84. Under the *Criminal Records Act 1991* (NSW) ss 12, 19, a pardon results in a conviction being treated as a spent conviction.

82 Sangha and Moles, 'Post-Appeal Review Rights' (n 14) 302.

83 Petitions made directly to the Governor must be made in writing and delivered to the office of the Governor at Government House.

84 Applications made directly to the Supreme Court must be lodged with the Criminal Registry at the NSW Supreme Court, and a copy must be provided to the Attorney-General. Whilst there is no specific form required for an application under the statute, the written application must be accompanied by supporting evidence that has not been previously raised in and rejected by a court, and the submissions on which the applicant relies.

85 *Appeal and Review Act* s 77(1)(a). The procedure for conducting an inquiry is set out in pt 7 div 4 of the Act.

has been made to the Governor, the statute then authorises the Minister (being the NSW Attorney-General) to refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal, or to request the Court of Criminal Appeal to give an opinion on any point arising in the case. This is a clear point of distinction from the prerogative of mercy, which cannot be exercised by anyone other than the Governor on advice. Here, the statute is empowering the Minister to act independently from the Governor, and to request the Court of Criminal Appeal to hear the appeal or provide an opinion. A further point of distinction is that both the Minister and Governor may only direct an inquiry or refer the case to the Court where evidence or mitigating circumstances give rise to doubt or question as to the person's guilt or degree of culpability.

Similar to the Governor's powers under the statute, in considering an application made under section 78, the 'Supreme Court may direct a judicial officer to conduct an inquiry' into the conviction or sentence, or it 'may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal'.[86] As with the Governor's statutory powers, these options are limited to instances where there appears to be a 'doubt or question' as to the person's guilt, the 'mitigating circumstances in the case', 'or as to any other part of the evidence [of] the case'.[87]

However, the Supreme Court is limited to the grounds of the petition, and cannot consider grounds that have already been determined on appeal by an earlier Full Court of the Supreme Court, unless a new matter comes to light which makes reconsideration necessary.[88] Further, the Court of Criminal Appeal is to deal with the case in the same way 'as if the convicted person had appealed' their case directly to the Court,[89] meaning that the powers of the Court of Criminal Appeal to receive fresh evidence to avoid a miscarriage of justice are limited.[90] To admit fresh evidence to avoid a miscarriage of justice requires that the evidence show that the convicted person is innocent, or that guilt would be so doubtful that it would be unsafe to allow the conviction to stand.[91]

C Applications for Review under the South Australian and Tasmanian Statutory Review Process

In South Australia, the *Statutes Amendment (Appeals) Act 2013* (SA) was enacted to provide an avenue of post-conviction review by way of application for

86 Ibid s 79(1). The procedure is set out in pt 7 div 4 of the Act.

87 Ibid s 79(2).

88 *R v Gunn [No 2]* (1942) 43 SR (NSW) 27, 29 (Jordan CJ); *R v Morgan* [1963] NZLR 593; *R v Smith* [1968] QWN 50; *R v Matthews* [1973] VR 199, 201 (Barber, McInerney JJ and Norris AJ); *Mickelberg v The Queen* (1989) 167 CLR 259, 311–12 (Toohey and Gaudron JJ).

89 *Appeal and Review Act* s 86.

90 Milne contrasts this position with South Australia, where there is no requirement to refer the whole case: Milne (n 4) 233.

91 *Coffman v The Queen* (2010) 202 A Crim R 375; *Mickelberg v The Queen* (1989) 167 CLR 259; *Varley v A-G (NSW)* (1987) 8 NSWLR 30; *Gallagher v The Queen* (1986) 160 CLR 392. See Bibi Sangha and Robert Moles, 'MacCormick's Theory of Law, Miscarriages of Justice and the Statutory Basis for Appeals in Australian Criminal Cases' (2014) 37(1) *University of New South Wales Law Journal* 243, 261–8 ('MacCormick's Theory of Law') for a discussion of what constitutes a miscarriage of justice in the statutory appeals legislation, and how the focus is on 'unsafe' or 'unsatisfactory' convictions.

a second or subsequent appeal of conviction on the ground that there is 'fresh and compelling evidence' that there has been a miscarriage of justice.[92] Once a convicted person has the permission of the Full Court to apply for a second or subsequent appeal, the onus is on the convicted person to satisfy the Court that there is fresh and compelling evidence that should be considered on appeal, 'in the interests of justice'.[93] The introduction of this second or subsequent appeal does not affect the prerogative of mercy; however, the Attorney-General may refer a petition for the exercise of the royal prerogative of mercy to the Full Court to be heard as an appeal, or seek an opinion from the Court.[94]

Similarly, in Tasmania the *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tas) introduced a second or subsequent appeal right into the *Criminal Code Act 1924* (Tas). Section 402A provides that after a convicted person has exhausted their ordinary appeal rights, they have the right to make a further appeal of their conviction on the ground of 'fresh and compelling evidence', which must demonstrate that there has been a 'substantial miscarriage of justice,' and that granting the appeal is 'in the interests of justice'. Section 419 provides that a petition for mercy may be referred by the Attorney-General to the Court, either to be heard as an appeal, or for the purpose of obtaining an opinion of the Court to assist the Attorney-General in their determination of the petition.

The statutory framework for post-conviction review provides a necessary avenue for scrutinising the safety of a conviction. The introduction of the second or subsequent appeal in South Australia and Tasmania will help to recognise the injustice done to those who have been wrongfully convicted, and to remove the legal obstacles to challenging a wrongful conviction once ordinary rights to appeal have been exhausted.[95] In this regard, a statutory framework for review serves a vital purpose of ensuring those who have been wrongfully convicted can admit fresh evidence.[96] However, in practice, access to this review process is limited by an 'extremely high threshold', meaning that in all likelihood, successful applications will be rare.[97] The legislation in South Australia and Tasmania

92 The *Statutes Amendment (Appeals) Act 2013* (SA) amended the *Criminal Law Consolidation Act 1935* (SA). However, since then, the South Australian criminal legislation has had an overhaul, and the laws relating to appeals have since been removed to the *Criminal Procedure Act 1921* (SA). Relevantly, as of 2017, the law relating to second and subsequent appeals is now found in s 159 of the *Criminal Procedure Act 1921* (SA).

93 *Criminal Procedure Act 1921* (SA) s 159(1).

94 Ibid s 173(1).

95 Milne (n 4) 214.

96 See Sangha and Moles, 'Post-Appeal Review Rights' (n 14) 305–9, where the authors discuss the limitations on the ability of Australian courts to admit fresh evidence, noting that the High Court and the intermediate courts 'take the view that there are no appeal rights beyond those granted by the relevant statute'. In *Mickelberg v The Queen* (1989) 167 CLR 259, 264, Mason CJ said 'Over the years [the High] Court has consistently maintained that it has no power to receive fresh evidence in the exercise of its appellate jurisdiction'. Whether fresh evidence can be admitted is determined according to statute in each jurisdiction.

97 Milne (n 4) 239, citing *Appeal and Review Act* s 79(3) and *Application of Holland* [2008] NSWSC 251, [9] (Johnson J).

requires a 'substantial miscarriage of justice',[98] without defining what makes a miscarriage of justice 'substantial'. In NSW, there must be a question or doubt as to the convicted person's guilt. Further, as is the case with the NSW statutory review power, the South Australian and Tasmanian statutory reviews exclude cases where a person has rightly been convicted, but nevertheless is deserving of mercy.

