CRIMINAL APPEALS AMENDMENT BILL 2021

Second Reading

Resumed from 11 August.

MS M.J. DAVIES (Central Wheatbelt — Leader of the Opposition) [4.42 pm]: I heard the end of that, then thought I was in the wrong space. I rise to close the debate from the opposition's perspective. Obviously, we have contributed to this debate and there is no change in our views as the legislation has been brought forward. I think the Attorney General covered the issues that we had and the bill has been debated in the other house. I do not intend to hold up the process any further. I will just report that I have not done what I said I should have done when we debated this last time and started proceedings to put together a will, but it is on the to-do list! I will get to it sometime after 2024, I reckon. It is one of the things I will try to do after the winter break. We talked about its importance. I thank the Attorney General for bringing this legislation to the house. I think it is something worthwhile. Without any further ado, I commend the bill to the house.

The ACTING SPEAKER (Ms R.S. Stephens): Just to clarify, Leader of the Opposition, we are on the Criminal Appeals Amendment Bill 2021.

Ms M.J. DAVIES: That is not what I am on. That is why I asked! My apologies. Sorry; I was under the impression we were doing the Administration Amendment Bill, which is on our green sheet.

Mr D.R. Michael: We did do it, just very quickly.

Ms M.J. DAVIES: I missed that. Right, I am clearly fast asleep. I am having a good day today! I will stand and talk to this bill while our speaker makes his way to the chamber. Again, I am going to demonstrate my in-depth knowledge of this legislation. My apologies; I was not paying attention and that is entirely down to me. The Attorney General will be pleased to know that I was very supportive of the passage of the previous legislation! There are many moments in this job, members, for people to look pretty silly. That was one of them.

Regarding the—let me double-check—Criminal Appeals Amendment Bill —

Mr D.R. Michael: Would you like one of our speakers to jump up?

Ms M.J. DAVIES: If that would be possible, because I am not the lead speaker on this bill. I can waste the house's time, but I would rather hear from somebody who has done the prep work on it. If I sit down, I will allow our lead speaker to return to the house. Thank you.

MR D.A.E. SCAIFE (Cockburn) [4.45 pm]: I am only too happy to take up the challenge of wasting the house's time but I think the Leader of the Opposition's contribution will turn out to be much more entertaining than mine will be. Nonetheless, I am happy to do my bit.

This is a significant bill that we are introducing today but, more so, it is significant that this bill has been introduced to this Parliament by this Attorney General. In that respect, I am pleased to speak to the Criminal Appeals Amendment Bill 2021 and to do so in circumstances in which it has been introduced by the Attorney General who has a long history of advocating for people who have been wrongfully convicted. I would like to acknowledge the Attorney General for the work he has done in that regard and the work he has done in bringing this bill to this Parliament.

It is, unfortunately, the case that we have wrongful convictions in our criminal justice system. Our system of justice is adversarial. It is not an inquisitive system. We, admittedly through that adversarial system, are searching for the truth but, unfortunately, do not always find it. The justice system, as a result, does sometimes make mistakes, which can lead to wrongful convictions. Sometimes, though, there are also deliberate cases of corruption or misconduct that result in wrongful convictions. This bill sets up a new and modern process for making sure that wrongful convictions in particular can be challenged. Obviously, the consequences of a wrongful conviction can be very serious. In his second reading speech, the Attorney General referred to the case of Andrew Mallard. Mr Mallard spent almost 12 years in prison after being convicted of the murder of Pamela Lawrence when he was, in fact, not guilty of that crime. Even after Mr Mallard was released, the Director of Public Prosecutions still named him as the prime suspect until a cold case review identified that Simon Rochford was much more likely to be the offender. Reflecting on Mr Mallard's case has caused me to reflect on the fact that the consequences in his case were serious, but the consequences can be much more serious in other jurisdictions. I am particularly referring to those jurisdictions that have retained capital punishment.

There are countless stories in Australia and across the world of people who have been wrongfully convicted. As a result, in jurisdictions that retain capital punishment, there are undoubtedly cases in which innocent people have been executed by the state. That is one of the reasons I have always opposed capital punishment. There is no punishment that is more final than capital punishment. Our justice system, in my opinion, simply cannot reach the state of certainty and satisfaction that could possibly justify capital punishment. I also put on the record my view that

capital punishment is an uncivilised form of justice. It is also a form of punishment that disproportionately affects poorer people and people of colour. Our system of justice is based on a fairly firmly held principle—the principle that justice must be done, or, what I might call substantive justice or justice on the merits. This is the idea that we hold people responsible for their crimes. We do not simply give in to any kind of mob rule. We expect that people will be only held responsible and only punished for their own behaviours.

