CRIMINAL APPEALS AMENDMENT BILL 2021

Second Reading

Resumed from 8 September 2021.

HON NICK GOIRAN (South Metropolitan) [7.53 pm]: It is my pleasure on behalf of the opposition to speak to the second reading of the Criminal Appeals Amendment Bill 2021. It must be said that this bill has taken some time to come before us. I note simply from the business program that the second reading on this bill—no doubt the comprehensive second reading speech delivered by the parliamentary secretary representing the Attorney General—was adjourned on Wednesday, 8 September last year. Here we are now on 14 June 2022 considering the matter for the first time.

I might mention quickly in passing that it is interesting that the government should choose to prioritise this bill at this time in light of what is left on the legislative program. We know that the government promised other types of reforms, but they are not before us. What we have here is the Criminal Appeals Amendment Bill 2021. This bill amends the Criminal Appeals Act 2004, which mainly deals with the conduct of criminal appeals in our state. The purpose of this bill is to create a new statutory right of subsequent appeal against a conviction. Interestingly, during my perusal of the bill—I will be pleased for the parliamentary secretary to address this in reply—it does not appear that there is any limit to the number of times a person can exercise this new further right of appeal. Currently, in order to commence a criminal appeal, an appeal notice must be filed within 21 days of the date of conviction, otherwise if this time frame has expired, a would-be appellant would need to seek leave of the court in order to proceed with their appeal. There are a number of permissible grounds of appeal against a conviction. However, new evidence is not an available ground in the first instance at present. Nevertheless, once this bill passes, it will be available as a ground of appeal in relation to a subsequent appeal. I am advised—again, I welcome the parliamentary secretary to clarify this in reply if possible, otherwise we can always deal with it in Committee of the Whole House—that Western Australia will be the only jurisdiction that allows a subsequent appeal based on new evidence.

Currently, once all avenues of appeal have been exhausted by somebody convicted of a criminal offence, that offender's only further option is to either petition the Attorney General for the matter to be referred to the Court of Appeal or, alternatively, to appeal—I say with a small "a"—or petition the Governor for the exercise of the royal prerogative of mercy. I am informed that these options will remain available for offenders, notwithstanding the passage of this bill. However, we should note that the Governor's pardon does not eliminate the conviction itself, and only clears the offender of the consequences of the offence.

I turn now to the intersection that occurs between the principle of finality and the potential for re-traumatisation for victims and their families. The finality of litigation is a very important principle in our legal system; in fact, it is one of the pillars of our legal system—that is, once a court has made a decision, that decision is final. This bill, once passed, will undermine that principle of finality, albeit, I hasten to add, not without some justification—that is, it will allow not only a second appeal, but also subsequent appeals to be made by a person who has been convicted of an offence on indictment. The principle of finality is important as it provides some measure of certainty to victims—that is, both primary and secondary victims, victims of the crime itself and the families of the victims. The opposition does not want to see victims of crime and their families re-traumatised and re-harmed by endless appeals exercised by this new statutory right in this bill. This concern is of course balanced by the opposition's overwhelming desire not to see a miscarriage of justice against an innocent person.

However, we hold serious concerns about how this legislation will play out once passed and this new appeals process is available to persons convicted of serious offences. We hold grave concerns about how this new appeals process will affect victims and their families. As I said, the second reading speech was as long ago as 8 September last year and the bill was debated in the other place from 11 August to 7 September. According to the second reading speech delivered by the Parliamentary Secretary to the Attorney General, this bill has significant safeguards to protect against the flooding of unmeritorious appeal applications, thereby protecting victims and next of kin from re-traumatisation. The opposition shares that aspiration articulated by the parliamentary secretary but we would like to be satisfied that there are indeed safeguards in this legislation that will protect against offenders flooding the courts with unmeritorious appeals because, as members can appreciate, it is incredibly traumatising and re-traumatising for the victims and in particular the family of victims to see the offender constantly trying to re-litigate these issues. We share the desire of the parliamentary secretary and the government to see safeguards in the legislation to protect against a flood of these new appeal applications. Why? In order to protect the victims and next of kin from re-traumatisation.

I note that the government says that one of these safeguards will be the court's discretion to order the appellant to pay the other party's costs of or relating to that appeal. That provision is found in proposed section 35J. In other words, the government is saying that a safeguard will be created when the court considers that the appellant—remember that this is a convicted offender—has launched an unmeritorious appeal because it could order costs against the appellant. The convicted offender will have to pay the legal costs associated with a failed, one might say unmeritorious, application. I must say it is questionable how effective this safeguard will be as a deterrent against unmeritorious

appeal applications. It is not difficult to contemplate a situation in which a convicted person was not pecunious at the time at which they were convicted and has since spent some time incarcerated. That particular individual is highly unlikely to be in any position to pay any costs order and consequently will not be deterred in the slightest from launching one of these applications. I say with the greatest respect to the government that the opposition would like to be satisfied that there will be something greater than that particular safeguard. We accept that that is a safeguard of sorts, but in order to protect victims and next of kin from re-traumatisation we would like to understand what other safeguards the government considered. In fact, did the government consider any further safeguards that could be applied against these offenders for these types of unmeritorious applications? We would be pleased to hear from the government on that matter. No doubt, as part of that, if the government has done its work on the consultation process, it would have considered a number of safeguard options and it would have ruled some in and some out. The government has clearly ruled in the discretion of the courts to give a costs order but what safeguard options did it consider that were ruled out? What safeguard options were put to the government during the consultation process?

Let us remember that this is not a new issue and this is not a new bill. In fact, the bill currently before us, the Criminal Appeals Amendment Bill 2021, as I mentioned, was passed in the other place in September last year but had its genesis in the previous Parliament. A bill similar to the one before us known as the Criminal Appeals Amendment Bill 2019 was third read in the other place on 25 June 2019. It was read into this place two days later, on 27 June 2019, but never brought on for debate by the Leader of the House in the fortieth Parliament. This is not a new issue and not a new bill. If we take the last time this matter was before the Legislative Council, on 27 June 2019, we are less than a fortnight away from it being three years since the originating bill was brought to our attention. In that three years, irrespective of COVID, the government had ample time to consult with stakeholders, particularly victims of crime, to consider what other options might be available to ensure that there were sufficient safeguards against these unmeritorious applications. I hasten again to indicate that although the opposition absolutely has an overwhelmingly desire to make sure that an innocent person does not continue to have a conviction against their name, that incredibly important and noble goal cannot have such a status that we have no regard for victims and their families and allow unmeritorious appeals from convicted offenders who take great pleasure in agitating the victims and their families, with no regard to the cost consequences because, of course, they know full well that they are in no position to pay any costs order.

