SUPREME COURT OF QUEENSLAND

CITATION:	*Crump v The Attorney-General and Minister for Justice for Queensland* [2016] QSC 56
PARTIES:	**RUSSELL STEWART HENRY CRUMP** (applicant) **v** **THE ATTORNEY-GENERAL AND MINISTER FOR JUSTICE FOR QUEENSLAND** (respondent)
FILE NO:	SC No 5989 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for Statutory Order of Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2016
JUDGE:	Ann Lyons J
ORDER:	**Application dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – DECISIONS OF GOVERNORS-GENERAL AND GOVERNORS – where the applicant was sentenced to life imprisonment for murder and had exhausted all appeal options – where the applicant petitioned for a pardon to the Governor of Queensland – where the Governor of Queensland referred the matter to the respondent Attorney-General – where, following advice from Crown Law, the Attorney-General decided not to refer the matter to the Court of Appeal pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) – where the applicant applied for a statutory order of review – where the applicant argues that he was denied natural justice and procedural fairness by the respondent failing to refer the matter to the Court of Appeal – where the respondent argues that the decision not to refer the matter is not subject to review – whether a decision of the Attorney-General pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) to not refer a petition for the exercise of the prerogative power of mercy is reviewable

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – OTHER DECISIONS – where the applicant was sentenced to life imprisonment for murder and had exhausted all appeal options – where the applicant petitioned for a pardon to the Governor of Queensland – where the Governor of Queensland referred the matter to the respondent Attorney-General – where, following advice from Crown Law, the Attorney-General decided not to refer the matter to the Court of Appeal pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) – where the applicant applied for a statutory order of review – where the applicant argues that he was denied natural justice and procedural fairness by the respondent failing to refer the matter to the Court of Appeal – where the respondent argues that the decision not to refer the matter is not subject to review – whether a decision of the Attorney-General pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) to not refer a petition for the exercise of the prerogative power of mercy is reviewable

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant was sentenced to life imprisonment for murder and had exhausted all appeal options – where the applicant petitioned for a pardon to the Governor of Queensland – where the Governor of Queensland referred the matter to the respondent Attorney-General – where, following advice from Crown Law, the Attorney-General decided not to refer the matter to the Court of Appeal pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) – where the applicant applied for a statutory order of review – where the applicant argues that he was denied natural justice and procedural fairness by the respondent failing to refer the matter to the Court of Appeal – where the applicant submits that an anomaly of trial may have occurred due to the unreliability of evidence – whether there has been a breach of the rules of procedural fairness

Constitution of Queensland 2001 (Qld), s 36
Criminal Code Act 1899 (Qld), s 18, s 672A

Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48, considered
Crump v The Queen [2009] HCATrans 245, related
Eastman v Attorney-General for the Australian Capital Territory (2007) 210 FLR 440; [2007] ACTSC 28, cited
Eastman v Australian Capital Territory (2008) 163 ACTR 29; [2008] ACTCA 7, considered
Horwitz v Connor (1908) 6 CLR 38; [1908] HCA 33, cited

Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, cited
Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, cited
Pepper v Attorney-General [2008] 2 Qd R 353; [2008] QCA 207, considered
R v Crump [2004] QCA 176, related
Von Einem v Griffin (1998) 72 SASR 110; [1998] SASC 6858, considered
Yasmin v Attorney-General of the Commonwealth of Australia [2015] FCAFC 145, considered

COUNSEL: The applicant appeared on his own behalf
W Sofronoff QC, with A Scott, for the respondent

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the respondent

This application

[1] The applicant is serving a life sentence for the murder of his wife in 2002. On or about 3 March 2010 he made a petition for a pardon to the Governor. The Attorney-General sought advice from the Crown Solicitor and, after receipt of a memorandum of advice dated 26 August 2010, did not refer the case to the Court of Appeal pursuant to s 672A of the *Criminal Code Act* 1899 (Qld) ("***Criminal Code***").[1]

[2] A further petition for a pardon was made to the Governor on 27 November 2014.[2] In that letter the applicant stated he wished "to apply under Section 672A for a pardon based on an anomaly of trial". On 10 December 2014 the Governor acknowledged receipt of the request to "exercise the Royal Prerogative of Mercy" and indicated that the matter had been referred to the Attorney- General.[3]

[3] On 4 April 2015 the Attorney-General determined, on advice from the Crown Solicitor contained in a memorandum of advice dated 18 March 2015, not to refer the applicant's case to Court of Appeal[4] pursuant to s 672A of the *Criminal Code.*

[4] On 17 April 2015 the applicant was advised in writing that the Governor refused the petition to exercise the prerogative.[5] The applicant sought a statement of reasons for that decision which was refused on 8 May 2015.[6]