In light of this, the prerogative of mercy occupies a distinctive role as a 'safeguard against mistakes'.[99] The statutory post-conviction review process is a means by which a determination can be made as to whether the conviction was correct 'within' the law, in order to avoid a miscarriage of justice.[100] However, the prerogative of mercy is able to look 'beyond' the law to moral questions, in order to temper justice with mercy.[101] It allows consideration of those matters that would be unavailable or improper for a court to consider, such as policy, public interest, and compassion, which may be relevant to the case but inappropriate in judicial decision-making. As Milne remarks, these considerations 'uniquely identify the fundamental place of the prerogative of mercy and its exercise as residing entirely within the province of the Crown'.[102]

IV THE CURRENT DEBATE SURROUNDING THE ROYAL PREROGATIVE OF MERCY

Much recent commentary on the royal prerogative of mercy has been critical. Caruso and Crawford in particular have argued that the prerogative of mercy is an essentially judicial power, and that vesting it in the executive branch breaches the separation of powers doctrine.[103] The mercy prerogative has also been criticised on the grounds that the granting of mercy defeats the purpose of the criminal law, which is, narrowly put, to punish offenders for wrongdoing.[104] These main criticisms seem to point to a deeper objection to the prerogative of mercy, namely that it is simply an inappropriate power for the executive to have.

98 *Criminal Procedure Act 1921* (SA) s 159(3); *Criminal Code Act 1924* (Tas) s 402A(6)(b).

99 Milne (n 4) 212, quoting *Burt v Governor-General* [1992] 3 NZLR 672, 678 (Greig J), cited with approval in *R v Home Secretary; Ex parte Bentley* [1994] QB 349, 365 (Watkins LJ for the Court).

100 See generally the 2014 'Miscarriages of Justice in the Criminal Law' thematic Issue of the *University of New South Wales Law Journal* (Volume 37 Issue 1). The articles in this issue focus on the post-conviction statutory appeals process and the miscarriage of justice for people wrongly convicted of crimes they did not commit, or where their conviction was the result of an error of law.

101 Sangha and Moles, 'Mercy or Right?' (n 4) 302 (emphasis omitted).

102 Milne (n 4) 240.

103 Caruso and Crawford (n 3) 312–13.

104 Punishment has numerous purposes: deterrence, retribution, incapacitation, rehabilitation, and restoration: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('Purposes of Sentencing'). See generally Michael S Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford University Press, 1997); David Wood, 'Retribution, Crime Reduction, and the Justification of Punishment' (2002) 22(2) *Oxford Journal of Legal Studies* 301.

A The Dangers of the Royal Prerogative of Mercy

1 Separation of Powers

Caruso and Crawford maintain that the prerogative of mercy is a judicial function, and as such is beyond the competency of the executive branch and should be removed to the judiciary. If this interpretation is correct, they argue that the prerogative of mercy breaches the separation of powers doctrine, which is a fundamental tenet of Australia's constitutionalism.[105] The separation of powers doctrine is typically traced back to Montesquieu, who stated that 'there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control'.[106] Each branch of government must pay due deference to the others and not intrude upon their functions. This does not mean that there can be no partial agency of one branch in another.[107] Montesquieu did not argue for a strict separation of those powers, but insisted upon a distribution of power in a system of checks and balances, particularly between the legislative and executive branches.[108] It is not essential that the three powers of government be in completely separate hands; rather, the *whole* power of one branch cannot be exercised by another.[109] Indeed, Australia's system of responsible government necessarily precludes a strict separation of powers.[110]

It is useful at this point to consider what judicial power actually is. The oft-cited[111] passage from *Huddart, Parker & Co Pty Ltd v Moorehead* is adopted as the classic definition:

> the words 'judicial power' used in [section] 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not begin until some

105 Caruso and Crawford (n 3) 313.

106 Charles Baron de Montesquieu, *The Spirit of Laws: Complete Edition*, tr Thomas Nugent (Cosimo Classics, 2011) 152.

107 The system of responsible government in Australia joins the legislative and executive branches via s 64 of the *Australian Constitution*. The High Court has made it clear that the judicial branch is to be separate from the legislative and executive branches: see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*') and *New South Wales v Commonwealth* (1915) 20 CLR 54. However, there are recognised exceptions to the *Boilermakers'* principle, namely: contempt of parliament; courts martial and military tribunals; administrative functions of Ch III courts; and *persona designata*: see *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 453; *Harris v Caladine* (1991) 172 CLR 84; *Grollo v Palmer* (1995) 184 CLR 348.

108 Montesquieu (n 106) 152–83.

109 Elbert P Tuttle and Dean W Russell, 'Preserving Judicial Integrity: Some Comments on the Role of the Judiciary under the "Blending" of Powers' (1988) 37(3) *Emory Law Journal* 587, 588, quoting J Madison, 'The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts' (1788) 47 *Federalist Papers*; Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30(1) *Sydney Law Review* 295, 299.

110 *Australian Constitution* ss 1, 64.

111 See, eg, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

> tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[112]

Importantly, judicial power adheres to the court, whether granted by the *Constitution*[113] or an Act of Parliament,[114] and not to the judges appointed to exercise it, contrasting with the prerogative of mercy which is exercised by the Governor or the monarch in their personal capacity. Further, this definition of judicial power, while useful, still does not clarify or exhaustively state what judicial power is. In *R v Quinn*, the High Court of Australia stated that 'no one of a list of factors is itself conclusive [of judicial power]'.[115] Indeed, 'judicial power' can be seen to operate along a spectrum, where some functions appear more or less 'judicial' in nature than others. Caruso and Crawford argue that an exercise of the prerogative of mercy involves the executive branch exercising judicial power. Their two main contentions are that the prerogative of mercy power is controlled by rules in the same manner as judicial power ('rules argument'), and that the power affects rights with finality ('finality argument').[116]

Regarding the rules argument, Caruso and Crawford argue that judicial power is a 'controlled power' insofar as 'its exercise must be based on authoritative legal materials … drawn from existing law'.[117] Likewise, they argue that the exercise of the prerogative must be guided and controlled 'by materials, rules, standards, principles and, ultimately, law'.[118]

However, their discussion focuses on the exercise of the prerogative of mercy in matters involving fresh and compelling exculpatory evidence or grounds of innocence, which arguably may be better suited to the statutory review process. This narrow scope is problematic because the prerogative of mercy is not limited to cases where the person is technically innocent. Many pardons have been granted to convicted persons where there is no doubt as to their guilt. Furthermore, this view that the prerogative is controlled by an application of rules is contrary to judicial opinions that the prerogative is a truly 'complete executive discretion',[119] 'unconfined and uncontrolled',[120] and as much shaped by public policy as it is by considerations of the law.[121] But even where government policy is not involved in a decision, the prerogative is not limited by codified rules. A decision as to whether or not to grant mercy can be guided by compassion just as much as by convention, distinguishing mercy decisions from judicial decisions which are based on an application of strict legal norms. Judicial power is authoritative because judicial

112 (1909) 8 CLR 330, 357 (Griffith CJ).
113 *Australian Constitution* s 75.
114 See, eg, *Judiciary Act 1903* (Cth).
115 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aickin J).
116 Caruso and Crawford (n 3) 319.
117 Ibid, quoting AR Blackshield, *Power in Australia: Directions of Change* (Centre for Continuing Education, Australian National University, 1981) 185.
118 Caruso and Crawford (n 3) 319–20.
119 *Re Matthews and Ford* [1973] VR 199, 201–2 (Barber, McInerney JJ and Norris AJ).
120 *Von Einem v Griffin* (1998) 72 SASR 110, 130 (Lander J).
121 *Burt v Governor-General* [1989] 3 NZLR 64, 73–4 (Greig J); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411 (Lord Diplock).

decisions follow precedent and set precedent for future disputes.[122] Exercises of the prerogative of mercy are not required to follow previous exercises of the power, and they do not limit future exercises. As such, the prerogative of mercy is not a controlled power in the same manner as the judicial power.