I also note that proposed section 35I found in clause 4 of the bill provides that no fee will be charged of a party to an appeal. I have to say that that provision essentially flies in the face of a safeguard against unmeritorious appeals. I understand where the government has tried to land things with this legislation, with the discretionary costs orders against unmeritorious appeals, but if at the same time the offender will not have to pay a fee on the appeal, I think, if anything, that type of provision will only facilitate unmeritorious appeals. It is certainly not a safeguard. I would like the government to reflect on whether it maintains that the provision at proposed section 35I is a safeguard. Perhaps one might argue that it is a safeguard for the innocent person, ensuring they have full access to the justice system and the ability to access an appeal to ensure that their innocence is found, but I fail to see how it could possibly be characterised as a safeguard against unmeritorious appeal applications.

As much as there is a temptation for all of us to view this legislation through the lens of the innocent person who is incarcerated for a crime that they did not commit and be sympathetic to it, it is not the only lens through which we should be viewing it. We also need to view it in terms of support for victims and their families.

I note that Section 35A of the act, although not being amended by the bill presently before us, demonstrates the lengths that we will go to in order to support the accused, but the victim does not enjoy such support. That particular section states —

> In an appeal commenced by a prosecutor under section 24(2)(da) or 25(3)(aa), the accused's reasonable costs of being legally represented in the Court of Appeal are to be paid by the State.

Like section 35A, new section 35I supports the accused in ways in which we do not support victims in our legal system by providing that no fee will be charged of the party to the appeal. The opposition would like to see more support provided to victims during the criminal appeals process.

In conclusion, I indicate that the opposition supports the bill in order to avoid any miscarriage of justice. However, we are of the view that the impact of victims will need a regular review as we live through this new iteration of the statute and, regardless, victims of crime and their families will need constant support through these new appeal applications.

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [8.11 pm] — in reply: I thank the member for his contribution today. He raised a couple of issues, some of which we will undoubtedly get into in more detail once we get to the Committee of the Whole House stage.

Perhaps I can draw the member's attention to a couple of points. The member asked a question about how many times somebody could make an application under these new provisions—whether there was a limit on the total number. The answer to that question is simply that there is no specified limit. It is not like it currently is in that a person gets one opportunity to appeal and once they have exhausted it, all that is available to them is the prerogative

writ for mercy via the Governor or Attorney General. However, there are some threshold issues that a person must satisfy before they can get before the court to have their appeal, and the first of those is leave—so they must obtain leave. There are provisions in the bill at clause 4, in what will be section 35F, that state that leave to appeal is required in all cases. So there is no matter of right to have a second and subsequent appeal; a person must seek leave. As the member knows, leave is not unusual in legal proceedings, but this sets out the grounds on which leave of the Court of Appeal must be satisfied. I take the member to proposed section 35F(4), which states —

> After an appeal has commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied —
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> (a) the ground identifies fresh and compelling evidence or new and compelling evidence that should, in the interests of justice, be considered on an appeal; and
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> (b) the ground has a reasonable prospect of succeeding.

It is not the case that the matters will be ventilated before the Court of Appeal time and again; there must be those things.

It is also important to note that the provisions of the Vexatious Proceedings Restriction Act 2002 will cover criminal appeals, so it will be a continuing safeguard that if somebody is vexatious in instituting proceedings, they can come under the provisions of that act. I am sure we will explore that in greater detail when we get into the committee stage of the bill, but that is the additional protection that currently exists.

The member also asked about the legal costs protection. It is not an absolute protection. It is not really in one sense a protection as such. It is a deterrent, if we can describe it as that, and we need to contemplate that not every potential applicant or person using these provisions is somebody who might still be in jail. They might have served their term and be seeking to have a past conviction overturned under these provisions, and they might be able to bear those costs, as opposed to a prisoner who might be in jail for life and has no means to pay. But it is obviously still a deterrent in that particular case. I share the member's concern about unmeritorious applications re-traumatising victims, but as the member quite rightly pointed out, we need to balance that against the idea that somebody remains in prison or subject to a conviction that was a miscarriage of justice. It is a constant issue that the justice system grapples with. The strength of our system is dependent on the concept that innocent people are not sent to jail, so I think it is an important issue that we have to consider, but we are conscious of those issues.

I turn to consultation. I am sure we will get further into the details in the committee stage, as is the custom of our bills. The matters of proposed section 35I that the member raised can also be explored further in committee, because that is an appropriate forum to deal with it, so we will proceed on that basis.

As I say, the member has raised a number of matters. I have touched on some of those in my reply, but I think it is more appropriate to get into them during the clause 1 debate and as we progress through the bill. The bill is not particularly long. Obviously, clause 4 is the significant clause that really deals with the operative parts of the bill, which, again, we can explore in further detail. On those short comments in my reply, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon NICK GOIRAN: I will pick up on that issue that we started to ventilate in the second reading debate. Why does the bill before us allow for not merely a second appeal, but an unlimited number of subsequent appeals?

Hon MATTHEW SWINBOURN: In my reply, I think I might have mischaracterised it. It is not an unlimited number of appeals; it is an unlimited number of leave applications to appeal. I need to make that slight—what is the word?—qualification. When we are talking about unlimited, it sounds more dramatic than it actually is. A person who seeks a second appeal under this legislation would need to have grounds to do so. I think I have already alluded to those grounds. It is either fresh and compelling evidence or new and compelling evidence. If an appellant—I think we are calling them appellants—has made an application on new and compelling or fresh and compelling evidence, a certain set of facts, if I can call it that, they are not allowed to come back and re-appeal on those same facts. There would need to be new "fresh and compelling evidence" or new "new and compelling evidence" for them to make that application. There is nothing initially to stop a person from vexatiously putting in multiple applications for leave to appeal, but we then have the vexatious litigant protections that could deal with that. As the member knows, there are people sitting in prison who do not have much better to do with their time than to try to use the legal system. I think there is a biblical saying that idle hands do the devil's work. There is always that element, and that exists currently. I do not think that this legislation will exacerbate that, because I think, in some respects,

for the points I have made, they will have to have some new ground on which to make a third or fourth appeal, if such a thing exists.