[5] On 18 June 2015 the applicant filed this application for a statutory order of review on the basis that he is aggrieved by the decision not to refer his conviction for murder to the

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1 Exhibit MGP1 to the affidavit of Michael Prowse sworn 18 August 2015.
2 Exhibit 2 to the affidavit of Russell Crump sworn 23 July 2015.
3 Exhibit 3 to the affidavit of Russell Crump sworn 23 July 2015.
4 Exhibit MGP2 to the affidavit of Michael Prowse sworn 18 August 2015.
5 Exhibit 4 to the affidavit of Russell Crump sworn 23 July 2015.
6 Exhibit 5 to the affidavit of Russell Crump sworn 23 July 2015.

Court of Appeal. The grounds of the application are that he has been denied natural justice and procedural fairness.

The applicant's conviction for murder

[6] The applicant was tried and convicted by a jury of the murder of his de facto wife, Erica Tomkinson, on 31 July 2003 after a 13 day trial. The case against him was largely circumstantial. The body of Ms Tomkinson had been found in an isolated lagoon at the end of a dirt track in the Toolara State Forest on 10 February 2002. The body had been weighed down with two besser blocks attached with twine. A number of injuries were found on the body including two head injuries caused by severe blows from an instrument that had blunt and sharp edges such as the back of an axe. There were also six parallel knife wounds to the abdomen and one to the upper inside of her left arm.

[7] The applicant appealed to the Court of Appeal. The facts from which the jury were asked to infer that the applicant had murdered the deceased on the morning of 4 February 2002 are set out in the decision of the Court of Appeal:[7]

> "The following are the main facts from which the jury were asked to infer that the appellant had murdered the deceased on the morning of 4 February 2002:
> (1) the body of the deceased was found in a part of the lagoon which could be reached only by a boat. The appellant had an aluminium dinghy and motor which he commenced negotiating to sell on the afternoon of 4 February and which he sold on the following day.
> (2) Twine of the kind used to tie the deceased's body to the besser blocks was found on the appellant's premises.
> (3) More tellingly, one of the besser blocks tied to the deceased's body had a distinctive groove which was identical to the groove on a besser block found on the appellant's property; and generally, both besser blocks were of the same construction and composition as blocks found on the appellant's property.
> (4) The appellant and the deceased were seen by Anthony Duffy at the third of the three lagoons, where he lived in his VW Kombi van, on the morning of 4 February. After talking to him there they left with the stated intention of going back to the first lagoon.
> (5) Shirley Sigsworth made a phone call to the appellant's home at 11.08 am on 4 February. It was unanswered. However the appellant had claimed to police that he was at home at that time.
> (6) The appellant arrived at the Gunalda Hotel between 12 noon and 1.00 pm on 4 February and stayed for about an hour and a half. When he later saw some of those who were also present in the hotel at that time, he appeared to try to persuade them that he was there for longer than in fact he was.
> (7) Whilst at the Gunalda Hotel he said that the deceased had left him taking money, 11 or 12 tall bottles of home brew and a quantity of clothing. However she had no vehicle, had not made any telephone calls beforehand and had not made contact with any neighbours. Their residence was at a considerable distance from any public transport.

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7 *R v Crump* [2004] QCA 176, [5].

(8) The deceased was seen alive in the appellant's company by the witness Glenn Sheppard between 7.30 am and 8.00 am on 4 February 2002 when he collected them from their residence and drove them to the Gunalda Hotel to pick up the vehicle they had left at that hotel the night before. That was before she was reportedly seen by Mr Duffy; she was not in the appellant's company when he went to the Gunalda Hotel later that same day as described in (6) herein. On that occasion the appellant explained her absence by saying she had stayed at home. On the next day, 5 February, he gave the further account at the Gunalda Hotel described in (7) herein, and also told it at a private residence that day, namely that the deceased had left him the previous day, 4 February 2002, taking some things with her.

(9) On the morning of 5 February there was a withdrawal from the deceased's bank account at an ATM. Mr and Mrs Barr who, according to the bank's records, used the ATM immediately after the person who effected that withdrawal, were able to describe the person before them as a male generally of the appellant's description.

(10) On the afternoon of 4 February the appellant called at Anita Ditton's house. She was not home but when she got home she rang him and told him to "stop hassling us" meaning herself and her mother who was home when the appellant called. On the following night when she was home watching the cricket on the television with Mr Duffy she saw the appellant's car drive past. About half an hour later he phoned, asked about her relationship with Duffy and asked if he could come over. Ms Ditton refused. However on the following night the appellant visited Ms Ditton and tried to "grope" her. Ms Ditton rebuffed his advances and he left.