The second main objection is that because a pardon affects the court record, and it has the appearance, intent, and effect to exonerate, the prerogative of mercy can be classified as a judicial power.[123] However, this is incorrect for two key reasons. First, in NSW, where a person is granted mercy on the grounds that they are found to be morally and technically innocent of the crime, the prerogative of mercy can only remove the punishment for the crime, being the sentence, and not the conviction. It is only through an application to the Court of Criminal Appeal that a conviction record may be removed.[124] The Court is not required to quash the conviction, and so in this regard, the decision to grant mercy is not purporting to interfere with the courts.[125] Secondly, where the prerogative of mercy is granted to someone who is guilty of the offence, the sole effect of the decision is to remove the punishment, and therefore the conviction stands.

These contentions – that the prerogative is not controlled by rules and that its exercise does not affect judicial power – point to the fundamental nature of the prerogative: it is inherently political in nature, and therefore does not offend the separation of powers doctrine. The prerogative of mercy is not deciding a controversy between subjects, or between the subject and the State. It is not determining liability in the context of controversies between subjects. That controversy has already been decided by a court. And unlike a criminal appeal, there is no right to mercy. 'A convicted person has no legal right [to] … the exercise of the prerogative of mercy'.[126] That is not to say that the courts do not extend mercy when determining a sentence. Rather, the prerogative of mercy and pardons are 'official [acts] by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction'.[127] Such acts are beyond the competency of a court and are 'a matter for the Executive Government'.[128] In *R v Vachalec*, Street CJ said:

> This Court exercises judicial power; it has no power or authority to give administrative directions regarding the treatment of prisoners. Nor has it power or authority by administrative order to change the character or concomitants of

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122 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 377 (French CJ, Hayne, Kiefel, Bell and Keane JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

123 Caruso and Crawford (n 3) 326–9.

124 *Appeal and Review Act* ss 84–5.

125 For Commonwealth offences, an absolute pardon will have the affect such that the person is taken to have never been convicted. This is limited to persons who have been found to have been wrongly convicted, and therefore is not available to persons who are granted pardons even though they are guilty of the offence. In those circumstances, the conviction will stand: see *Crimes Act 1914* (Cth) ss 85ZR, 85ZS.

126 *De Freitas v Benny* [1976] AC 239, 247 (Lord Diplock).

127 Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford University Press, 1989) 4.

128 *R v Murray* [2000] NSWCCA 331, [9] (Ireland AJ, Heydon JA agreeing at [1] and Smart AJ agreeing at [2]).

> sentences or to bring about total or qualified release of persons in custody. That power and authority resides in the hands of the Executive Government.[129]

Indeed, if the prerogative of mercy is purely an executive power, then placing it in the hands of the judiciary could offend the *Kable* state incompatibility doctrine.[130] But that discussion is beyond the scope of this article.

2 The Purpose of the Criminal Law

Some of the opposition to the prerogative of mercy, as a political power, is informed by political principles of crime and justice.[131] In a speech to the Legislative Assembly regarding the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 (NSW), the Hon Chris Hartcher said that

> [t]he Government has given itself, or the courts, the power to impose a sentence of life imprisonment but retains the power to release that person at any time under the prerogative of mercy … On the Premier's advice the Governor may, under the prerogative of mercy, even when the person has been sentenced to life imprisonment, release that person the very next day. So much for the Premier's promise about getting tough on crime and tough on the causes of crime … This is a classic Bob Carr confidence trick and is exposed as such.[132]

The statement crystallises a number of objections. It points to the political will for a 'tough on crime' approach to the criminal law and argues that the prerogative of mercy undermines confidence in the criminal law. It raises the desirability of maintaining consistency and coherence as 'core values of a properly functioning legal system',[133] assuming that this requires that those who create and enforce laws must treat each offender as relevantly the same. This echoes Andrew Novak's analysis of utilitarian and retributive criticisms of the virtue of mercy: 'if a pardon is just, the law must be wrong; if the law is just, a pardon must be wrong … if God is merciful to some sinners, why not to all whose sins are similar?'[134]

The prerogative of mercy applied in some exceptional cases does not necessarily reflect that the law is wrong or unjust. Rather, mercy is simply part of the criminal justice landscape, allowing individuated justice. Not all cases

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129 (1981) 1 NSWLR 351, 353–4, cited in *R v Murray* [2000] NSWCCA 331, [9] (Ireland AJ, Heydon JA agreeing at [1] and Smart AJ agreeing at [2]).

130 The High Court of Australia established a restriction on the vesting of non-judicial power in state courts capable of exercising federal judicial power: *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. Caruso and Crawford are aware of this, in part. They argue that because the post-conviction statutory review process is an exercise in judicial power, the Court would be breaching the *Kable* doctrine if it undertook this review at the behest of the executive: see generally Caruso and Crawford (n 3) 331–8. However, the prerogative of mercy presents an even more fundamental problem: it is entirely executive and does not involve courts in the process at all. How the *Kable* principle applies to court processes differs between the Commonwealth and state levels insofar as the *Australian Constitution* and the *NSW Constitution* do not require the separation of powers to the same extent. In the context of NSW, the fundamental criterion is whether exercising the prerogative of mercy would require the Supreme Court to act in a way that is inconsistent with the traditional court process. Arguably, it would.

131 Azize (n 4) 2.

132 New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2001, 16374 (Chris Hartcher). Note that Bob Carr was Premier of NSW at the time.

133 Sangha and Moles, 'MacCormick's Theory of Law' (n 91) 243.

134 Novak, *Comparative Executive Clemency* (n 35) 3, referring to philosophical questions raised by Cesare Beccaria, and Saint Anselm of Canterbury.

involving the same offence should be treated the same. Every offender, and the circumstances surrounding the offence, is different. Consistency in the criminal justice system is desirable, but applied absolutely it may result in injustice. For instance, consistency and toughness on crime manifested in mandatory sentencing, or treating every offender the same, seems to ignore that there are many different aims of punishment.

As discussed in *Veen v The Queen [No 2]*, the purposes of punishment are various. These include: protection of society, deterrence, reform, retribution,[135] and even rehabilitation and diversion from the criminal justice system.[136] This is because the criminal justice system is about more than just punishing offenders to achieve justice. Discussing mercy in sentencing, Chief Justice Spigelman noted that the 'requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. Specifically, the requirements of justice, in the sense of just desserts [sic], and of mercy, often conflict. Yet we live in a society which values both justice and mercy'.[137] They are both important objectives.[138] Approaching punishment such that consistency is the sole objective, absent the concept of mercy, can create a punishment system that is too harsh.

Mercy can be implemented to offset that harshness where appropriate.[139] Contradicting Chief Justice Spigelman's contention that justice and mercy can at times appear to be incommensurable and inconsistent with one another, mercy is oftentimes necessary for justice by considering the intrinsic and individual worth of offenders.[140] It is true that there is a desire for legal certainty in criminal law, but this does not necessarily equate with a strict one-size-fits-all approach to criminal justice. Courts are typically able to exercise discretion in sentencing by determining what may be the appropriate punishment in each case on an individual basis. In this way, courts are able to exercise their discretion in giving some offenders a tougher sentence, and other offenders a more lenient sentence. While offenders are charged for the offence, the sentence reflects both the offence and the individual offender.

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135 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ). Their Honours noted that 'sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment'.

136 New South Wales Law Reform Commission, *Sentencing* (Report No 139, 2011) 35–6.

137 Chief Justice JJ Spigelman, 'Judging Today' (Speech, Local Courts of NSW 2003 Annual Conference, 2 July 2003) 72–9 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2003.pdf>.

138 Chief Justice JJ Spigelman, 'New Approach to Criminal Sentencing' (Speech, 12 October 1998) 12–13 <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1998.pdf>.