Hon NICK GOIRAN: At the moment, if a person has appealed unsuccessfully, as I said in my second reading contribution, they are left only with the opportunity to petition either the Attorney General or the Governor. I take it that the government does not quibble with that suggestion?

Hon MATTHEW SWINBOURN: The prerogative remains.

Hon NICK GOIRAN: Yes. If one of those petitions are made at present to either the Attorney General or the Governor, are victims and their families notified that a petition has been made?

Hon MATTHEW SWINBOURN: There is no prescribed requirement to notify families. It is not a prerogative; it is the royal prerogative. I have prerogative on the brain for some reason. There is no requirement for the Attorney General or the Governor—it is effectively the Attorney General—to notify the family. However, depending on the circumstances of a particular petition for royal prerogative, the Attorney General may notify the family. They may dispose of the writ in a summary manner, and therefore there is no need to notify and re-traumatise the family. Really, there is a discretion for those things. There is no requirement in that regard. It does not mean that it does not happen in those circumstances.

Hon NICK GOIRAN: Compare and contrast that situation to how it will be once this new statutory right is created. Once an appellant launches an application in pursuance of their right of appeal under division 2, will the victim or the victim's family be notified?

Hon MATTHEW SWINBOURN: If I recall correctly, the member asked whether families will be notified under the new process.

Hon Nick Goiran interjected.

Hon MATTHEW SWINBOURN: They will not be notified under the bill itself, because the bill does not deal with that. If I take the member to proposed section 35G, "Commencing appeal", it states —

> (1) An appeal under this Part must be commenced and conducted in accordance with this Part and rules of court.
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> (2) An appeal under this Part must be commenced by lodging with the Court of Appeal an application for leave to appeal that sets out the grounds for appeal.
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> (3) On commencing an appeal, the appellant must serve a copy of the application for leave to appeal on the other party or parties to the proceedings before the trial court.
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> (4) The Court of Appeal may at any time order the appellant to serve a copy of the application for leave to appeal on any other person that the court thinks fit.

I think it would be highly unlikely that the court would ever order that a copy of an appeal be served on the family, because that is not really how it would want to communicate with them. They will not have been a party. The party to the appeal would be the Director of Public Prosecutions, the right of the state, so they will receive those things. That is similar to the current process for someone filing an appeal. If somebody has been convicted of an indictable offence and then lodges an appeal with the Supreme Court, there is no requirement to notify the victims of that appeal, but there are victim supports provided through the Department of Justice, so victims will and do have access to the victim support service that is currently offered by the Department of Justice. The victim support service offers confidential counselling and support services to victims of crime and, in situations in which the offence resulted in the death of a victim, to the immediate family members. These services are provided by professional counsellors and trained volunteers. The victim support service can provide information about court proceedings, provide counselling and support, support victims during court proceedings, help victims understand their rights and provide information and referrals for other services. The additional number of people requiring support under this service will be managed within the existing resources.

In answer to the member's question, perhaps in a roundabout way, the process that already applies to an appeal and the supports that are available for victims and their families would continue under this legislation. It might be the case, particularly in very high-profile cases, that an individual lodges a second or subsequent appeal, it is served on the DPP, and then the DPP would take steps to communicate with the family and assist them to access the victim support services that are available through the Department of Justice.

Hon NICK GOIRAN: We have identified that the Attorney General has a discretion as to whether he or she will notify the family and the victims in the event that an application is received—that is, a petition to the Attorney General that the matter be referred to the Court of Appeal, or alternatively an application for the royal prerogative of mercy. That is left with the Attorney General on a discretionary basis. Under this process, this statutory right to launch an appeal or, as the parliamentary secretary said, an application for leave to appeal, there will be a requirement that the

appellant serve the Director of Public Prosecutions. Does the DPP then have the discretion as to whether it will notify the victim and the family along the same lines as the Attorney General or is there an existing policy or procedure within the DPP that it is automatically done whereby the DPP always alerts the victim and the family?

Hon MATTHEW SWINBOURN: The member is right in one respect; the DPP has a policy. I do not have a physical copy to provide to the member, but we will try to get one. It is called *Policy and guidelines for victims of crime 2018*. I am looking at it online so I do not have the full document to finger through as I would normally. It states —

> During the proceedings, ODPP paralegals send standard letters to victims which contain relevant information about the prosecution at the following critical stages …

There are a number of dot points. It states —

- In the event that an appeal is lodged by the offender against conviction or sentence, or the State against an acquittal or sentence; and
- At the conclusion of any appeal proceedings.

There is a policy in place within the Office of the Director of Public Prosecutions—we are trying to get a copy of it to table—that provides what the Office of the Director of Public Prosecutions should do in these circumstances. There is no reason to assume that it would be any different under this bill because although it is a second and subsequent appeal, it is still an appeal.

Hon NICK GOIRAN: The parliamentary secretary mentioned victims. Does that policy also apply to victims' families or a family member of the victim in the event that the victim is deceased?

Hon MATTHEW SWINBOURN: We are trying to work our way through it. The Victims of Crime Act 1994 provides some guidance because its definition of "victim" is —

> (a) a person who has suffered injury, loss or damage as a direct result of an offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender; or
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> (b) where an offence results in a death, any member of the immediate family of the deceased.

That provides some guidance. That is not the final answer to the question because I think we want to be more certain of that. If we can, we will take that on notice overnight and give the member a more precise answer when we get back to the bill, unless we get an answer today. We are trying to work through that particular point.

Hon NICK GOIRAN: I smile only because I note that this is a bill of only some 14 clauses and most of our work will be conducted in the first five clauses. We will indeed see whether there is an overnight recess in this instance.

Hon Matthew Swinbourn: I am in your hands.