There is another principle that underpins our justice system, and that is the principle of finality. The principle of finality is essentially the principle that once somebody has been tried for a crime in our criminal justice system, they cannot be tried again at a later stage. Members will no doubt be familiar with this. The term I am referring to is "double jeopardy", although that is more an Americanised term than one that is used commonly in Western Australia. The principle of finality and the principle of substantive justice can be in tension, and that is because we cannot endlessly be litigating or disputing matters in the courts. However, at the same time, we do not want wrongful convictions. If a case has been litigated or prosecuted and it has reached the wrong outcome, we still want to have an avenue to ensure that the proper outcome—the just outcome—is reached.

This bill seeks to strike the balance between the principle of substantive justice and the principle of finality, while also removing politicians from the process of deciding cases that should be the subject of, say, a further appeal. It will allow a person who has been convicted and who has exhausted their rights of appeal to bring a new appeal when there is new and compelling or fresh and compelling evidence. It will also ensure that past convictions—past decisions—are not unnecessarily disturbed. In that respect, I note that the core process can be very traumatic for victims of crimes and their families, so it is important that we do not needlessly go through appeals processes. Those appeals processes can cause victims and their families to have to relive the experiences that led to a prosecution in the first place, so it is important that we do not subject victims or their families to further trauma through unmeritorious appeals.

Indeed, my contribution today will be about the principles of finality and substantive justice and then I will look at particular cases in a Western Australian context that are examples of when a bill like this would have made a difference and also discuss the protections in this bill against unmeritorious appeals.

As I said at the outset, there are various principles that underpin our justice system, and the first principle that I refer to is substantive justice or justice on the merits. This is, as I said, the principle that states that in our justice system, we want to achieve the right outcome. We want to attribute responsibility for a criminal act to the right person. We want to punish the wrongdoer, not innocent parties. It is what people would think of as an ordinary conception of justice. But the principle of finality is essentially the principle that disputes should not constantly be reopened and re-argued. There is a variety of reasons for the principle of finality. It allows people to move on and put disputes behind them. It also allows for the efficient use of the courts' resources. Courts have limited resources. They are publicly funded. There are only so many hours and so many judicial officers available. The principle of finality also ensures that we are not constantly using the justice system to deal with disputes that should have already been resolved. Indeed, the law has a variety of methods for satisfying the principle of finality—concepts such as estoppel, abuse of process and, as I mentioned, double jeopardy or otherwise known as a plea of autrefois acquit. I would like to refer to a passage from the case of Barrow v Bankside Agency Ltd [1996] 1 SLR 257 at page 260. In that case, the court said —

> The rule in Henderson v Henderson … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

Those last couple of sentences in particular outline the public policy purpose behind bringing proceedings to a final conclusion—having a final result at the end of a prosecution and its appeals process. A slavish devotion to the principle of finality, however, may mean that there are miscarriages of justice, and this means wrongful convictions. Of course, it might also mean wrongful acquittals. Equally, a slavish devotion to justice on the merits creates inefficiency, it does not allow the victims or the accused to move on and it also demands a standard of perfection in the law that is very likely unachievable. The justice system must resolve that tension between the need for finality and the need to achieve substantive justice.

In recent years in civil litigation in particular, there has been a move towards efficiency and finality over a preference for justice on the merits. However, the considerations are somewhat different in the criminal justice system. In the criminal justice system, we are obviously dealing with crimes, and in many cases serious crimes. We are also dealing with punishments that are very serious. We are talking about terms of imprisonment—punishment that will

deprive a person of their liberty. It is arguably more important in criminal cases that the courts achieve the correct outcome. But, as I have said, court proceedings themselves can be traumatic and we do not want them to drag on forever. That tension is most obvious in the case of possible wrongful convictions. It is obviously important for victims and their families to have finality, but it is also critical that we do not have innocent people serving time in prison. It is also, I note, critical to the victims and the families that the right result is achieved. Victims and families want the right person to be punished, deterred and, in the case of terms of imprisonment, taken out of society so that they cannot reoffend against others.

One way of resolving the tension between the principle of finality and the principle of substantive justice is obviously just the appeals process. The appeals process really grows out of the tension between the two principles. It acknowledges that courts ordinarily get it right, but appeals also provide a process to correct errors if they occur. Of course, eventually the appeals process exhausts itself and if a wrongful conviction, for example, has been sustained throughout an appeals process, the wrong result remains. There are also some limitations to appeals. There is an ordinary rule in most appeals that new evidence cannot be adduced or that a party cannot run their case in a way different from how they ran it before.