139 Glen A Ishoy, 'Reassessing the Purpose of Punishment: The Roles of Mercy and Victim-Involvement in Criminal Proceedings' (2014) 33(1) *Criminal Justice Ethics* 40, 40–1, citing Rachel E Barkow, 'The Ascent of the Administrative State and the Demise of Mercy' (2008) 121(5) *Harvard Law Review* 1332; Carol S Steiker, 'Murphy on Mercy: A Prudential Reconsideration' (2008) 27(2) *Criminal Justice Ethics* 45; Andrew Brien, 'Mercy Within Legal Justice' (1998) 24(1) *Social Theory and Practice* 83. Ishoy considers the application of mercy by a judge to be problematic, and recommends a re-evaluation of punishment policy instead. This article agrees with Ishoy on these two points, but qualifies this insofar as arguing that mercy should be retained as an option available to the executive, rather than the judiciary.

140 EL Muller, 'The Virtue of Mercy in Criminal Sentencing' (1993) 24(1) *Seton Hall Law Review* 288, 346.

In principle, then, we may accept an appeal to mercy and individuated circumstances in sentencing. However, the sentencing process itself does not always allow for this, meaning the prerogative of mercy can be especially important. Two areas of criminal law illustrate this dilemma, and subsequent potential for the prerogative: first, mandatory sentencing or life without parole, where judicial discretion is removed; and second, appeals for compassionate early release on parole for the ill and aged. Both mandatory sentencing and compassionate early release on parole are beyond the jurisdiction of the courts, and outside the scope of the statutory review powers.

In 2011 in the Northern Territory, 19-year-old Zak Grieve was involved in the planning of the murder of Ray Nicefero. On the night that the murder was to take place, Grieve indicated his unwillingness to continue with the plan, and pulled out. Four people were convicted of the homicide, including Grieve, who was convicted of murder for his part in the initial planning stages, under the principle of 'extended common purpose'.[141] Grieve was sentenced to a mandatory non-parole period of 20 years. In remarks handed down at Grieve's sentencing, Mildren J acknowledged that Grieve's degree of criminality was considerably less than that of his co-accused, and that Grieve was otherwise of good character and unlikely to reoffend. However, without the power to lessen his sentence, Mildren J recommended that Grieve's case was suitable for the prerogative of mercy.[142] In an interview, Mildren J said that he felt 'very sad and disappointed that the [judicial] system is left powerless to do anything about it. Grieve was the one who was the least to blame. By any moral standard, anyway'.[143] In 2017, a petition was organised by Sydney's Indigenous Social Justice Association to free Grieve and abolish mandatory sentencing,[144] and Grieve's mother applied for the prerogative of mercy in September 2017.[145] On 19 December 2018, the Administrator of the Northern Territory Ms Vicki O'Halloran, acted on the advice of the Executive Council and reduced the non-parole period of Grieve's sentence from 20 years to 12 years. Grieve will be eligible for release in 2023.[146]

141 See *Criminal Code Act 1983* (NT) sch I s 12, where a person who aids, counsels, or procures another to commit and offence may be charged with committing the offence, and a finding of guilt of counselling or procuring the commission of the offence entails the same consequences as a finding of guilt of committing the offence.

142 *Grieve v The Queen* [2014] NTCCA 2, [36] (The Court).

143 Dan Box, 'Fixed Terms a "Silly Nonsense"', *The Weekend Australian* (online, 30 August 2017) <https://www.theaustralian.com.au/news/investigations/the-queen-and-zak-grieve/zak-grieve-fixed-terms-a-silly-nonsense-says-judge/news-story/05b71bd9121303fbfc446dcb15d320a6>.

144 The petition had 2,618 signatures at the time it was closed: 'Free Zak Now! The NT Can Pardon Zak Now. Stop the Mandatory Sentencing in the NT!', *change.org* (Web Page) <https://www.change.org/p/the-new-northern-territory-government-justice-for-zak-grieve-free-zak-now-mandatory-sentencing-in-the-nt-is-perpetuating-injustice>.

145 Amos Aikman, 'Grieve's Mercy Plea Gets Closer', *The Australian* (online, 4 September 2017) <https://www.theaustralian.com.au/news/investigations/the-queen-and-zak-grieve/zak-grieves-mercy-plea-moves-a-step-closer/news-story/14a52030409c063fcf7e5cd92cfb98a5>.

146 Ella Archibald-Binge, 'Zac Grieve to be Released Early from NT Prison after Successful Mercy Plea', *NITV* (online, 20 December 2018) <https://www.sbs.com.au/nitv/article/2018/12/20/zak-grieve-be-released-early-nt-prison-after-successful-mercy-plea>.

In 1988, Bronson Blessington was 14 years old when he participated in the abduction, sexual assault, and murder of Janine Balding.[147] Despite his status as a child, and psychiatric evidence that Blessington had the mental capacity of a 9 or 10-year-old,[148] he was tried as an adult and convicted.[149] He received a life sentence, and a non-release recommendation was made (which was not binding). The law in force at the time of the offence provided that anyone sentenced to life imprisonment could, after 8 years, apply for a non-parole period to be set.[150] However, as a result of retrospective 'cement laws',[151] which specifically targeted Blessington and nine other prisoners, Blessington was stripped of any possibility of parole.[152] Sentencing children to life without parole or release is prohibited by articles 37(a)–(b) of the *Convention on the Rights of the Child*.[153] A life sentence for a child can be disproportionately lengthy when compared to a life sentence imposed on an adult, and life sentences have been found to 'have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment'.[154] The former Director of Public Prosecutions (NSW), Nicholas Cowdery, remarked that Blessington's sentence of life without parole is 'deplorable', and that the imprisonment of a juvenile for an indefinite term is 'objectionable'.[155] In 2010, the United Nations Human Rights Committee found that Australia was in breach of international law in Blessington's case. An application for the prerogative of mercy to be exercised in Blessington's case is still under consideration.[156]

Both of these cases, of Grieve and Blessington, demonstrate that taking a hard line, 'tough on crime' stance can produce an unfair outcome, and a violation of people's rights in some exceptional cases. Whilst Blessington's case involved a rare enactment of retrospective legislation, Grieve's case demonstrates the issues that can arise with mandatory sentencing, which is all too common. Cowdery

147 This case received considerable media coverage and sparked public outrage due to the horrific nature of the crime.

148 Wendy O'Brien and Kate Fitz-Gibbon, '"Cemented in Their Cells": A Human Rights Analysis of Blessington, Elliott and the Life Imprisonment of Children in New South Wales' (2016) 22(1) *Australian Journal of Human Rights* 111, 115.

149 Ibid 114.

150 *Crimes Act 1900* (NSW) s 463(1), repealed by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) s 5.

151 Referring to the 1997 amendments of the *Sentencing Act 1989* (NSW) (now repealed), and the 2001 and 2005 amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW): see O'Brien and Fitz-Gibbon (n 148) 112.

152 O'Brien and Fitz-Gibbon (n 148) 112.

153 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

154 JE Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Report No A/HRC/28/68, 2015) [74], cited in O'Brien and Fitz-Gibbon (n 148) 112, 113.

155 Tom Allard, 'Bronson Blessington: Former DPP Nicholas Cowdery Backs Mercy for Janine Balding Killer', *Sydney Morning Herald* (online, 5 February 2016) <https://www.smh.com.au/national/nsw/bronson-blessington-former-dpp-nicholas-cowdery-backs-mercy-for-janine-balding-killer-20160205-gmmrfn.html>.