(11) On Friday 8 February 2002 the appellant told Christine Beileiter, the cook at the hotel, that the deceased "is no longer"; she overheard him telling other people that "the divorce papers were in the mail and things like that". One of those people may have been Karen Thomsen whose evidence was that on that Friday the appellant said to her at the hotel that the deceased had "fucked off". That witness later questioned him outside the hotel, and was told that the appellant had gotten a letter from the deceased on the Wednesday (ie 6 February). The appellant also told the witness John Robinson at the hotel that Friday that he had already heard from the deceased's solicitors, that the letter from them was stamped at Dalby, and that the deceased's parents came from that town. No suggestion was made at the trial that any correspondence from the deceased, or any instructions from her had actually been received by the appellant after 4 February 2002. The jury were entitled to treat evidence of the appellant's statement about such correspondence as evidence that he knew she was dead and was attempting to explain away what would be her permanent absence.

(12) After speaking to Sandra Bartkiw on 9 February he visited her on the same day. He told her that Ricki would not be returning. He then grabbed her and tried to hug and kiss her. On Monday 11 February he rang her suggesting that they should be more than friends. Ms Bartkiw rejected his advance.

(13) There was evidence from a large number of people that the appellant had been violent to the deceased over a substantial period of time. That evidence included admissions by the appellant to that effect.

(14) The appellant lied to police about the circumstances in which and the person to whom he sold his boat. In an interview on 11 February he told them he sold it about a fortnight beforehand or even longer. He said he had put an advertisement in the Gympie paper. He later said that he had not put an advertisement in the paper but had put a sign up in Coles, Gympie. He said he had a phone call the following day and sold it that day. He said that he was unable to identify the person to whom he sold it and gave only a vague description of a man whom he said was the buyer. In fact he sold it to a second hand dealer on 5 February after ringing several such dealers on the afternoon of 4 February."

[8] The applicant's appeal to the Court of Appeal was based on five grounds:

1. Evidence of his previous violence should not have been admitted.

2. Statements by the deceased alleging that the applicant had been violent to her should not have been admitted.

3. Evidence of statements made to the applicant alleging violence by him to the deceased should not have been admitted as he did not expressly admit or adopt them.

4. He was denied a fair trial by the Crown calling the witness Duffy and not calling the witness Beavan.

5. The trial judge failed to put the defence case to the jury in respect of whether the Crown could prove the killing was murder rather than manslaughter.

[9] The first three grounds related to the evidence of witnesses who gave evidence about the applicant's history of violence to the deceased. Whilst the Court concluded that some of the evidence should have been excluded, the Court was satisfied that the wrongful admission of the evidence could not have had a prejudicial effect as there was a great deal of other evidence of the applicant's violence to the deceased which was "uncontradicted and for the most part unchallenged."[8]

[10] The next ground related to the evidence of the witness Duffy and the argument his evidence should not have been admitted and, if it was admissible, the witness Beavan should have been called by the prosecution. The Court concluded that Duffy's evidence was admissible, including his bizarre statements, as ultimately the reliability of Duffy's evidence was held to be a matter for the jury. Davies JA stated:[9]

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8 *R v Crump* [2004] QCA 176, [16].
9 *R v Crump* [2004] QCA 176, [6].

> "Except for the evidence of Anthony Duffy, the evidence with respect to all of the other matters was strong and credible. I shall say more about the evidence of Anthony Duffy when discussing ground 4. It is sufficient here to make two further points. The first is that all admissible facts likely to throw doubt on the evidence of Anthony Duffy were before the jury. And the second is that, even without the evidence of Anthony Duffy the circumstantial case against the appellant was a strong one."

The Court also considered that Beavan's evidence was not admissible as it did not go to any issue in the trial.

[11] Davies JA specifically referred to those 14 factors (outlined in paragraph 7) that were relied on by the prosecution at the trial of the applicant and concluded that, when taken together, they "constituted a very strong circumstantial case that the [applicant] had murdered the deceased on the morning of 4 February". The Court of Appeal was also satisfied that there had been no misdirection by the trial judge and held:[10]

> "In the absence of evidence from which manslaughter could be inferred there was therefore no basis, in my opinion, for a direction with respect to manslaughter and the learned trial judge would have been correct in not giving one. The direction which his Honour did give was, in my opinion, unduly favourable to the appellant. This ground of appeal must therefore also fail." (footnote *omitted*)

[12] The applicant's appeal against his conviction was unanimously dismissed by the Court of Appeal.