Currently, for people in Western Australia who believe that they have been wrongfully convicted and have exhausted their appeals, only one option is available to them to challenge their conviction—that is, to lodge a petition for the royal prerogative of mercy with the Attorney General. The Attorney General then has a discretion to refer the matter to the Court of Appeal for consideration. I think the name of that process indicates that it is out of date—being a royal prerogative. A person's only real remedy at the moment in circumstances in which they believe they have been wrongfully convicted, and perhaps new evidence has become available, is that they have access to a royal prerogative. It is also a process that inserts politics into a process that really should be free from it. Most, if not all, members would agree that we want to see a dispassionate consideration of the merits of a case by our criminal justice system, not a consideration of any politics. The bill will now provide that option by enabling the dispassionate judicial reconsideration of a case. This follows similar reforms in South Australia, Tasmania and Victoria. It will allow the Court of Appeal to hear an application for a further appeal in cases in which fresh and compelling or new and compelling evidence has been found. In doing so, the Court of Appeal will first have to determine whether to grant leave for that appeal. Once leave has been granted, the appeal against the initial conviction, which had been upheld on appeal, can then be heard.

There are many well-known examples of wrongful conviction, such as Mr Mallard's, which were later resolved through petitions for a royal prerogative of mercy. I would like to speak about some of those examples. My purpose for speaking about some of those examples is to tease out how the process of a petition for a royal prerogative of mercy works, to explain why we need this bill and also to explain some of the features of the bill, such as the difference between new evidence on the one hand and the concept of fresh evidence on the other.

[Member's time extended.]

Mr D.A.E. SCAIFE: The first case that I would like to discuss is described in a judgement called von Deutschburg v The Queen [2013] WASCA 57. This case relates to events that happened in Western Australia. It highlights the way that advances in science in Western Australia contributed to fresh evidence, and therefore to a successful petition and appeal against a conviction. The facts of that case are as follows. On 1 June 1983, Mr von Deutschburg burgled the home of 86-year-old Mr Stavros Kakulas. Mr von Deutschburg assaulted Mr Kakulas, causing him the following injuries: bruising to the arm, chest and right eye; and four fractured ribs. About 18 hours after the assault, Mr Kakulas was examined by his general practitioner, who then admitted him to hospital. Sadly, Mr Kakulas later died in hospital. He died from internal bleeding from an acute duodenal ulcer. The prosecution's case at trial was that the ulcer that led to Mr Kakulas's death was caused by the physical and psychological stress caused to Mr Kakulas during the assault by Mr von Deutschburg. That part of the case was supported by the following extract from the report of Dr Hainsworth —

> The direct cause of his death was bleeding into the intestine from acute duodenal ulceration—ie a 'stress ulcer'. This ulcer had arisen <u>after</u> the injuries and was the <u>result</u> of the deceased having undergone physical & (psychological) stress.

That argument was accepted by the jury and Mr von Deutschburg was convicted of Mr Kakulas's murder on the basis that his assault had somehow aggravated the ulcer, causing it to bleed, leading to Mr Kakulas's death.

Since those events in 1983, there have been significant advancements in knowledge about the causes of ulcers. Much of that work has been done here in Western Australia by Professor Barry Marshall and Dr Robin Warren. Those two researchers established that stomach ulcers, which had long been thought to be caused by stress, almost always or much of the time are caused by a bacteria known as *Helicobacter pylori*. Professor Marshall and Dr Warren won a Nobel prize for that discovery. The two of them are among Western Australia's few Nobel prize winners.

It turns out that 29 years after the event involving Mr von Deutschburg and Mr Kakulas, Professor Marshall deposed an affidavit in 2012 in relation to his review of Mr Kakulas's condition. In summary, he found that there was a less than five per cent chance that stress alone would cause a duodenal ulcer. He found that although Dr Hainsworth's view was consistent with the medical opinion at the time, it is now considered highly unlikely that an ulcer would be caused by an assault. Professor Marshall also stated that, in his opinion, the injuries inflicted on Mr Kakulas by Mr von Deutschburg did not contribute to or accelerate the development of bleeding of the duodenal ulcer. In addition to that affidavit, Dr Clive Cooke, a pathologist, deposed an affidavit after having reviewed microscope slides of tissue samples from Mr Kakulas. Dr Cooke deposed that the ulcer showed features of chronicity and therefore had existed before the assault. Dr Cooke's conclusion was that the ulcer was likely to have been pre-existing. Dr Cooke also stated that it was essentially unknown whether an injury to or the psychological stress that had been experienced by Mr Kakulas contributed to the bleeding of the ulcer.