Hon NICK GOIRAN: Yes, I understand. Nevertheless, I appreciate that if the bill were to make excellent progress this evening, no doubt the hardworking officers and the parliamentary secretary will revert to the opposition in any event out of session. This demonstrates the point about the possible re-traumatisation of victims because what becomes clear is that under the existing system, the offender can appeal once. What we are now going to do is allow the offender to potentially appeal on an unlimited number of occasions. That will re-traumatise victims and their families because at present, once there is an attempt for a second appeal, it is in the form of a petition to the Attorney General or the Governor and that is what the parliamentary secretary described as at the discretion of the Attorney General to notify the family. I think the parliamentary secretary quite helpfully set out that it would be possible for an Attorney General to effectively summarily dismiss the petition having obviously given it proper consideration and not thought it necessary to notify and traumatise the family. But under the DPP guidelines, we know that it is automatic policy to notify the victim and, in the event of the victim being deceased in the sense that the crime committed led to their death, the victim's family members. I do not dispute the merits of that policy; it is an important policy and the DPP should maintain it.

But the point is that, consequently, victims will always know about it whereas at the moment, that is not necessarily so. That in itself is not a reason to not support the bill. It highlights what I said in the second reading contribution that it is important for us to also consider this bill through the lens of the victim and the families, because this bill will re-traumatise victims and families more so than the existing model. It is not without merit because of the rights and importance of an innocent person not being incarcerated. We do not quibble with the fact that there is merit in the bill before us. But it seems to me that it does follow that as a proportion, there will be more traumatised and re-traumatised victims and families as a result of this bill than if we left the existing system as it is, simply because the Attorney General will always continue to have the discretion to say, "I'm not going to notify. I'm summarily dismissing this matter." It is that that I am asking the government to give specific consideration. The parliamentary secretary has already helpfully drawn to members' attention that there is a victim support service that exists to help victims. Again to the issue of when a victim is deceased, the secondary victims, if you like, are the families and, in a sense, they will be elevated to becoming the primary victims at that point. Does the victim support service also help family members of victims?

Hon MATTHEW SWINBOURN: In the case of someone who is deceased, the answer is yes, but also I take the member to the definitional section of the policy, which states at paragraph 3 —

> A victim of crime ("victim") is a person who suffers personal harm, loss or damage as a direct result of an alleged offence or, in the event of the death, incapacity, or young age of the victim, an immediate family member of, or other person responsible for, the victim.

That is the DPP's policy. I table a copy of the *Policy and guidelines of victims of crime 2018*. It is document of the Office of the Director of Public Prosecutions.

[See paper 1340.]

Hon NICK GOIRAN: I thank the parliamentary secretary for tabling that document on the guidelines of the Director of Public Prosecutions. Can I ask the parliamentary secretary to turn his attention now to the quantity of the appeals or, as he says, applications for leave to appeal? In my view, one does not go without the other, but again, let us not quibble over that. How many applications does the government anticipate will be brought on as a result of this bill making its passage through the chamber?

Hon MATTHEW SWINBOURN: It is too difficult to calculate a figure in that regard, but we have taken some guidance from what has happened in the three jurisdictions that have introduced similar legislation and also from the number of petitions for royal prerogative that have been received by the Attorney General. I can confirm that up to the time of the introduction of the bill in the other place—I think that was last year—the Attorney General had received 12 petitions for the royal prerogative of mercy.

Hon Nick Goiran: Is that until August last year—starting approximately when?

Hon MATTHEW SWINBOURN: From when Hon John Quigley became the Attorney General in 2017. When South Australia passed its bill in 2013—I am not quite sure when it commenced, but we can presume it commenced relatively soon after then—there have been nine appeals under its system. I can give the member some more details; I am sure he will want that. Permission to appeal was refused in six cases and granted in three cases. In one of those cases, the Court of Appeal was later found by the High Court to have been in error in refusing permission to appeal. Three appeals have been allowed and the convictions quashed. Retrials were ordered in two of the three appeals, but the Director of Public Prosecutions did not proceed to a retrial on either of those matters. There has been only one subsequent appeal and the applicant was successful the second time around. There has been only one appeal to the High Court but the appeal was dismissed by the High Court.

Victoria passed its provisions in 2019. There were six applications. Obviously, Victoria is a much more significant jurisdiction than both South Australia and Western Australia. In fact, I will deal with Tasmania because —

Hon Nick Goiran: Maybe "larger", rather than "more significant"!

Hon MATTHEW SWINBOURN: Larger—yes, sorry. I thank the member for the correction. I agree with him; it is of course nowhere near as significant! Tasmania passed its legislation in 2015. It has had one application; permission to appeal was granted but the appeal was ultimately dismissed. In Victoria, since the commencement of its legislation, permission to appeal was granted in one matter and subsequently the convictions were quashed and a retrial ordered. Permission to appeal was granted and the conviction quashed in one matter on the basis of consent from the DPP. Permission to appeal was refused in three matters. In addition, there has been one case in which an applicant applied for a review of a registrar's decision to reject his application for leave to appeal because it was an abuse of process. That application was refused. In total, six applications were made.

I think that gives us an indication that we are not talking big numbers in relation to these things. A particular set of circumstances would need to be satisfied for someone, one, to be granted leave and then, two, to be successful on appeal.

Hon NICK GOIRAN: I thank the parliamentary secretary for that helpful data. We can see that, evidently, there will be some use of this new statutory right of appeal. The parliamentary secretary mentioned that 12 petitions had been received by the Attorney General in his time since 2017 until the time that this bill was introduced into the other place, which according to my notes is about August last year. Does the parliamentary secretary have information on how many times the victim was notified by the Attorney General in those 12 cases?

Hon MATTHEW SWINBOURN: We do not have that information, member. It is five years old.

Hon NICK GOIRAN: That is fair enough. Can I take the parliamentary secretary then to the issue of the test or what I would describe as the threshold? We have already discussed that this bill has no statutory limit on how many of these applications can be made, but will the threshold for leave to appeal increase? Is it intended that the courts should apply a higher test or threshold on every subsequent application? Obviously, for the first application, the test is as set out here, and the parliamentary secretary has already brought to our attention that there has to be fresh and compelling evidence related to the offence or new and compelling evidence related to the offence. The parliamentary secretary has already explained that it will not be satisfactory on what I would describe as a third or

fourth or fifth application for the appellant to simply retry the fresh and compelling evidence that they already tried at their second appeal. It has already been knocked out. They cannot just keep coming back and presenting the same evidence every time.

I think that the government has indicated that it is not the intention of the government nor Parliament for that to be the case. But that said, is it intended by the government that the threshold should in some way be interpreted by the courts to increase if a person keeps coming back?