[13] The application for special leave to appeal to the High Court was refused.[11]

[14] The applicant is unrepresented in this application. He has relied in this application on his affidavits sworn 6 June 2015 and 23 July 2015 and his outline of submissions filed on 10 February 2016. That material referred to the decision of the Governor not to grant a pardon.

The legislation

[15] Section 36 of the *Constitution of Queensland* 2001 (Qld) is a statutory enactment of the Crown prerogative of mercy:

> "**36 Power of Governor—relief for offender**
>
> (1) This section does not limit the operation of another Act.
>
> (2) In relation to an offence against a law of the State, the Governor may grant the offender, in the name and on behalf of the Sovereign—

[10] *R v Crump* [2004] QCA 176, [41].
[11] *Crump v The Queen* [2009] HCATrans 245.

> (a) a pardon, a commutation of sentence or a reprieve of execution of sentence for a period the Governor considers appropriate; or
>
> (b) a remission of a fine, penalty, forfeiture or other consequence of conviction of the offender.
>
> (3) The grant may be unconditional or subject to lawful conditions."

[16] Section 18 of the *Criminal Code* then provides that the *Criminal Code* does not affect the Royal prerogative of mercy.

[17] It is clear that it was the Governor who refused to exercise the Royal prerogative of mercy and that decision was communicated to the applicant by letter dated 17 April 2015. There is a long line of authority that decisions made in the exercise of the Royal prerogative of mercy are not reviewable. In *Eastman v Attorney-General for the Australian Capital Territory,*[12] Lander J reviewed those decisions and concluded that he was "constrained by authority to hold that the discretion as to the exercise of the prerogative of mercy is not amenable to judicial review".

[18] However, at the hearing the applicant stated that he is now seeking a statutory order of review only in relation to the decision by the Attorney-General pursuant to 672A of the *Criminal Code* not to refer the matter to the Court of Appeal and not the decision of the Governor. I shall not therefore refer further to that aspect of the application.

Section 672A of the *Criminal Code*

[19] Section 672A of the *Criminal Code* provides as follows:

> "Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may—
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> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
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> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

[20] "Court" is defined in s 668 of the *Criminal Code* as meaning "the Court of Appeal" and "Crown Law Officer" is defined in s 1 of the *Criminal Code* as meaning the "Attorney-General or director of public prosecutions."

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[12] (2007) 210 FLR 440, 458-459 [78].

The Grounds of Review

[21] In his application for a review of the Attorney-General's decision not refer the matter to the Court, the applicant criticises the evidence which was lead against him at his trial, particularly the fact that there was no DNA evidence relied on and that there was no other evidence to link him to the scene other than the evidence of Duffy. In his affidavit sworn 23 July 2015 the applicant makes reference to an outline of submissions that was sent to the Governor in March 2010. In those submissions, which comprises some 33 pages, he goes through the evidence at his trial and critiques it. It is unclear to me whether the applicant is specifically relying on those submissions in this application as he does not refer to them in any way other than to say they were sent to the Governor in 2010. In any event, on my reading of that material it would seem that he is not referring to any fresh evidence but rather is critical of the evidence that was presented and argues that the verdict is unsafe.

[22] In his current outline of submissions the applicant once again heavily criticises the reliance by the prosecution on the evidence of Duffy together with criticisms that the respondent has failed to follow its own procedures. In particular the applicant argues that the respondent has failed to take into account the fact that an anomaly of trial may have occurred and that his right to natural justice has been breached by failing to refer the matter to the relevant court for determination.

[23] In his current Outline of Submissions he makes the following points:[13]

- The prosecution relied heavily on the evidence of one Anthony James Duffy. There was basically no other evidence to connect the applicant to the offence.

- At one stage of the investigation Duffy himself admitted to the crime, implicating one of the investigating police officers as an accomplice.

- A complaint was made to the Crime and Misconduct Commission. After investigating the matter the Commission determined that Duffy was an unreliable witness who made his claims under drug induced psychosis.

- At a later date, the Department of Public Prosecutions investigated Duffy and determined him to be a credible witness.

- The applicant submits that the respondent failed to consider the government's own procedures.

- The applicant submits that the procedure followed by all government departments is that the department is not to investigate and come to a determination if the matter has already been investigated and determined by another government department previously.

[13] Applicant's outline of submissions filed 10 February 2016, [5]-[14].

- An example of this is a complaint regarding alleged criminal activity was made about "C" to the Legal Services Commission who determined no action as to be taken. A complaint was then made to the Queensland Police Service who were unable to investigate the matter as it had been investigated and determined by another government department previously.

- The applicant submits that the respondent failed to take into account this procedure that was breached by the Department of Public Prosecutions therefore the applicant's right to procedural fairness has been breached.