The Court of Appeal took that fresh evidence into account and accepted that the only reasonable conclusion that would have been open to the jury was that there was such doubt that Mr von Deutschburg should not have been convicted of murder. As a result, Mr von Deutschburg's wrongful conviction was overturned. That was a good outcome in that case but it was obviously a long time in the making. Importantly, it points to the variety of ways in which evidence can change. It was not a case of fraud or corruption being exposed; in fact, it was just that, as a result of scientific advancements, better evidence became available. That highlights the distinction in the bill between fresh and new evidence. Under the Criminal Appeals Amendment Bill 2021, Professor Marshall's evidence would be classed as fresh evidence and that is because fresh evidence is evidence that was not and could not have been tendered at trial despite the exercise of reasonable diligence. In this case, Professor Marshall's evidence was not available at the original trial in the 1980s because the science in that area had yet to advance. That is different from "new evidence" in the bill, which is evidence that was not tendered but which could have been tendered with reasonable diligence.

The second case that I would like to briefly mention is that of Scott Austic, who was convicted in 2009 of the murder of Stacey Thorne on 9 December 2007. Mr Austic was sentenced to life imprisonment with a minimum non-parole period of 25 years. His appeal against that conviction was dismissed. In 2012, Mr Austic submitted a petition to Hon Christian Porter, who was then the Attorney General, but the petition was rejected. In September 2013, he submitted another petition to Hon Michael Mischin, who was the new Attorney General, but his petition was again rejected. He submitted another petition in substantially the same terms as the petition he had submitted to Hon Michael Mischin to the current Attorney General in 2018, who decided to act on it and referred the matter to the Court of Appeal. In May 2020, the Court of Appeal overturned the conviction. In doing so, the Court of Appeal found that there was credible, cogent and plausible evidence that various pieces of evidence were planted. Those pieces of evidence included a knife that was found in a field after it had been previously thoroughly searched by the State Emergency Service and also a bloodstained cigarette packet that was not in the original photos of the crime scene but mysteriously appeared 30 hours later when the scene was reviewed. Mr Austic's case is very troubling. Although his conviction was ultimately overturned, what is important about Mr Austic's case is that it demonstrates why the petition for royal prerogative is not the appropriate way of reviewing these cases. Six years passed between Mr Austic's original petition and his ultimately successful petition to the Attorney General. His successful petition was in substantially the same terms as the rejected petition. That shows that the failure or success of a petition is somewhat arbitrary; it may hinge on the views of the particular Attorney General of the time. Arbitrariness is something that we want to avoid in our justice system.

The cases of Mr von Deutschburg and Mr Austic underline that there is unfortunately a need in Western Australia for legislation that provides an avenue for wrongful convictions to be challenged. Nonetheless, cases such as those of Mr Austic and Mr von Deutschburg cannot lead to a system of constant appeals. As I said at the outset, we do not want to subject victims and families to ongoing court processes and for that reason there is a number of protections in the bill to prevent unmeritorious appeals. I will outline a number of those. As I said earlier, the appellant must first seek leave to appeal and leave must be granted in relation to each specific ground of appeal. The starting position is that the application for leave needs to be determined in advance of the substantive hearing, so leave must be granted first. Obviously, it is a requirement that the appellant identify evidence that is both compelling and fresh or new and, in respect of new evidence, the Court of Appeal must be satisfied that in light of all the evidence it has been established that the appellant is innocent. That is a higher bar because the Court of Appeal has to be positively satisfied of the appellant's innocence. I am satisfied that that is a rigorous regime that will provide options for the review of cases in which there is compelling and new or fresh evidence while also preventing unmeritorious appeals. For that reason, I congratulate the Attorney General for introducing this bill to Parliament and I commend it to the house.

MR R.S. LOVE (Moore — Deputy Leader of the Opposition) [5.14 pm]: I rise to speak in the second reading debate on the Criminal Appeals Amendment Bill 2021 on behalf of the opposition, which I guess makes me the lead speaker, although I do not think I will take an hour to run through this matter. This bill is similar to the Criminal Appeals Amendment Bill that was introduced in 2019, about which we had extensive discussions.