156 'Bronson Blessington's Mercy Petition Still with Attorney General', *The Daily Advertiser* (online, 8 March 2016) <https://www.dailyadvertiser.com.au/story/3776874/blessington-petition-still-being-considered/>.

argues that mandatory sentencing for serious crimes is problematic and that 'mandatory sentencing can lead to "results that would be plainly unreasonable and unjust"'.[157] Adrian Hoel and Karen Gelb also argue that mandatory sentencing has repeatedly failed to meet its aims, and that the imposition of a mandatory sentence 'guarantees only a very superficial, artificial consistency and one that trades its subtlety for simplicity'.[158] A critic may rightly argue that the goal should be repealing mandatory sentencing laws, leaving judges with a wider discretion in sentencing. And yet, the use of mandatory sentencing in Australia is increasing.[159] Given the potential injustices that this creates, the prerogative of mercy's ability to temper justice in cases where mandatory sentencing laws are particularly harsh continues to be relevant.[160]

The continuing relevance of the prerogative of mercy is not pinned to mandatory sentencing alone, however. The ill health or old age of an offender may in some circumstances suggest a need for compassion and mercy on the part of the executive, since these factors 'will generally have little (if any) relevance to sentencing'.[161] In *GS v The Queen*, N Adams J observed that it was not uncommon for the NSW Supreme Court to hear applications for leave to appeal against sentences on the grounds of old age or serious illness, which can be exacerbated by incarceration.[162] However, her Honour determined that whilst the Court 'has sympathy for applicants in such circumstances … it is not for this Court to intervene in a sentence that is otherwise appropriate and not affected by error in order to give an ill or elderly applicant hope of release before his or her death'.[163]

Similarly, in *R v Vachalec*,[164] the prisoner appealed to the Court of Criminal Appeal to be released from prison, arguing that he was not being cared for correctly by the prison authorities, given his critical health condition.[165] Street CJ rejected the appeal, stating that the Court could only consider legal grounds of appeal.[166] These cases highlight that the courts distinguish their functions from those of the executive.[167]

Recent studies have shown an increase in the representation of older people in prison populations, disproportionate to the number of older people in the general

157 Nicholas Cowdery, 'Mandatory Sentencing' (Speech, Sydney Law School Distinguished Speakers Program, 15 May 2014) <https://www.ruleoflaw.org.au/wp-content/uploads/2014/05/Dist.-speakers-15-May-2014-Mandatory-Sentencing-paper1.pdf>, quoting *Sillery v The Queen* (1981) 180 CLR 353, 357 (Gibbs CJ).

158 Adrian Hoel and Karen Gelb, 'Sentencing Matters: Mandatory Sentencing' (Research Paper, Sentencing Advisory Council, 7 August 2008) 21.

159 See Cowdery (n 157).

160 Azize (n 4); Milne (n 4); Sangha and Moles, 'Mercy or Right?' (n 4).

161 *Cameron v The Queen* [2017] NSWCCA 229, [13] (Basten JA).

162 [2016] NSWCCA 266, [107].

163 Ibid.

164 (1981) 1 NSWLR 351.

165 He had swallowed acid as a child and was admitted to hospital over 100 times for oesophageal obstruction.

166 *R v Vachalec* (1981) 1 NSWLR 351, 353–4.

167 Ibid (Street CJ).

population.[168] Trotter and Baidawi argued that this increase 'presents significant implications for planning, policy and service delivery across the correctional system'.[169] In particular, older prisoners report an increase in issues including: coping with terminal illness and chronic disease, disability, and pain management; vulnerability to victimisation by other, younger prison inmates; and depression, dementia, and other psychological problems. People with dementia in prison often have difficulties in following rules and caring for themselves, such as eating and maintaining personal hygiene.[170] None of these factors amount to legal grounds for appeal.

Basten JA remarked in *Cameron v The Queen*, '[o]ld age, illness and decrepitude may provide factors relevant to the executive power of early release based on mercy'.[171] This is because, as Rothman J observed in *Anastasiou v R*, 'sympathy is not the test that this Court must apply. The Court must apply principle … sympathy is the province of the Executive Government, either through the Parole Authority or the grant of mercy; not by the grant of appeal'.[172] Evidently, the consideration of compassionate grounds for early release is a purely administrative matter.

Even after an offender has died, the prerogative of mercy can serve to restore the reputation of the offender or reflect changing attitudes to the crime. This was highlighted in the case of Dr Alan Turing, the English scientist who was instrumental in breaking the 'Enigma' code used by German forces in World War II, thus accelerating the end of the war. In 1952, Dr Turing was convicted of homosexual activity, was sentenced to chemical castration, and was stripped of his security clearance. Following a long public campaign to clear his name, Dr Turing was granted a posthumous free royal pardon under the prerogative of mercy by the Queen on 24 December 2013. United Kingdom Justice Secretary Chris Grayling said that Dr Turing's great contribution to saving the lives of thousands of people in the war had been 'overshadowed by his conviction for homosexual activity, a sentence we would now consider unjust and discriminatory and which has now been repealed … Dr Turing deserves to be remembered and recognised for his fantastic contribution to the war effort and his legacy to science. A pardon from the Queen is a fitting tribute to an exceptional man'.[173] This case further demonstrates the difference between the prerogative of mercy and the judicial power. In Dr Turing's case, he did commit a crime according to the laws in force

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168 Chris Trotter and Susan Baidawi, 'Older Prisoners: Challenges for Inmates and Prison Management' (2015) 48(2) *Australian & New Zealand Journal of Criminology* 200; Efty Stavrou, 'Changing Age Profile of NSW Offenders' (Bureau Brief Issue Paper No 123, NSW Bureau of Crime Statistics and Research, March 2017); Susan Baidawi et al, 'Older Prisoners: A Challenge for Australian Corrections (Trends & Issues in Crime and Criminal Justice Paper No 426, Australian Institute of Criminology, August 2011).

169 Trotter and Baidawi (n 168) 202.

170 Chris Angus, 'Older Prisoners: Trends and Challenges' (E-brief No 14/2015, NSW Parliamentary Research Service, October 2015) 11.

171 [2017] NSWCCA 229, [13].

172 [2010] NSWCCA 100, [34], [37].

173 United Kingdom Ministry of Justice, 'Royal Pardon for WW2 Code-Breaker Dr Alan Turing' (Press Release, 24 December 2013) <https://www.gov.uk/government/news/royal-pardon-for-ww2-code-breaker-dr-alan-turing>.

in 1952. This is quintessentially a matter of an executive pardon, rather than a judicial determination of criminal liability. There is no judicial decision to be made in his case, as his actions remain criminal. In the United Kingdom case of *R v Secretary, State for the Home Department; Ex parte Bentley*, the Court remarked that the prerogative of mercy is 'capable of being exercised in many different circumstances and over a wide range',[174] operating as a 'constitutional safeguard against mistakes',[175] even in those cases where the convicted person is guilty of the crime but nonetheless 'should have been reprieved'.[176]

There is no right or entitlement to the prerogative of mercy, and not all offenders are deserving of mercy. Mercy can provide a reprieve where the punishment, although appropriate in most cases, would be unjust when applied to a specific offender. It can also be of comfort to a convicted person's family after the offender has already died. The same prerogative of mercy that was critical in saving people from the executioner, that was fundamental in the development of NSW as a penal colony, continues to be relevant in the current system with the harsh consequences of mandatory sentencing and inability to grant parole in deserving cases.[177] As Chief Justice Spigelman observed, whilst justice and mercy may appear at odds, mercy has value in the criminal law,[178] such that the executive can achieve justice by tempering it with mercy.

B The Virtue of the Royal Prerogative of Mercy

Even accepting that the prerogative of mercy does not offend the separation of powers, and achieves the purpose of the criminal law to do justice, there is still a seemingly deeper theoretical objection to the prerogative of mercy: that it is simply an inappropriate power for the executive branch to possess, being 'contrary to fundamental principles of constitutional democracy'.[179] Beyond the practical applications of the prerogative of mercy just discussed, there is also a theoretical basis for supporting the existence and survival of the prerogative of mercy as an executive power.