- The applicant submits that the respondent has failed to take into account a relevant factor that should have been taken into account.

- The applicant submits that the respondent has failed to take into account that an anomaly of trial may have occurred and has breached the applicant's right to natural justice by failing to refer the matter to the relevant court for determination.

Is the decision of the Attorney-General pursuant to s 672A of the *Criminal Code* reviewable?

[24] Whilst the respondent initially argued that on the face of it the current application is in substance a "general application for the exercise of the prerogative and did not specifically invoke s 672A", at the hearing the respondent was content to proceed on the basis that the only relief sought is a review of the decision of the Attorney-General pursuant to s 672A. Accordingly, the preliminary issue which needs to be determined in this case is whether the decision by the Attorney-General pursuant to s 672A of the *Criminal Code* is reviewable.

[25] There is no doubt that the decision by the Attorney-General was made "pursuant to an enactment". However, there is a line of authority that the power to refer a petition for pardon to a Court of Appeal is also unreviewable.

[26] In this regard the respondent argues that whilst the power to refer a matter to the Court of Appeal is a power conferred upon the Attorney-General by statute that does not necessarily mean that the decision is reviewable. In particular, it is argued that there are some decisions, such as to whether to file an *ex officio* indictment, to enter a *nolle prosequi* or to grant a *fiat*, which are not considered to be subject to review primarily because of the nature of the power. It is the power to commence, to control or to terminate legal proceedings. In *Barton v The Queen*[14] it was held that it was undesirable for the court, whose function it is to determine an accused's guilt or innocence, to become too closely involved in the question as to whether a prosecution should be commenced.[15] In *Barton* Wilson J held that whilst the filing of an *ex officio* indictment was a statutory power "[n]evertheless, it is a very distinctive type of statutory power, retaining in its relationship to the process of criminal justice something of the nature of a prerogative

[14] (1980) 147 CLR 75.
[15] *Barton v The Queen* (1980) 147 CLR 75, 94-95 (Gibbs ACJ and Mason J).

power. As such, it is a power which does not lend itself to supervision by the courts, including those courts whose jurisdiction relates to the trial of proceedings so initiated".[16]

[27] That was also the view of the High Court in *Maxwell v The Queen*[17] where Gaudron and Gummow JJ held that there were certain decisions involved in the prosecution process which are of their nature insusceptible of judicial review.

[28] In *Von Einem v Griffin*[18] the South Australian Full Court held that the power to refer a petition for a pardon as an appeal was also unreviewable. Lander J specifically held that the exercise of the power was not reviewable because the section conferred no legal right and presumed all legal rights have been exhausted because a petitioner seeks "mercy and no more than that".[19] His Honour considered that the section did not require the Attorney-General to exercise his discretion and that the statutory power was entirely discretionary.

[29] The respondent relies on that decision to argue that the ability to refer the case contained in the petition is part of the consideration of the pardoning power and there is no separate right conferred upon persons who have been convicted to make application to the Attorney-General and a right to require her to consider whether to refer a matter to the court. In this regard, the respondent relies on the decision in *Horwitz v Connor*[20] to argue that the exercise of the prerogative of mercy is not reviewable.

[30] In *Mallard v The Queen*[21] the plurality outlined the history of the exercise of the power of referral to the Court of Appeal by an Attorney-General pursuant to s 140 of *Sentencing Act* 1995 (WA) and continued:[22]

> "The significance of this history for present purposes, is that the exercise for which s 140(1)(a) of the Act provides is effectively both a substitute for, and an alternative to, the invocation, and the exercise of the Crown prerogative, an exercise in practice necessarily undertaken by officials and members of the Executive, unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions."

[31] In *Von Einem v Griffin*[23] Prior J had also referred to an Attorney's powers of referral pursuant to the South Australian *Criminal Law Consolidation Act* 1935 and had also considered that the Attorney's powers were essentially ancillary to the prerogative as follows:[24]

> "The Attorney's powers of referral in s 369(a) and (b) are expressed to be referrable to a petition for the exercise of Her Majesty's mercy. In *Burt v Governor-General* (1992), Cooke P referred to the 'traditional view' that a

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16 *Barton v The Queen* (1980) 147 CLR 75, 110 (Wilson J).
17 (1996) 184 CLR 501, 534.
18 (1998) 72 SASR 110.
19 *Von Einem v Griffin* (1998) 72 SASR 110, 130.
20 (1908) 6 CLR 38.
21 (2005) 224 CLR 125.
22 *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).
23 (1998) 72 SASR 110.
24 *Von Einem v Griffin* (1998) 72 SASR 110, 113.