The bill will amend the Western Australian Criminal Appeals Act 2004 by introducing a new right for offenders who are convicted of an indictment, on appeal, to bring a second or subsequent appeal to the Court of Appeal against their conviction if there is either fresh and compelling or new and compelling evidence relating to the offence. The Attorney General is well-acquainted with what happens in the justice system. He knows that miscarriages of justice occur from time to time and attempting to right those types of miscarriages of justice is something that he has long championed, and that is acknowledged by all sides in Western Australian politics. It is fitting that with his firsthand experience in these types of situations, the Attorney General has brought this bill to the chamber.

I understand that under the current legislation, the appeals process involves going to the Attorney General or the Governor when others appeals have been exhausted. The Attorney General can allow for a review or a second or subsequent appeal of a matter at their discretion. There have been delays in the consideration of such cases and sometimes a new Attorney may make a different decision when a right to appeal has been denied by the former Attorney General. A change of political position might mean a difference in the exercise of discretion, and that does not lead to a great deal of certainty or provide a clear path, which is very important. We also know that delays in these types of situations can cause trauma to the individual who has been convicted of a crime, perhaps wrongfully, and that continually going over these issues and undoing what might have been sealed—overturning the principle of finality—can reinforce the trauma for the families of victims, survivors and the extended community because they have to go through what has been a very difficult time, which brings back bad memories.

There are a number of quite famous cases in which miscarriages of justice have occurred. As far as I am aware, many of these cases required the Attorney General of the day to use their discretion to decide whether there should be a second appeal. Some of those cases are well known in the annals of Western Australian legal practice. Just about every Western Australian will remember some of these miscarriages of justice and can talk about what they heard and can recall some of the impacts that the case may have had on the victims and the person who was wrongfully convicted. One of the cases that comes to mind is the case of John Button, who was accused of murdering his girlfriend. The murder was later attributed to Eric Edgar Cooke. As we know, Cooke made a confession about the murder, but a number of unfortunate decisions were made in the investigation and the lead-up to John Button eventually having his conviction overturned.

Darryl Beamish was accused of murdering a victim who had been slain by Eric Edgar Cooke. He was exonerated in 2005 after the Button case had been appealed. We know of the so-called Perth Mint swindle for which brothers Peter and Ray Mickelberg were convicted. After police corruption came to light, their convictions were quashed in 2004. The Andrew Mallard case is no doubt very familiar to the Attorney General. In another case, Mr Gibson was jailed for five years before being released, and was eligible for quite a payout; I believe it was about $13 million. Nonetheless, he was a victim of a miscarriage of justice. In another case, Scott Austic was found guilty of stabbing his then pregnant lover. He has had his conviction recently quashed due to the planting of evidence. As that is quite a recent case, it is perhaps quite well known to people now. It has been spoken about already in the chamber. I know that that particular case occurred in the electorate of the Leader of the Nationals WA, so I am sure that she would also be well aware of it.

It is good to just pause at this point and think about what has happened for Mr Austic. He has had his case heard and the appeal has led to his conviction being quashed. However, I do recall the grief of the family of Ms Stacey Thorne when that occurred, and I think any feeling person would have nothing but sympathy for them. The conviction would have given them a sense of closure, and they could say that the person who did the crime had been convicted. Now, regardless of whether they accept what the court has said, I am sure that they have gone through a lot of grief and trauma as a result of all that has happened. I know that the impetus for this bill was cases like the Austic and Mallard cases and, as I have said earlier, other court cases that have been brought to the attention of the public; almost every Western Australian knows of these cases.

In 2019, when this bill was being debated in the other place, former member for the Legislative Council Hon Alison Xamon asked one rather large question on notice, which was really a series of questions. The only real answer she got was to wait for the briefing. There is no response to Hon Alison Xamon on record, as far as I am aware. I will let the Attorney General know that question on notice 2650 asked on 4 December 2019 raises a few issues that might play out, and I might ask about it at the consideration in detail stage. I will allow the Attorney General to know that now, just for his benefit.

Mr J.R. Quigley: Which question was it?

Mr R.S. LOVE: It was question on notice 2650 asked by Hon Alison Xamon on 4 December 2019.

Mr J.R. Quigley: I will have to look for it.

Mr R.S. LOVE: Getting back to some of these other cases, we know that some people in the community may feel that some of the people who have had their convictions overturned are in fact still guilty. For everybody, there will always be a lingering sense of an unfortunate situation for all those people who get caught up in this type of thing. Ideally, we would like to have a criminal justice system in which these sorts of mistakes do not happen. When

miscarriages of justice occur, I think it is important that these matters are reviewed and looked into to ensure that what went wrong in the investigation or the trial of the person does not occur again. We need to do everything we can to ensure that it does not occur again.