Carolyn Strange said that

> [s]ecular analysts would do well to learn from discussions of justice in religious circles, where mercy is not subject to such neglect. Judeo-Christian philosophers (among others) value the personal virtues of forgiveness and compassion, and they are less prone than criminal justice scholars to draw sharp distinctions between justice and mercy … in the Judeo-Christian tradition, mercy is a virtue hinged to the unshakeable principle of justice.[180]

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174 [1994] QB 349, 363 (Watkins LJ for the Court).

175 Ibid 365.

176 Ibid. Note that in 1998, the Criminal Cases Review Commission referred the matter to the Court of Appeal (Criminal Division) under s 9 of the *Criminal Appeal Act 1995* (UK), and Bentley's conviction was quashed on the basis that the verdict had been unsafe: *R v Bentley (Deceased)* [1999] Crim LR 330.

177 Novak, *Comparative Executive Clemency* (n 35) 195.

178 Spigelman, 'Judging Today' (n 137).

179 Caruso and Crawford (n 3) 312.

180 Carolyn Strange, 'Introduction' in Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion* (UBC Press, 1996) 3, 4.

The prerogative of mercy was seen as 'the brightest jewel in the British crown'.[181] It bolstered the criminal justice system by serving 'both as a brake on the sheer number of public executions (but not on the deterrent effect of a liberally applied bloody code) and as a regular demonstration of the king's concern for even the lowliest and most dysfunctional of his subjects'.[182] Taking a theoretical, rather than a purely doctrinal approach to government power and decision-making offers insights into the continuing role of the prerogative generally, and the mercy prerogative in particular.

Drawing from Dicey, Locke, and Blackstone, and their related but distinct analyses of the royal prerogative powers, Thomas Poole contends that in all of these formulations, the prerogative powers are an expression of the imperative authority of a monarch.[183] The monarch is necessarily the ultimate decision-maker.[184] The 'style of decisive leadership it sustains'[185] continues to draw upon the ideal of kingly rule, which survives today. Poole is critical of characterising it as a species of special power distinct from mere formal processes and bureaucracy, and the procedural requirements of government. He questions whether there is any need for continued deference to this type of power, or whether the prerogative should be demystified and simply be grouped with the rest of the executive powers.[186]

Nevertheless, Poole observes that recent case law in the United Kingdom demonstrates that the courts recognise that the prerogative continues to be a special category of executive power that evokes a special authority to which the courts should defer in appropriate cases.[187] This reflects not simply a historical curiosity, but an understanding that the monarch (or his or her representative and executive officers) exercises a valid form of rule, characterised by the task of seeking not only adherence to law, but the flourishing of society through protecting the individual and the common good.[188]

While many may find the role of a monarch or the governors as representatives of the Crown merely ceremonial, if not anachronistic, it is worth exploring for reasons of constitutionalism. Other commentators, referring to the personal powers of the monarch or governors, see this role as necessary for upholding constitutional principles.[189] The powers of the Crown operate as a kind of umpire, ensuring that

181 Edward Christian, *Charges Delivered to Grand Juries in the Isle of Ely* (T Clarke and Sons, 1819) 283, quoted in VAC Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (Oxford University Press, 1994) 200.

182 Steve Poole, *The Politics of Regicide in England, 1760–1850* (Manchester University Press, 2000) 33.

183 Thomas Poole, 'The Strange Death of Prerogative in England' (2018) 43(2) *University of Western Australia Law Review* 42, 53.

184 Ibid 53–4.

185 Ibid 54.

186 Ibid 57, 65.

187 Ibid 65.

188 See John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley Blackwell, 2013) 251, 253–4; John Milbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (Rowman and Littlefield International, 2016) 211, 216.

189 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Oxford University Press, 1991) 47.

democratic processes follow not only justice according to law, but fairness too.[190] The monarch can then operate as an inverse check on government, acting as the 'ultimate constitutional watchdog for protecting parliamentary democracy and the constitution'.[191] This is not an argument in favour of an overly active monarch or governor who may jettison constitutional practices on a whim. Rather, it suggests that a monarch and her representatives should exercise independent discretion only when necessary to protect constitutional government, or to do what is right according to their wisdom and duty to do good.

All contemporary governments are based on a 'one person at the top' model of governance. Constitutional monarchies in particular adopt this model not only for symbolic retention of a monarch, but also 'for reasons of final co-ordination, necessary legal innovation and final decision-making'.[192] According to Paul Kahn, the role of personal judgment and decision-making is vital to legal theory. Following Carl Schmitt, he discusses this through the prism of sovereignty, meaning the exercise of an exception in distinction to the law that, as with the central case of a revolution, nevertheless grounds a legal order.[193] Schmitt considered the exception to be the continuation of the sacred or the miraculous in modern politics, where the sovereign constitutes the state itself.[194] Both Kahn and Schmitt problematically associate this exception beyond or at the borders of law – the decision of the sovereign – with the exercise of will.[195] This means that it can turn into the self-referential assertion of one's own authority, secured ultimately by one's success – what is 'good' or 'right' is simply that which is willed by the sovereign, even if this results in gross violations of human rights.[196] As such, we can only agree with this view in part, provided the will of the sovereign is bound by something more than just legal authority.

Justice is something more than simply the strict application of law, which is the role of the judge.[197] It may require the exercise of a decision, vested in a person. The personhood of the sovereign and their ability to decide in their personal capacity, allows the sovereign to find a solution according to wisdom, which can incorporate charity or mercy in a way that an institution never could.[198] Max Weber said that the increasing bureaucratisation and institutionalisation of administrative systems dehumanises those systems, 'eliminating from official business love, hatred, and all purely personal, irrational and emotional elements which escape

190 Milbank and Pabst (n 188) 217.

191 George Winterton, 'The Constitutional Position of Australian State Governors' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 274, 295 (emphasis omitted), citing Tasmanian Department of Education and the Arts, *The Role of the Governor of Tasmania* (1990) 9. See also Milbank and Pabst (n 188) 216.

192 Milbank (n 188) 252.

193 Paul W Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press, 2011) 24, 34.

194 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr George Schwab (University of Chicago Press, 2005) 36–7.

195 Kahn (n 193) 50.

196 Ibid 17–19.

197 Ibid 24, 26.

198 Ibid 37, drawing upon FW Maitland, *Equity: Also the Forms of Action at Common Law* (Cambridge University Press, 1910) 5.

calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue'.[199] Removing the personal from the law is valued for its ability to achieve efficiency and certainty. But Weber argues that focusing on procedure rather than outcomes 'is enough to drive one to despair … and the great question is … what can we oppose to this machinery in order to keep a portion of mankind free from this parcelling-out of the soul?'[200] The personal, and the decision, are virtues. The absence of them is not.

Importantly, the decision-maker (here, the monarch or the Governor) is not simply exercising his or her will. Rather, 'the purpose of a "final" authority is to serve something other or higher than itself'.[201] The monarch or sovereign comes to 'stand in for the whole: Parliament, but also, symbolically, the entire tradition or the continuity and protection of a quest for the good in our shared political and civic life'.[202] Indeed, this is exemplified in the oaths taken by the monarch and her representatives, forming a 'covenant with the people'.[203]

At least since the eighth century, the monarchs of England took an oath which bound them in their exercise of their powers.[204] The Oath of Governance not only empowers the incoming monarch to assume the throne, it also requires that the powers of the Crown are exercised in accordance with the terms of the oath, in pursuit of justice and mercy in all decisions before God.[205] Sir William Blackstone said that the Oath of Governance

> is the most indisputably a fundamental and original express contract … in the king's part of this original contract are expressed all the duties that a monarch can owe to his people; viz to govern according to law; to execute judgment in mercy: and to maintain the established religion.[206]

In taking the Oath of Governance upon her coronation, Queen Elizabeth II solemnly promised to 'cause Law and Justice, in Mercy, to be executed in all [her] judgements'.[207] Section 9E of the *Constitution Act 1902* (NSW) requires the Governor of NSW to take the Oath of Allegiance (swearing to bear true allegiance to the Queen).[208] The Governor is also required to take the Oath of Office, by which

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199 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed Guenther Roth and Claus Wittich, tr Ephraim Fischoff et al (Bedminster Press, 1968) vol 3, 975.