refusal to exercise the prerogative of mercy is not reviewable in any court. He quoted judicial statements by Lord Diplock in *De Freitas v Benny*, and Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* then referred to *Horwitz v Connor* and three other cases, saying that 'this line of cases shows unwillingness to review either a refusal to exercise the prerogative or a refusal by a Minister to exercise a statutory power ancillary to the prerogative, such as a power to refer a petition to a court'." (footnotes *omitted*)

[32] His Honour continued:[25]

"The Attorney's powers are expressed to be 'ancillary to the prerogative'. The powers are powers of reference on petitions of mercy as the heading to the section still proclaims. Legislative schemes have changed elsewhere, particularly in England. It seems to me that to allow judicial review in this case would involve intrusion by the court into an executive sphere not properly severed from but indeed referrable to the prerogative of mercy. A more recent approach is to say that review of the Attorney's powers is nothing more than review of a statutory discretion with respect to which there is not the reluctance that prevails with respect to a review of the prerogative. In *R v Toohey; Ex parte Northern Land Council* the High Court confirmed the existence of a power to review the exercise of statutory powers by the Executive for alleged improper purposes. Prerogative powers were not in issue. There was however some discussion of the basis of earlier authority which had treated the actions of the governor or other vice-regal representatives as immune from judicial review. Absent a clear majority view with respect to the direct authority of *Horwitz,* this Court must adhere to the propositions of law for which that case stands as authority notwithstanding acknowledgment from some of the justices in *Toohey* that the absence of a power to review the exercise of prerogative powers might be explained on the basis that the subject matter involved was non-justiciable or because no rights were affected, or because there was no duty to exercise the relevant prerogative discretion which had no precise legal limits in terms of scope, purpose or criteria for exercise. Whilst Mason J thought that a justiciable exercise of prerogative power can be subject to judicial review, other justices made a clear distinction. Toohey does not overrule *Horwitz.* Fifty years after *Horwitz* a powerful English court denied the reviewability of a statutory power ancillary to the prerogative. The approach of the House of Lords in *Council of Civil Service Unions v Minister for Civil Service,* is to have judicial review applicable to the exercise of prerogative or common law powers provided it relates to a public law matter and the subject matter is justiciable. That approach has not been the subject of an express decision in the High Court. There are decisions of several Australian courts accepting the CCSU approach. In this State, in *Blyth Hospital v SA Health Commission,* King CJ referred to the fact that certain types of decisions by the executive government are subject to review by the courts. His view was that the review occurs 'irrespective of whether it is made in the exercise of a power derived from statute, common law or the prerogative'. (foonotes *omitted*)

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[25] *Von Einem v Griffin* (1998) 72 SASR 110, 114.

[33] A number of courts in New Zealand, South Australia and England have, however, departed from that traditional view. In particular the recent decision of the Full Federal Court in *Yasmin v Attorney-General of the Commonwealth of Australia*[26] was to the effect that the Attorney-General was under a statutory duty to consider and determine whether he should refer a petition to the Court of Appeal. The Court held that there was "no clear authority concerning the extent to which an exercise of the prerogative of mercy, as an exercise of executive power, would in contemporary circumstances be considered reviewable by the courts."[27] The Court continued:[28]

> "When the case arises, no doubt there will be debate about the High Court's statement in *Horwitz v Connor* [1908] HCA 33; 6 CLR 38 at 40 that it has no jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy. On one view, all the Court was saying was that because mandamus to the Governor in Council would not lie, there was no jurisdiction to review the discretion. Consideration would also need to be given to authorities such as *Barton v The Queen* [1980] HCA 48; 147 CLR 75 where a statutory power (to present an ex officio information) was held to be sufficiently similar to a prerogative power to justify the conclusion that it could not be examined by a court on judicial review. The Full Court of this Court has held an exercise of prerogative power may be reviewable: see *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278, 280-281, 302-304; cf *von Einem v Griffin* [1998] SASC 6858; 72 SASR 110 at 113 per Prior J (Wicks J agreeing). In *von Einem* Lander J left the matter more open, but appeared also to lean towards the proposition the mercy prerogative was not reviewable (at 129):
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> > It is probable, therefore, that, as presently advised, the prerogative of mercy is not subject to review, not because its source is the prerogative but because of the subject matter of the power itself. The weight of authority seems to suggest so: *Burt v Governor General* [1992] 3 NZLR 672; cf *R v Secretary of State for the Home Department*; *Ex parte Bentley* [1994] QB 349.
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> Almost a decade after he made these observations, Lander J had occasion to look again at the authorities in *Eastman v Attorney-General (ACT)* [2007] ACTSC 28; 210 FLR 440. In that case, Mr Eastman applied for judicial review pursuant to s 34B of the *Supreme Court Act 1933* (ACT) and the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (*ADJR Act* (ACT)) of a decision of the Executive of the Australian Capital Territory Government, in whom the exercise of prerogative powers in respect of the Australian Capital Territory was reposed by reason of s 37 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). His Honour held that the decision was not reviewable under either the *ADJR Act* (ACT) or the *ADJR Act*, in the latter case by reason of s 3A(2) which provided that the *Australian Capital Territory (Self-Government) Act* was not an enactment for that

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[26] [2015] FCAFC 145.