I refer to the case I mentioned before about Mr Gibson. When that conviction was overturned, a report on ABC online news looked at some of the matters relating to the conviction. At the end of the report, it said —

> There were further questions being asked again about Mr Gibson and a group of people he was with that night by the police.

Even though his conviction had been overturned, there seemed to be some mindset in the Western Australia Police Force that it needed to continue to consider that he may have been involved, even after the state had paid $13 million in compensation and the conviction had been quashed. I found that to be quite strange. The report was in the media; I am not making it up. But it seemed rather strange to me that that would be the case. I think it is very important that police and prosecutors and the legal profession look very carefully at ensuring that cultures are set so that these types of miscarriages are as few as possible and there is respect for the outcome of the appeal process. I know that we must consider how the victims, the families and communities will be supported and managed, and how their trauma is supported as these cases proceed.

Another matter that I may ask about at the consideration in detail stage is the effect on persons who have been granted some level of compensation for injury resulting from a criminal act when the conviction is overturned. Will this legislation in any way affect the compensation payment that they received earlier? I will probably ask the Attorney General about that matter at the consideration in detail stage. I heard that other members have gone through many of these cases and I do not want to take up people's time by going through and reading reports that many members will know very thoroughly already. However, I will refer to the Austic case. I will read from an ABC report released on Monday, 23 November 2020. It states —

> Western Australia's highest court has revealed its reasons for ordering a new trial for a man who was wrongfully convicted of murder, finding that there was "credible, cogent and plausible evidence" that crucial evidence against him was planted.

In spite of that finding, at the end of this report—again, getting back to the need to learn from what happens in these matters—are quotes from the Western Australian Commissioner of Police Chris Dawson, who said —

> … the matter of Ms Thorne's murder was being discussed with state prosecutors.
>
> "We will discuss this with the Director of Public Prosecutions, there's already been some preliminary discussions," he said.
>
> "Ordinarily, police will accept the outcome of any criminal trial.
>
> "We accept that the criminal justice system has a duty to do their job and so do jurors.
>
> "And at times, they issue 'guilty' verdicts and at times, 'not guilty' verdicts. That's the way the justice system works."
>
> In a previous inquiry, the state's Corruption and Crime Commission formed no opinions of misconduct by the police or the Office of the Director of Public Prosecutions.
>
> But it noted there were potential concerns in relation to aspects of the evidence against Mr Austic, including the cigarette packet and the knife.
>
> The Commissioner suggested there was no need for a review of the investigation itself.

I found it surprising that that would be the position of the commissioner in such a case. It goes on to say —

> "This was not a trial about police corruption, this was a trial of a person charged with a homicide," he said.
>
> "The matter has been, in terms of any allegations, I know, thoroughly reviewed by the CCC previously. I've got no other new, fresh information.
>
> "[If] there's any new information that's come forward, well of course we'll review that, but I've not had any new matters brought to my attention."

I thought that was very strange given that the Court of Appeal had ruled that there had been a miscarriage of justice and gave reasons that there had been "credible, cogent and plausible evidence" that crucial evidence against him was planted. I would have thought it was extraordinary that in those circumstances, the Commissioner of Police said there should not be a further review. It worries me that the reason something like that happens is that perhaps there might be "enthusiastic" investigations, shall we say, that should be stamped out. There should be a ruthless investigation in such a situation, I would have thought, to get to the bottom of exactly what happened. The Corruption and Crime Commission did a review and came back with an opinion.

Mr J.R. Quigley: I think that review was for the appeals.

Mr R.S. LOVE: Yes. It referred to its previous inquiry. Even then "it noted the potential concerns in relation to aspects of the evidence". That is in a report by the ABC; they are not my words. I find it strange that in that situation the police commissioner has said that he does not see any need for a further review of the investigation.

Mr J.R. Quigley: I agree.

Mr R.S. LOVE: I think there should be such a review and an investigation in those circumstances as a matter of course. I do not know what the Attorney General may say about that, if anything, but if he would undertake to look into that, I would be very appreciative.

I will wind up my contribution at this point, noting again that this is a bill that had been introduced previously. I know some aspects of this Criminal Appeals Amendment Bill 2021 are a little different from the 2020 bill. There has been a change of wording in a couple of provisions that we will discuss in consideration in detail. I will allow the Attorney General to explain to me the reasons for those changes when we go into consideration in detail.

I will finish with a quote attributed to Sir Ronald Wilson, the crown prosecutor against John Button in 1998 when he said that "the search for justice is as old as humanity. It is not an activity confined to any particular group of human beings. Indeed, the longing for justice is characteristic of all that is best in human nature."