Hon MATTHEW SWINBOURN: Legally, at law, it will not be a higher threshold test for leave. I mean, it is effectively the same for each new application. However, in practice, if somebody has had a second appeal and now a subsequent appeal is being dealt with, obviously there needs to be a distinction between the grounds on which they went for their second appeal and the subsequent appeal. If they are just bringing the application based on their previous unsuccessful second appeal, that would be an abuse of process and we would expect the court to essentially dismiss the matter at the first opportunity on the basis that it is an abuse of process.

In terms of the leave process itself, the act gives precedence to leave being determined before the merits of the application are considered. There are circumstances in which a court can grant leave at the same time as considering the merits. Proposed section 35F states —

> (1) Leave of the Court of Appeal is required for each ground of appeal in an appeal brought under this Part.
>
> (2) Except as provided in subsection (3), the Court of Appeal must decide whether to give leave to appeal on a ground of the appeal before the hearing of the appeal.

That is the primacy of dealing with leave. If the member has ever dealt with leave matters, he will know that in some instances, it is essentially dealt with at exactly the same time as the merits of the matter are determined. The appeal is run and then at the end, the court says, "And leave is granted", but that is not the primacy that is placed in here.

The proposed section continues —

> (3) If the Court of Appeal considers it necessary or desirable, it may give leave to appeal at the hearing of, or when giving judgment on, the appeal.

Without exhaustively going through the circumstances in which the Court of Appeal might do that, it may most obviously be in circumstances in which the Director of Public Prosecutions, for example—the state—is not opposing the second or third appeal. It would see no issue with dealing with both the merits of the matter and the leave to appeal if the state is not opposing the appeal in those circumstances. That is just one example of when that might possibly happen. It is likely to be extremely rare. Given that the person has already been convicted and has exhausted their normal avenues of appeal, I cannot imagine that the Court of Appeal itself would throw open the door for leave applications to be considered just as a matter of course. History has shown that Supreme Court judges have been quite reluctant to grant further appeals when the Attorney General of the day has referred matters back to them.

The leave threshold to be successful in a second or subsequent appeal based on new evidence is higher than it is for an initial appeal in that innocence must be positively proved on the balance of probabilities rather than merely introducing reasonable doubt or that a jury might have returned a verdict of not guilty. It is more difficult because there is no presumption of innocence and there is no basis. It is evidence led rather than error of law led, so in those circumstances we think that the leave hurdle is significantly higher.

Hon NICK GOIRAN: If a court determines that the person's appeal under this bill is unmeritorious for whatever reason—it may dismiss the application at the leave stage or at the final hearing—will that person still be able to apply to the Attorney General or the Governor for intervention?

Hon MATTHEW SWINBOURN: Yes, because the royal prerogative of mercy is not being interfered with by what we are doing in the bill.

Hon NICK GOIRAN: Yes, but what about the other avenue—that is, for the Attorney General to refer the matter to the Court of Appeal? Will it still be possible for the Attorney General to do that, notwithstanding the fact that a court would have already considered whether there was new and compelling evidence or fresh and compelling evidence, the court said no? Will it still be possible under this bill for the offender to go to the Attorney General and petition him or her and for them to say that they think that the court got it wrong and refer it to the Court of Appeal?

Hon MATTHEW SWINBOURN: Yes, it will be possible. It is not being extinguished in that regard, but I think that once we talk about what is possible, we might want to talk about what is probable or improbable. I think it is highly improbable that any Attorney General of the day would, if the person had already had their second or subsequent appeals dismissed, refer the matter back to the court for the purpose of reconsidering any element of those matters. Yes, it will be possible, but, I would say, extremely improbable.

Hon NICK GOIRAN: I agree with the parliamentary secretary. My question then is: why are we retaining the possibility for a petition to the Attorney General to refer a matter to the Court of Appeal? Why are we not simply saying, "No; you have to take your matter to the Court of Appeal via the Criminal Appeals Amendment Bill 2021"?

Hon MATTHEW SWINBOURN: We have not interfered with that particular discretionary power of the Attorney General, and there is a good reason for that. It is because this bill will permit second and subsequent appeals only against a conviction for an offence on indictment. The bill will not permit second and subsequent appeals against a summary conviction or sentence. The royal prerogative of mercy can continue to be exercised in those cases, including referral back to the court for determination on particular elements. The royal prerogative of mercy will continue to be a potential avenue for people on compassionate grounds, such as the release of terminally ill prisoners and things of that kind.

Hon NICK GOIRAN: Were victims of crime consulted about the bill?

Hon MATTHEW SWINBOURN: The Commissioner for Victims of Crimes was consulted on the development of the bill.

Hon NICK GOIRAN: Certainly, at one time there was a Victims of Crime Reference Group. Does that group still exist? I know that this bill is not new; as I have said, it even had a life in the previous Parliament. Was the reference group consulted on the bill?

Hon MATTHEW SWINBOURN: We do not have any knowledge about whether the group continues to exist, but I can confirm that if it does exist, it was not consulted with. Consultation was done directly with the Commissioner for Victims of Crime.

Hon NICK GOIRAN: What feedback did the Commissioner for Victims of Crime have on how this bill will impact on victims?

Hon MATTHEW SWINBOURN: As part of the consultation process on this bill, the Commissioner for Victims of Crime was invited to provide comment on the proposal to introduce this new right to a second or subsequent appeal when there is fresh and compelling or new and compelling evidence. The commissioner's comments were taken into account when the bill was drafted and the bill incorporates significant protections to protect victims' rights, thereby protecting the victims and next of kin from re-traumatisation.

Hon NICK GOIRAN: That is interesting information. The bill now incorporates—to use the phrase that has just been brought to the attention of the house—significant protections. What are those significant protections? I am going to assume that they are more than just this discretionary capacity for the court to award costs against an unmeritorious appellant.

Hon MATTHEW SWINBOURN: The protections that we are talking about are the structures of the process itself. If we start with the first step that a person needs to take, which is to obtain leave from the Supreme Court or the Court of Appeal to be able to get through, that leave threshold is difficult for them to satisfy. When we were developing the bill, we had regard to some guidance provided by the High Court in a case called Van Beelen v The Queen [2017] HCA 48. It was dealing with South Australian legislation. At paragraph 27, the court said —

> Section 353A manifests an intention that finality yield in the face of fresh and compelling evidence which, when taken with the evidence at the trial, satisfies the Full Court that there has been a substantial miscarriage of justice. If, following an unsuccessful s 353A appeal, further fresh and compelling evidence is discovered, the evident intention is that the Full Court have jurisdiction to remedy any substantial miscarriage of justice. The right to approach the Full Court directly conferred by s 353A in such a case is to be contrasted with the mechanism of executive referral in the case of a petition of mercy. The concern that a convicted person may bring successive, —

This is the important part —

> meritless applications under s 353A is addressed by the requirement to obtain —

Again, it is the South Australian example —

> the Full Court's permission to appeal.