200 JP Mayer, *Max Weber and German Politics: A Study in Political Sociology* (Faber & Faber, 2nd ed, 1946) 127–8, quoting a speech delivered by Weber proprietary to the Verein für Sozialpolitik (Association for Social Policy) in 1909.

201 Joel Harrison, 'Sovereignty' in Nicholas Aroney and Ian Leigh (eds), *Christianity and Constitutionalism* (Cambridge University Press, forthcoming) 20.

202 Ibid 21–2.

203 Milbank and Pabst (n 188) 196. See also at 206; Harrison (n 201).

204 MRLL Kelly, 'Historical Review' (2002) 27(1) *Australian Journal of Legal Philosophy* 156, 164.

205 See Roger Trigg, 'Religion in the Public Forum' (2011) 13(3) *Ecclesiastical Law Journal* 274, 279.

206 Sir William Blackstone, *Commentaries on the Laws of England* (University of Adelaide, rev ed, 2014) bk 1 ch 6.

207 Oath of governance taken by Queen Elizabeth II upon her coronation on 2 June 1953; see the order in J Arlott, *Elizabeth Crowned Queen, the Pictorial Record of the Coronation* (Odhams Press, 1953) 53–4, cited in MRLL Kelly, 'The Queen of the Commonwealth of Australia' (2001) 16(1) *Australasian Parliamentary Review* 150, 150.

208 Section 9E allows the incumbent Governor to make an Affirmation instead of an Oath.

the Governor swears to well and truly serve the Queen and 'to do right to all manner of people'.[209]

This oath-taking points to the sovereign and his or her representatives acting so as to embody and enact some conception of the good – what is right and just for this political order, as required of them.[210] Sir Peter Cosgrove, former Governor-General of Australia, said that the role of a Governor-General is to 'reflect the community to itself', and all tasks and decisions in connection with that role should be driven by 'equity, compassion, generosity, tolerance and energetic ambition'[211] in pursuit of the common good. In this case, the quest for what is good is crystallised in the prerogative of mercy.

In *R v Cosgrove*, Morris CJ remarked on how, more than simply producing legal ramifications, a pardon is able to provide a second chance:

> the effect of [a] pardon … is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity.[212]

Although a pure common law discretionary power, the prerogative of mercy is not just an arbitrary monarchical right of grace and favour.[213] Rather, it is a valuable mechanism that allows the government to consider policy, public interest, individual circumstances, and the overall common good when deciding a mercy case. In developing colonies like NSW, it freed prisoners not simply for use as a labour force,[214] but also led to many prisoners becoming land owners, farmers, architects, and even officers. With the global decline of the death penalty,[215] and the increasing use of the appeal courts,[216] the frequency with which the prerogative of mercy is used for serious crimes has also declined. As the criminal justice system continues to change, the situations where an exercise of the prerogative of mercy is appropriate will also change. The prerogative continues to serve as a 'constitutional safeguard against mistakes',[217] and it will be necessary for the executive to determine in which cases the prerogative should be exercised, and what form the pardon should take.[218]

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209 This mirrors the Oath of Office taken by a person appointed as the Governor-General of the Commonwealth, as required by the *Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia*, 21 August 2008, in Commonwealth, *Gazette: Special*, No S 179, 9 September 2008. These replaced the *Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia* of 21 August 1984, in Commonwealth, *Gazette: Special*, No S 334, 24 August 1984.

210 Harrison (n 201) 22–3.

211 Sir Peter Cosgrove, 'Address to the Joint Sitting of Parliament on the Occasion of the Swearing in of the Governor-General' (Speech, Parliament House, 28 March 2014) 1–2 <https://old.gg.gov.au/speech/address-joint-sitting-parliament-occasion-swearing-governor-general>.

212 [1948] Tas SR 99, 105–6, quoting Blackstone.

213 Milne (n 4) 217.

214 Convicts were rewarded for their labour by reductions in their sentence duration: see Newman (n 48) 4.

215 The last person to be executed in Australia was Ronald Ryan in 1967 for shooting a prison guard during an escape attempt. See also Novak, *Comparative Executive Clemency* (n 35) 5–6.

216 *Mallard v The Queen* (2005) 224 CLR 125, 128–9 [4] (Gummow, Hayne, Callinan, and Heydon JJ); *DPP (ACT) v Eastman* (2002) 118 FCR 360, 384 (Madgwick J).

217 *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349, 365 (Watkins LJ).

218 Ibid.

V THE NEED FOR TRANSPARENCY IN EXERCISING THE ROYAL PREROGATIVE OF MERCY

ATH Smith once argued that if the prerogative of mercy is to be tolerated, great care is necessary to ensure that the power is not abused.[219] It is true that there have been some objectionable exercises of the prerogative of mercy in NSW. In 1875, the collapse of an elected government was attributed to Governor Sir Hercules Robinson exercising the prerogative of mercy in the case of Frank Gardiner.[220] In 1902, Attorney General BR Wise arranged for the early release of a moneylender, to whom Wise was believed to be indebted.[221] And in 1987, Cabinet Member Rex Jackson was found guilty of conspiracy to accept bribes for the improper release of prisoners.[222] There have been notable controversial pardons in other countries as well. In the United States, President Ford granted a presidential pardon to Richard Nixon in connection with the coverup of the Watergate burglary, infuriating many Americans, and possibly costing President Ford the 1976 election.[223] President Bill Clinton drew heavy criticism for granting clemency to long-time friend and Democratic Party donor Marc Rich, for evading over $48 million in taxes.[224]

Nevertheless, in all of these cases, the abuses of executive power or position were brought to light, and resulted in either legal or political consequences. This leads to an argument for transparency. If the prerogative of mercy were to become more transparent, this would increase public confidence in the power and ensure the executive is more accountable to both the public and Parliament. Indeed, Joseph Azize suggests that frequent examination of the prerogative of mercy should lead to 'it be[ing] more widely invoked', rather than seeing its use decline.[225]

The High Court of Australia in the case of *Osland v Secretary to the Department of Justice* noted that whether the prerogative of mercy will be exercised in relation to a person who was convicted of a serious crime (in this case, murder) 'engages the public interest at a high level of importance'.[226] This is particularly so because the prerogative of mercy can '[throw] up opinions about

219 ATH Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398, 400.

220 Woods (n 45) 25 n 19. Gardiner was a notorious bushranger, who had been sentenced to 32 years hard labour. The Governor, responding unilaterally to petitions, released Gardiner, subject to exile. The resulting parliamentary crisis resulted in Henry Parkes being replaced as Premier by John Robertson.

221 Ibid, citing HV Evatt, *Australian Labour Leader: The Story of WA Holman and the Labour Movement* (Angus and Robertson, 1942) 150 ff.