[27] *Yasmin v Attorney-General of the Commonwealth of Australia* [2015] FCAFC 145, [83] (Kenny, Robertson and Mortimer JJ).

[28] *Yasmin v Attorney-General of the Commonwealth of Australia* [2015] FCAFC 145, [83]-[84] (Kenny, Robertson and Mortimer JJ).

purpose. His Honour then undertook an examination of the relevant authorities, both in Australia and elsewhere, to determine whether the decision was reviewable at common law. His Honour concluded at [78]-[80]:

> I am constrained by authority to hold that the discretion as to the exercise of the prerogative of mercy is not amenable to judicial review: *Horwitz v Connor*. I am not, I think, prevented however from concluding that the processes which must be observed either by the statute which empowers the exercise of the prerogative (or statutory) power or by the law generally are subject to judicial review. In *Von Einem v Griffin*, as I have pointed out, the Court did not need to conclude on whether the decision was reviewable. But insofar as the majority did, they were addressing the decision not the process.
>
> I think therefore I am entitled to inquire into whether the decision maker in the Executive discharged its obligations at law in reaching its decision. The decision itself is for the Executive and not subject to review. However, if the Executive has not conducted itself in accordance with the law in reaching that decision and, in particular, not observed the rules of natural justice, the decision must be set aside.
>
> When it appears that the decision maker has failed to accord an applicant natural justice as dictated by the Act which empowers the decision or by the law, the decision maker has not acted to exercise the prerogative of mercy. There can be no mercy where the decision maker does not act fairly. That does not mean that the decision itself is subject to review. Indeed, as the law stands, it is not. However, the applicant's complaint is related to the process. I think that he is entitled to have his complaint considered by the Court."

[34] Furthermore, in *Pepper v Attorney-General*[29] the Queensland Court of Appeal proceeded on the basis that the decision of the Attorney-General whether to refer the matter to the Court of Appeal was amenable to judicial review pursuant to the *Judicial Review Act* 1991 (Qld). The Court however held that the Attorney-General's decision was a decision "relating to the administration of criminal justice" and therefore because of the exemption in s 31(2) and Sch 2, Item 1 of the *Judicial Review Act* 1991 (Qld), there was no statutory obligation to give reasons even if requested.

[35] In *Martens v Commonwealth*[30] Logan J considered an application for review of an exercise of power under s 672A of the *Criminal Code* in circumstances where Martens had been found guilty in the Supreme Court at Cairns of an offence under the *Crimes Act* 1914 (Cth). After unsuccessful appeals Martens had sought a pardon from the Governor-General or a reference to the Queensland Court of Appeal pursuant to s 672A as well as an order for review pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("**ADJR Act**"). The decision of *Von Einem v Griffin* was distinguished on the basis

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29 [2008] 2 Qd R 353, 360 (Muir JA).
30 (2009) 174 FCR 114.

that it was not a case where a judicial review application was made under an equivalent of the ADJR Act and Logan J held:[31]

> "In this case though, the view is open that, insofar as he refused to refer the case to the Court of Appeal, the Minister made a decision:
>
> 1. under an enactment, namely s 68A of the *Judiciary Act*, which rendered applicable s 672A of the Queensland Criminal Code;
>
> 2. of an administrative character; and accordingly one
>
> 3. to which the ADJR Act applies."

[36] However, I note that the Court of Appeal of the Australian Capital Territory in *Eastman v Australian Capital Territory*[32] also referred to a number of the earlier decisions and continued:

> "[33] As Lander J demonstrated, numerous recent decisions have raised doubts as to the extent to which exercise of the prerogative of mercy may be reviewed by the courts. Those decisions demonstrate a departure from the traditional view that such exercise is not reviewable. In Australia, that position was established by the decision of the High Court in *Horwitz v Connor* (1908) 6 CLR 38 at 40; [1908] HCA 33 (*Horwitz*) where Griffith CJ said on behalf of the Court:
>
> > … no Court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy.
>
> …
>
> [37] Although some of the judgments in *Toohey* may suggest a change in approach to the question, the High Court has not yet departed from the decision in *Horwitz*."