DR J. KRISHNAN (Riverton) [5.32 pm]: Thank you, Mr Deputy Speaker. I rise today to commend the Criminal Appeals Amendment Bill 2021 to this house. To start with, I congratulate the Attorney General for bringing such an important bill to this house. I second the comments made by the member for Cockburn that our Attorney General has a long history of supporting credible bills and he has stood up and spoken with expertise time and again.

We have been discussing the case of von Deutschburg, whom the previous speaker spoke about. The debate was whether a duodenal ulcer and the bleed was caused by stress or bacteria. Please let me share my experience, Mr Deputy Speaker. When I went to medical school, my professor taught me and my batch of students that gastric and duodenal ulcers are caused by hurry, curry and worry! He believed that strongly, and that is what we were trying to explore when we were getting patients' history to find out whether they had any hurry; if they were regularly having curry; and if they did worry. In those days, we did not have the internet. *Helicobacter pylori* came to our knowledge much later in my career. To give members a bit of background about how H. pylori came into existence, Barry Marshall, Nobel prize winner, who comes from Kalgoorlie in Western Australia, said in 1982, "We have discovered bacteria *Helicobacter pylori*." The whole world laughed at him. How could bacteria survive in an acerbic environment in the stomach? People refused to accept that concept. To prove his point, Barry Marshall consumed the bacteria and exhibited the symptoms of a bacterial infection. That is the extent to which he went. Winning a Nobel prize was not easy. That Nobel prize changed the wrongful conviction of von Deutschburg, who had been convicted of the ulcer being caused by stress, when that was not the case. I am trying to say that when new and evolving evidence is presented that could significantly change a previous judgement when a person was wrongfully convicted, an opportunity should be given for that.

I know of a young adult who worked very hard and had a passion for being at sea. During his first assignment as a fourth engineer on a ship, he was arrested in a foreign country where he did not even know the language because some things were found on the ship that were not supposed to be on it. The whole crew was convicted because of a language barrier. The young man was not aware of what was going on, but the punishment was 15 years in jail although the fourth engineer had no responsibility for and no involvement in the consignment on the ship. He was there for maintenance on the ship. It was not the captain; it was the fourth engineer who was given a 15-year sentence. He was fortunate to have an opportunity to appeal and when the decision was overturned, the young boy's life was given back to him.

We understand that in rare circumstances corruption is involved and wrong evidence is provided and a wrong judgement is given. We also need to accept that, unfortunately, there is no perfect system to provide justice. We have a lot of trust and belief in our criminal justice system. Our judges do an exemplary job by providing the best judgement they can based on the evidence that is presented at that time. However, if the evidence changes, the same judge would definitely provide a different judgement. That is what this bill is about. When there is a significant change in the evidence that will have a significant impact on the outcome or judgement, an opportunity needs to be given. The current provision does not allow a second right of appeal. The only option the appellant has is to seek royal prerogative of mercy from the Attorney General. We have discussed previous examples of how an Attorney General can dismiss something. There can be various reasons for that. There may be pressure from the press and pressure of public opinion that interferes with the person having access to an appeal. This bill is about finding the right answer for correcting mistakes.

How will the bill work? For a new jurisdiction to be created on the count of appeal, there has to be fresh and compelling evidence to have a significant impact on the judgement and evidence that was not presented or could

not have been presented at the trial—that is, new evidence. An appellant will have to seek leave to appeal with fresh and compelling evidence. It is in the interest of providing justice that the judicial system may allow or deny access to an appeal like this based on what has been presented and taking into account whether the evidence is fresh and compelling enough.

We discussed the case of Scott Austic, who was convicted in 2009. His appeal in 2010 was dismissed. In early 2012, the then Attorney General did not accept the appeal. The appeal was referred back again in 2013. The then Attorney General also refused to refer the case. In February 2018, Austic again appealed. Our current Attorney General believed that fresh evidence had been presented and that a wrongful conviction had been made, and referred the case to the judicial system. In May 2020, the conviction was overturned and, in November 2020, Scott Austic was acquitted. It was a clear case of the court taking into consideration fresh evidence. Although the appeal process was not significantly different from that undertaken with the previous Attorney General, I congratulate the current Attorney General for having an eye for detail and a passion for providing justice and making sure that people who are wrongly convicted are given an opportunity to change that judgement.