222 Ibid 25.

223 Novak, 'Transparency and Comparative Executive Clemency' (n 41) 821.

224 Ibid.

225 Azize (n 4) 2.

226 (2010) 241 CLR 320, 345 [47] (French CJ, Gummow and Bell JJ).

the fairness and authority of the criminal justice system … and asserted inadequacies in the law'.[227]

In November 2018 the NSW Attorney-General Mark Speakman announced the new policy that petitions for the exercise of the prerogative of mercy or statutory review should be a matter of public record in the interests of open justice. In a media release announcing the new policy, the Attorney-General said that 'in modern-day NSW it's time to lift the veil of mystery … [and] make NSW the first jurisdiction in Australia to regularly share these details with the community'.[228]

Andrew Novak notes that the pardons process in the United States is slowly opening up to greater administrative scrutiny under the Freedom of Information ('FOI') legislation in much the same way as was recommended by the High Court in *Osland*,[229] and now the NSW Government. Novak identifies other countries which have also engaged in reporting and publishing pardon decisions. In Belize, an annual report is provided to the Prime Minister and is subject to consideration by the National Assembly. In Zimbabwe, pardons are published in the government gazette. In 27 states in the United States, the Governor is required to report pardons to the state legislature.[230]

However, as Novak notes, there is a danger in making details of mercy applications public. The privacy of not only offenders, but of victims, can be compromised, and it may further politicise the process, whereby applications are rejected to maintain the appearance of being 'tough on crime' in particular, well-known cases.[231] The newly announced policy of the NSW executive to specify the number of applications received and for what offences, without identifying the parties involved will address this concern. In the same way that identities are redacted for cases involving children or sexual assault offences, the identities of offenders applying for the prerogative of mercy should be redacted where it is in the public interest to do so. Each decision will be published on the website of the NSW Department of Justice, and this article argues that it should also be provided to Parliament to highlight potential concerns with current legislation (such as mandatory sentencing). If the types of cases and special circumstances considered in each case are reported, along with the outcomes of the decisions, the public can gain a greater insight into the prerogative of mercy power and the process of its exercise, without compromising privacy.

Public scrutiny of the office of a Governor or Governor-General 'helps to make it accountable to the people'.[232] This will be extended to the exercise of the prerogative of mercy. The aims of responsible government can be better achieved by importing a level of scrutiny into the decision-making process. Increased transparency will reaffirm a public commitment to do right on the part of the sovereign and her representatives and invite another opportunity to be responsible to the people. Seeing the exception can instil a sense of a collective commitment

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227 Ibid 345 [48] (French CJ, Gummow and Bell JJ).
228 'Delivering Transparency to Mercy Decisions' (n 6).
229 Novak, 'Transparency and Comparative Executive Clemency' (n 41) 836–7.
230 Ibid 841–2.
231 Ibid 843–4.
232 George Winterton, 'The Hollingworth Experiment' (2003) 14 *Public Law Review* 139, 145.

to a just and merciful order, allowing the public to become part of the process. As colonial pardons were matters of public record and were known to be used for the good of the colony, modern instances of mercy will similarly be open so an informed public can determine whether their government is in fact fulfilling their purpose to not only govern, but to do good.

VI CONCLUSION

The prerogative of mercy is the oldest existing procedure for the remission of punishment.[233] Despite the introduction and development of appeal processes since its introduction in NSW, the prerogative of mercy remains necessary to respond to particularly harsh applications of the law in certain exceptional cases, and systemic failings in the criminal justice system.[234]

Mercy has played a fundamental role in the development of Australia as a nation. Pre-Federation, Australia was a collection of penal colonies, characterised by harsh living conditions and a harsh, bloody criminal justice system. It was an exercise of mercy that convicts were spared the noose and transported to the colonies at all. Upon arrival, pardons did more than simply free a labour force; they transformed the colony of NSW from a land of convicts to a self-sustaining settlement.[235] Governor Macquarie believed that convicts could be reformed and form part of the new society as citizens that were no longer defined solely by their criminality.[236]

Critics of the mercy prerogative have argued that in the years following the settlement of NSW, the prerogative of mercy has been rendered unnecessary, and should be abandoned in favour of improving the appeals process.[237] However, even refining the appeals process will not remove the need for the 'safety net of the executive to remedy the occasional injustice'.[238] As this article has demonstrated, there will likely still be gaps in the statutory appeals framework. There is no right to a subsequent appeal after an unsuccessful appeal.[239] In such cases, a convicted person can only apply either for an exercise of the prerogative of mercy, or for a statutory review under the *Appeal and Review Act*. Milne,[240] and Sangha and Moles[241] have argued that the current statutory review processes across Australia

233 Daniel T Kobil, 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1991) 69(3) *Texas Law Review* 569, 638–9.

234 Barkow (n 139) 1346.

235 It is important to note that mercy did not seem to extend to Indigenous Australians, which serves as a reminder that mercy should and must be available to all if the prerogative of mercy is to be retained, and public confidence in its use is to be ensured.

236 Macquarie believed that a reformed convict should be returned to their previous position in society: Chief Justice Spigelman, 'The Macquarie Bicentennial: A Reappraisal of the Bigge Reports' (n 54) 13.

237 See generally Caruso and Crawford (n 3); Milne (n 4). However, Milne argues that the prerogative of mercy should not be abandoned just yet, until further reforms are made to the appeals process.

238 Smith (n 219) 439.

239 *Burrell v The Queen* (2008) 238 CLR 218. See also the discussion in Sangha and Moles, 'Post-Appeal Review Rights' (n 14) 305.

240 Milne (n 4) 219.

241 Sangha and Moles, 'Mercy or Right?' (n 4); Sangha and Moles, 'Post-Appeal Review Rights' (n 14) 305.

each contain an extremely high threshold that has made successful applications rare. Further to this, given that statutory reviews require evidence that raises doubt as to the person's guilt, or suggests that there has been a miscarriage of justice, people who are in fact guilty of an offence but nevertheless are deserving of a reprieve, are precluded from applying for statutory review.

The courts cannot provide relief for a convicted person unless there are legal grounds for appeal. A mandatory sentence may seem harsh in a particular case, but that does not empower a court to sentence contrary to legislation. A prisoner may be likely to die before the completion of their sentence, but compassion cannot authorise a court to order an early release. This leaves the convicted person with no other option than applying for mercy under the prerogative.

The prerogative of mercy allows for the consideration of matters which are neither available nor appropriate for a court, such as compassion, love, and sympathy. This demonstrates the contrast between the prerogative of mercy and the judicial power. The prerogative of mercy is not limited to considering only those evidential concerns within the confines of strict legal rules that characterises the decision a court makes. Rather, the consideration of policy, public interest, and certain other individual circumstances that may make a person deserving of mercy, uniquely identify the prerogative of mercy as a special authority, distinct from judicial power, and exclusively within the competence of the Crown.[242]

There is an argument that the prerogative of mercy fails to achieve the purpose of the criminal law to punish offenders for wrongdoing, insofar as it undermines the values of consistency and coherence in the application of the law. Like cases should be treated alike. This article does not dispute that consistency is an important principle. Punishment should be consistent for similar cases. Rather, this article is concerned with the exceptional cases that are deserving of individuated justice tempered by mercy. Cases like Zac Grieve and Bronson Blessington show that taking a 'tough on crime' approach can oftentimes lead to injustice. There is no doubt that they are guilty of their crimes, but mandatory sentencing and retrospective laws have produced disproportionately harsh punishments.

The prerogative of mercy can achieve more than simply relief for an individual; it can reflect the values of forgiveness and compassion as a demonstration of the sovereign's promise to do right. Cases like Dr Alan Turing, who was pardoned for a crime that was based in historical prejudice and discrimination, allowed for the symbolic righting of what may now be considered an injustice.

Beyond the practical application of the prerogative of mercy in individual cases, exercises of mercy can reflect to the public the changing morality and wisdom of government, and confirmation that love, charity, and compassion are virtues in a political order. This article has argued that deciding the exception stems from the sovereign's position as the ultimate decision-maker, and the oath and covenant with the people 'to do right'. Increased transparency of the prerogative of mercy would be a demonstration of the sovereign's commitment to do right by inviting the public to be part of the process and hold the sovereign accountable.

242 Milne (n 4) 219.

This will hopefully not only increase public confidence in the exercise of mercy, but lead to better, fairer outcomes, in deserving cases.