[37] The Court then referred to the fact that the application of general principles of procedural fairness should not be limited by archaic notions concerning the source of executive power. The Court held however that it was reluctant to treat those recent decisions as a principal basis for departing from well-established legal propositions and were not persuaded that they should depart from the decision in *Horwitz v Connor*[33] in the interests of promoting a consistent body of administrative law.[34]

[38] I note in particular that in that decision the court considered that as the applicant before it was unrepresented, the appeal did not offer a suitable vehicle for the resolution of such questions. The court held that in light of the conclusion they had reached concerning the

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31 *Martens v Commonwealth* (2009) 174 FCR 114, 120-121 [24].
32 (2008) 163 ACTR 29, 39-40 [33], [37] (Stone and Dowsett JJ, Moore J agreeing).
33 (1908) 6 CLR 38.
34 *Eastman v Australian Capital Territory* (2008) 163 ACTR 29, 40 [38].

merits of the claim, it was not necessary to determine whether the decision was reviewable.[35]

[39] Accordingly, in the circumstances of this case I will adopt a similar approach given the applicant is also unrepresented. Without deciding if the decision of the Attorney-General here is in fact reviewable I will turn to a consideration of the merits of the application.

[40] It is clear that no reasons for the Attorney-General's decision have been given and, on the authority of *Pepper v Attorney-General*,[36] such a decision is not one for which a statement of reasons is required pursuant to s 31 of the *Judicial Review Act* 1991 (Qld).

[41] Accordingly, it is therefore necessary to discern if there is an error on the face of the decision. The grounds of review essentially allege that the decision not to refer the matter to the Court of Appeal is unreasonable. The applicant argues that large tracts of evidence were deficient or unreliable and therefore the conviction is unsafe and a pardon should be granted. The respondent argues the applicant has not identified any matter which he did not or could not ventilate at his trial. This must be accepted. In his current outline of submissions, and in his previous submissions to the Governor, the applicant has not referred to any new material or any fresh evidence which was not available at his trial. In particular, the essence of the applicant's submission is that the evidence of Duffy is not reliable. That was a matter which was referred to in considerable detail by the Court of Appeal and that aspect of the appeal was dealt with at the time. Davies JA in this regard held:[37]

> "[24] Duffy made a complaint, by statutory declaration to the Crime and Misconduct Commission in about August 2002 about the conduct of two police officers involved in the investigation of this offence, Detective Victor Tipman and Constable Lisa Fife. In that statement Duffy said that he was present when the deceased was killed. He said that the [applicant] and another witness in the case Carl Pflugrath came to his kombi van, the [applicant] sat on top of him and Pflugrath injected him in the leg. They then walked him to the lake where he saw the deceased stripped naked, Detective Tipman and Constable Fife. He said that Tipman wiped a serviette over the deceased's pubic area in order to place Duffy's sperm on her body. He then directed Duffy to have sex with the deceased but he ended up having sex with Constable Fife. Pflugrath then produced an axe handle from Duffy's vehicle and directed him to hit the deceased over the head with it. He did so and the [applicant] also did. He was then forced to plunge a knife into the deceased. He was then released and walked off in a daze.
>
> [25] Understandably, in evidence he doubted the accuracy of this statement and was unable to explain how he came to make it. He thought it may have been 'influenced by some sort of subliminal mind control by virtue of the fact that I lived in my combi'. He was a marijuana user but it is pointless to speculate how he came to make such a bizarre statement.

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35 *Eastman v Australian Capital Territory* (2008) 163 ACTR 29, 41 [43].
36 *Pepper v Attorney-General* [2008] 2 Qd R 35.
37 *R v Crump* [2004] QCA 176, [24]-[27].

> [26] In his evidence in court he confirmed that he saw the appellant and the deceased at the third lagoon on the morning of 4 February. The appellant told him that they had put some fishing lines in the first lagoon. They then left him and, from the sound of the [applicant's] utility truck, they appeared to stop again at the first lagoon. He did not see them after that.
>
> [27] He was cross-examined at length by defence counsel on all of his statements including the bizarre statement which I have set out. In the end the reliability of his evidence that he saw the [applicant] and the deceased at the third lagoon on the morning of 4 February was a matter for the jury. If it was accepted as reliable, notwithstanding what the jury may have thought of his other evidence, it was probative evidence in the circumstantial case. His evidence was therefore plainly admissible."

[42] Accordingly, if I do have jurisdiction I would dismiss the application on the merits.

Order

[43] The application is dismissed.