It needs to be noted that in WA, it would need to be a full quorum of the Court of Appeal. A single judge in the Court of Appeal can hear applications once jurisdictions are conferred by the rules of the court. In the case of Western Australia, it might be a single judge depending on what the Supreme Court itself decides to do under its rules. The High Court itself recognised that the different levels—the leave threshold, the actual tests themselves, the fresh and compelling evidence and the new and compelling evidence requirements—are a high bar for anybody to satisfy. We cannot rule out somebody with ill or evil intent trying to abuse the court process and sometimes with the deliberate intent of re-traumatising a victim or the family of a victim. Unfortunately, there are people like that out there. We have an act that deals with those particular individuals—the Vexatious Proceedings Restriction

Act 2002. We do not think it will exacerbate the current mischief makers' capacities because they are doing that already. We are dealing with them at the moment through the different actions that they have taken over time.

Hon NICK GOIRAN: I am trying to understand whether that is in the absence of the government having consulted victims, which did not happen; instead, there was consultation with the Commissioner for Victims of Crime. I am trying to understand what value was added to this process by the Commissioner for Victims of Crime. The response that we were provided indicated that as a result of the consultation with the commissioner when the bill was drafted, it now has significant protections. When I tried to identify those significant protections, we were told that they are effectively two things: one is this process of leave; and the second, which is associated and ancillary to that, is the tests that have to apply. Is that indicative that prior to consultation with the Commissioner for Victims of Crime, there was no leave application in the draft bill or the tests that are currently in the bill before us?

Hon MATTHEW SWINBOURN: What I read out might have caused—I do not know that confusion is the right word. I will read out the last sentence again. The commissioner's comments were taken into account when the bill was drafted and the bill incorporates significant protections in order to protect victims' rights. It may be that one could draw the conclusion that significant protections were put in as a consequence of the commissioner, and that would be incorrect. When we consulted with the Commissioner for Victims of Crime and had that close consultation, those provisions were already built into the bill at that time. The Commissioner for Victims of Crime, if I can venture to say this, was satisfied with the protections that were built in through that process. It was not because of the Commissioner for Victims of Crime that they are there; the work was done by many others. There was consultation, of course, with other people, including the Director of Public Prosecutions, which very much has a view to victims as well, and those processes were ongoing in that regard. As the member quite rightly pointed out, there was the 2019 bill and now we have the 2021 bill, so we are testing our memories to some degree on some of the consultations that happened over time, but no issue was taken with how we were progressing with the second and subsequent appeals or with the policy it is trying to reflect.

Hon NICK GOIRAN: Do we know whether the Commissioner for Victims of Crime consulted with victims about the bill?

Hon MATTHEW SWINBOURN: We do not know whether she did that.

Hon NICK GOIRAN: I sometimes wonder why we have a Commissioner for Victims of Crime because it is not readily apparent to me how much value we get from the position, but perhaps that is a debate for another day. I accept that the parliamentary secretary did not say that there had been no consultation with victims—he indicated that the government is not aware whether there was or not—but I really hope that there was because it is now apparent to me, just from our consideration of clause 1, that a natural consequence of this legislation and this new scheme of additional appeals, which will get served on the DPP and as a result of its very good guidelines will be drawn to the attention of victims, will be that more victims will be traumatised as a result of this regime than under the current legislation. As I say, that is not a situation that any of us desire and it is not without any competing merit or value because of the importance of making sure the innocent person is not incarcerated. Nevertheless, I truly hope that the Commissioner for Victims of Crime has indeed consulted with victims, specifically about something as significant as this legislation.

We will move on, parliamentary secretary, to my last theme under clause 1—that is, to get an indication of the extent to which the bill before us differs from the models in the other three jurisdictions that the parliamentary secretary mentioned: South Australia, Victoria and Tasmania. The parliamentary secretary kindly drew to our attention that the South Australian legislation has been in existence the longest and some nine applications have been made, at least last time we checked, probably about a year ago, and although some have been dismissed, stress testing the system for unmeritorious applications, some have also been successful. For those who have been successful, it obviously means that they were innocent so that is a good and proper outcome by the criminal justice system as a result of that arrangement. In the South Australian legislation, for example, are there substantive—I do not necessarily need us to go through the insignificant differences, or even stylistic or what I could describe as jurisdictional differences—or significant differences, like a safeguard? Does one of the other jurisdictions perhaps limit the number of subsequent appeals that can be made, or have a higher threshold, or a definition of "new and compelling" or "fresh and compelling" evidence that is different from ours? Those are the types of substantive matters that I would consider to be significant that I am looking at.

Hon MATTHEW SWINBOURN: The first issue I want to clarify is that none of the other three jurisdictions has a limit on the number of appeals. The member asked for significant differences but I think that is an important commonality between jurisdictions. There are two particular significant differences between all three jurisdictions and Western Australia. The first is the introduction of the new and compelling evidence test. The other jurisdictions do not have that provision. Only Western Australia has that test, and I am sure that if the member wants to pursue that issue, he can. In relation to fresh and compelling evidence, we added an additional limb that the other states

do not have—that is, the requirement that deals with the negligent or incompetent conduct of the legal practitioner. I take the member to clause 4 and proposed section 35D(1), which provides —

> For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***fresh*** —
>
> …
>
> (b) if —
>
> (i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and
>
> (ii) the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

Another difference that was brought to my attention is that leave to appeal before the hearing of the appeal is a matter that will be dealt with in Western Australia. The other jurisdictions do not have that. I talked previously about the primacy that the act will give to leave being determined before the merit is determined; the other jurisdictions do not have that primacy. That is an additional layer that we put in the legislation.

I do not know how significant this last difference is because obviously each jurisdiction has its own bespoke criminal appeals legislation and way to deal with particular things. In South Australia it applies to any offences, whereas in Western Australia it will apply to only an indictable offence, which is the same in Tasmania and Victoria. The member asked for the significant ones. As he said, he is not interested in stylistic or jurisdictional vagaries and those sorts of things, but those are the ones we have been able to identify.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: To assist the deputy chair, after a question on clause 2, I have questions on clauses 4 and 6.

Here we find that the government is relying on the bill, once it has passed, to come into operation on a day fixed by proclamation. I understand that that might be to ensure that rules of the court can be put in place before the substantive provisions commence. Which part of the bill requires the court to prepare special rules in order for this new scheme to come into operation?

Hon MATTHEW SWINBOURN: Nothing under this bill requires them to make rules. There are, of course, other heads of power in which the Supreme Court can make rules to govern how it deals with a particular matter. For example, under the Criminal Appeals Act 2004, section 50 "Rules of court" provides for the Supreme Court to make rules in relation to the Criminal Appeals Act itself. That act empowers it to do that. I can confirm that the court has confirmed with the advisers that it will make rules with regard to that—it does not need to—and it has indicated to us that it will take it approximately six months to finalise those rules. That is where we are at.

Hon NICK GOIRAN: I have no question now, just a comment, really. It is just extraordinary. Keep in mind that this bill was before the previous Parliament in 2019, and it has taken three years to get to this point with this new scheme, in its new form, with regard to appeals. Apparently we will now have to wait another six months for the courts to prepare its rules.

Hon Matthew Swinbourn: It will be PCO that does the drafting or signs off on the rules.

Hon NICK GOIRAN: Parliamentary Counsel's Office is buried with the enormous workload that the government has given it, no doubt including the elder abuse reforms that we have been waiting for from the Attorney General for nearly 2 000 days. I make the comment that it seems remarkable that we will be waiting another six months on this matter. Nevertheless, I would like to see the bill progress this evening so that the six-month period can commence as soon as possible.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Part 3A inserted —

Hon NICK GOIRAN: I take the parliamentary secretary to proposed section 35H, which is entitled, "Decision on appeal". The Law Society expressed some concern with regard to this provision. The parliamentary secretary will see that there is the use of the word "innocent" under proposed section 35H. It is that particular word that the Law Society has previously stated, when consulted on a draft of a similar bill in 2018, is an ambiguous term. For example, when new and compelling evidence may knock out a link in the chain in circumstantial evidence, this would not establish innocence, but would lead to a situation in which the court would uphold a no case submission or the jury would have likely acquitted the accused. What consideration has the government given to that advocacy

from the Law Society about the word "innocent" to instead allow a situation in which a jury acting reasonably would have acquitted the offender?

Hon MATTHEW SWINBOURN: Consideration was given to those issues. We have not changed the bill, but if it assists, I will elaborate a little more about why the bill uses the term "innocent" rather than "not guilty". In the trial, the accused will have the benefit of the presumption of innocence with the prosecution having to prove the accused guilty beyond a reasonable doubt. By contrast, in a further appeal based on new and compelling evidence, the appellant will have to prove on the balance of probabilities that he or she is innocent. Because new evidence has been previously available for the accused to use at his or her discretion, but for whatever reason was not used, it is appropriate there be a higher threshold test for new evidence than for fresh evidence. The common law test is summarised in Gibson v The State of Western Australia at paragraph 59 and states —

> At common law, where an accused has been convicted, an appellate court will not allow an appeal, on the basis of new as distinct from fresh evidence, unless the new evidence establishes that the appellant is innocent or the new evidence raises such a doubt that the court is satisfied that the appellant should not have been convicted. See ***Lawless v The Queen*** [1979] HCA 49; (1979) 142 CLR 659 …

It goes on, and also references —

> … ***DPJB v The State of Western Australia*** [2010] WASCA 12 (Owen JA, McLure P relevantly agreeing).

The test in the bill creates a higher bar again than the common law principles for initial appeals based on new evidence as the bill asks only if the offender is innocent and not also whether the offender should not have been convicted. The question is not whether the new evidence shows that there ought to have been reasonable doubt about the guilt of an offender; it emphasises that second or subsequent appeals, particularly those based on new evidence, are not to be lightly allowed. The term "innocent" has been used rather than "not guilty", because innocence is a positive concept that the offender must prove, and it is intended to highlight the higher bar for new evidence in second or subsequent appeals.

Hon NICK GOIRAN: I think it is very helpful that the parliamentary secretary has read that into the record, because, as I understand it, we are the only jurisdiction that is going to allow these types of appeals based on new and compelling evidence. In a sense, since we are going to be leading the way in this respect, we need to make sure that we get it right. I think it is important that the court hears very clearly that the intention of the government and the Parliament is that there is, quite purposely, this higher test for new evidence as distinguished from fresh evidence. I thank the parliamentary secretary for reading that into the record.

I draw the parliamentary secretary's attention to proposed section 35E(2), which provides that —

> Evidence is not precluded from being admissible on an appeal brought under this Part just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

In what circumstances might evidence be admissible in a subsequent appeal under this legislation if it was inadmissible in the earlier trial of the offence resulting in the relevant conviction?

Hon MATTHEW SWINBOURN: I will give the member two general examples. The first is a case in which Parliament, for example, has changed what might be considered admissible evidence in a court. I am trying to think of an example; I cannot off the top of my head. Parliament has changed the Evidence Act in the past to allow an area of evidence that was not previously allowed. I think family and domestic violence cases might be a good example. Previously, evidence of past behaviour or violence against a domestic violence victim who might then have committed a crime against their perpetrator was difficult to introduce. The other circumstance is whereby higher courts have changed the state of the law with regard to evidence. In the past, evidence may not have been admissible, but in appeals for other cases the interpretation may have changed. Perhaps I can give one further example, and that is scientific changes. Something might be speculative. If we go back to the early 1990s, DNA evidence was probably difficult to admit because courts might have been very suspicious of the quality of the science, but as the science improved over time, courts became much more accepting of that kind of evidence. That would be an example, as well.

Hon NICK GOIRAN: I ask the parliamentary secretary to turn to proposed section 35G(2) that provides that an appeal must be commenced by lodging an application for leave to appeal with the Court of Appeal. If the appellant is self-represented, what type of facilitation will there be on the part of the Department of Justice to, if you like, assist the appellant who wishes to lodge their appeal in person?

Hon MATTHEW SWINBOURN: As a matter of course, the Department of Justice does not provide any particular assistance to self-represented parties, other than, for example, if they were to contact the court and seek guidance on a particular form to use and the person they speak to says "You need form X or Y." That would be the same with court registrars, as well.

Hon NICK GOIRAN: What about the filing of the form, if they are doing it by themselves?

Hon MATTHEW SWINBOURN: Is that what the member means—a prisoner filing the form by themselves?

Hon NICK GOIRAN: Yes, lodging in person.

Hon MATTHEW SWINBOURN: Let me get some more advice on that.

The advisers from the Department of Justice I have at the table are probably not from the right part of Justice, because that would be the Department of Corrective Services, and I do note that I am the Parliamentary Secretary to the Minister for Corrective Services as well. My understanding is that corrections would be inclined to help facilitate the filing of that form, but it would not provide them any assistance other than with the physical process. That would be the same for any court or legal documents for self-represented litigants. This is not going to create a new category of assistance or help in that regard.

Hon NICK GOIRAN: What about applications for legal aid? Will appellants have any special rights under these particular provisions; or, if there is no special right to legal aid because of this provision, is it expected that the ordinary appellant—if you like, the typical appellant who would use this particular provision, such as the 12-odd people who have been submitting petitions to the Attorney General since 2017—would have access to legal aid to facilitate the lodging of such an application?

Hon MATTHEW SWINBOURN: Not as a matter of course. It would be entirely up to Legal Aid Western Australia to determine whether someone's application for legal aid was of sufficient substance and merit for them to meet the requirements under its guidelines, but there are no special arrangements for this. I suspect that legal aid would be denied in cases in which the application was vexatious or an abuse of process. It is not just an expectation; it should be rejected in all those circumstances. But there are no special arrangements with legal aid.

Hon NICK GOIRAN: I refer to proposed section 35I, which provides that there is to be no fee payable by an applicant. They are not to be paying a fee as a party to the appeal. Does that include the payment of a suitors' fund fee? Is it ordinarily the case, for example, at the first appeal—not the second and subsequent appeals covered by this legislation, but the ordinary first appeal—that the appellant would ordinarily pay a suitors' fund fee, and would they still need to do so in this instance?

Hon MATTHEW SWINBOURN: We are not 100 per cent about the suitors' fund. What I can say is that what is being proposed here for fees is the same as for a first appeal. In a first appeal, there are no fees. This is just replicating that. If a suitors' fund contribution were required on a first appeal, the member can imagine that it would be required on a second and subsequent appeal; similarly, if it were not required in those circumstances, it would not be required in subsequent appeals. I cannot give the member an affirmative answer as to whether it is or not, but we are proposing here a continuation of the structure that exists for first appeals.

Hon NICK GOIRAN: I turn to the issue that the parliamentary secretary drew to our attention during the debate on clause 1—that is, proposed section 35D(1)(b)(ii), this extra limb, as the parliamentary secretary described it, which states the requirement that the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender. The parliamentary secretary will see that subsection 35D(1)(b)(ii) is linked to the previous subsection (i) by the use of the word "and", so a person has to satisfy both parts —

> (i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and
>
> (ii) the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

What if no lawyer represented the offender at the original trial?

Hon MATTHEW SWINBOURN: The provision does not apply if the offender was self-represented.

Hon NICK GOIRAN: What does that mean with respect to evidence that was not tendered at the trial but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous —

Hon MATTHEW SWINBOURN: I think that is the fresh evidence in itself. If the member looks at proposed section 35D(1)(a), it states —

> if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal …

That is the additional limb for represented people. Of course, proposed section 35D(2) refers to the new evidence provisions and states —

> the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal …

Hon NICK GOIRAN: Thank you for that. I am not concerned about the definition of "new evidence" in subsection (2) to which the parliamentary secretary referred. Rather, I am drawing to the parliamentary secretary's attention the definition of "fresh evidence", which is defined in one of two ways. It is either defined as per proposed section 35D(1)(a) or proposed section 35D(1)(b). Proposed section 35D(1)(a) stands on its own, but under proposed section 35D(1)(b), two things need to be satisfied and it seems to me that they cannot be satisfied without a lawyer having been present. Is the parliamentary secretary indicating that in the instance that evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal, and the person was a self-litigant, that it is sufficiently captured by proposed section 35D(1)(a)?

Hon MATTHEW SWINBOURN: It is captured by proposed section 35D(2), which is new evidence, which is a higher bar. It is not captured by proposed section 35D(1)(a); rather, it will be captured by proposed section 35D(2). In those circumstances, the self-represented litigant would, if they satisfy that and exercise reasonable diligence in the carriage of their matter, satisfy proposed subsection (2), and that would be their avenue in.

Hon NICK GOIRAN: The problem with that, parliamentary secretary, is that if we then say to that self-litigant, "Sorry, you can't rely on the definition of "fresh evidence" in your circumstances because you were a self-litigant. You're going to have to reply on the definition of "new evidence"," the test for new evidence is higher because they have to prove innocence rather than a miscarriage of justice, as the parliamentary secretary explained earlier. Why are we making the test more difficult for a self-litigant?

Hon MATTHEW SWINBOURN: A self-represented offender will not fall within the definition in proposed section 35D(1)(b)(ii) because no lawyer represented the offender. A self-represented person has full control of their case and makes all the decisions themselves, whereas this may not be the case for a person represented by a lawyer. The provision is designed to protect offenders from a lawyer's incompetent or negligent failure to tender evidence for which no fault lies with the offender rather than, I suppose, the negligence or incompetent failure of a self-represented litigant to properly represent themselves.

Hon NICK GOIRAN: I am not satisfied that that properly explains the issue. We will allow them to have that evidence as new evidence but then we say, "You'd better make sure the new evidence proves your innocence. If you'd had a lawyer, you'd be able to get through the gate as fresh evidence and then you wouldn't have to meet the higher test." That is not apparently clear to me at this point from the answer that has just been provided. Nevertheless, I indicate that I have only one further question about this clause. I have a question on clause 6 so despite our best endeavours, we will be continuing tomorrow, which will assist the parliamentary secretary to follow up on some of those matters.

The DEPUTY CHAIR: Noting the time, I am required to report progress to the house.

Progress reported and leave granted to sit again, pursuant to standing orders.