What safeguards are in this bill? We have spoken about someone who was wrongfully convicted. We also need to take into consideration the victim and their family who have been through this process. We cannot re-traumatise them by going through the whole process again. There has to be leave for each ground of appeal. The evidence cannot have been presented during the trial or previous appeals and has to be fresh and compelling. The appellant has to pay the respondent's costs, so there is a cost barrier. An application for leave has to be heard in advance except in exceptional circumstances in which the court decides to hear both the appeal and the application for leave together. There is a higher bar for new evidence of positively having to prove innocence. Taking all this into consideration, in the interest of providing justice and giving people another chance when a wrongful conviction is made, I commend the bill to the house. I am confident that the government will have an overwhelming majority in this chamber and I hope that this bill will pass through the upper house as well.

MR S.A. MILLMAN (Mount Lawley — Parliamentary Secretary) [5.43 pm]: I rise to make a contribution to this debate on the Criminal Appeals Amendment Bill 2021. I thank the preceding speakers for the government, the members for Cockburn and Riverton, for their contributions. They touched on a number of the matters I was hoping to cover in my contribution. I also listened to the contribution of the lead speaker for the opposition, the member for Moore. When the equivalent bill, the Criminal Appeals Amendment Bill 2019, came on for debate in the fortieth Parliament, the lead speaker for the opposition was the former member for Hillarys Peter Katsambanis, who said that the opposition would support the bill. I did not catch that in the contribution from the member for Moore so I will make my contribution bearing in mind that we have not yet heard whether the opposition will support the bill. As the member for Riverton just said, when the bill comes on for debate in the Legislative Council, the opposition should indeed support it. I say that because it deals with two fundamental philosophical principles that our society holds —

Mr R.S. Love: Member, I think you will find that a fair reading of what I said is that the bill has already been debated and I was not going to go over what had been debated.

Mr S.A. MILLMAN: I heard all of that.

Mr R.S. Love: Obviously, we support the bill.

Mr S.A. MILLMAN: I thank the member for the interjection. I am glad that I took the interjection and am very happy to hear that the opposition is supporting the bill. I will tailor my comments accordingly. I thank the member and I am very happy to hear that sentiment expressed. I did not hear it expressed so clearly in the member's contribution. I heard that the member did not want to go over old ground, which is fair enough. I also do not propose to go over old ground at great length, but I want to comment on a couple of things. They turn on the question of why this chamber and this Parliament more generally should support this legislation. Previous speakers have already addressed quite extensively and more than sufficiently the question of what has happened in the past. Members referred to the Austic and Mallard cases and cases that have had political intervention by exercise of the right of royal prerogative on the part of the Attorney General to have matters reconsidered by a court. The member for Cockburn very clearly articulated the importance in our democratic system of the separation of powers. These are the last sorts of considerations that we want to be politicising.

I am glad to see the member for Cockburn has returned to the chamber to appreciate my commendation of his contribution. During the course of the debate in the previous Parliament, the member for Kalamunda said —

> Having a politician make a decision on a matter as serious as this in the court of public opinion is not ideal to say the least, particularly when the person seeking the appeal has been convicted of murder or a similar heinous crime.

I am talking about the separation of powers. Our current Attorney General has been prepared to exercise the courage necessary to use the power that is granted to him under the royal prerogative, but it would be so much better to have a system in place that makes this whole process much more objective. For us to legislate to create that system would not be unique or abnormal; it would follow the example that has been set. When we debated the 2019 bill, we were able to refer to the fact that both South Australia and Tasmania had already introduced similar provisions, together with the United Kingdom. I am advised that we can add Victoria to the list of jurisdictions that have something similar. Removing that ministerial prerogative—the royal prerogative—of mercy and placing it in a firm statutory context is incredibly important because it speaks so fundamentally to the separation of powers between the legislature and the judiciary.

The other very important fundamental democratic principle at play here is that we want to convict only those people who are guilty. We live in a free society and we want to celebrate that freedom. According to the notes that I wrote down, the member for Riverton said that there is a high degree of trust and belief in our criminal justice system. He also said that no system is perfect. I will refer again to the contribution from the member for Kalamunda; he said —

> It is commonly understood and generally accepted by the legal profession that the rate of wrongful conviction runs at about one or two per cent. In most areas of human endeavour, an accuracy rate of 98 to 99 per cent would be seen as close to perfect; I think everyone would agree with that. However, that is not the case for a person who has been wrongfully convicted of a crime and sentenced to imprisonment.

I want to invite commentary on that point. The member for Armadale who is now Minister for Finance is unlikely to make a contribution to the debate on this legislation but as a legal practitioner he made an excellent contribution to the last debate. He quoted the great British jurist William Blackstone who said that it is better for 10 guilty persons to escape than one innocent one suffer. This proposition was advanced by someone as learned and revered in legal circles as Blackstone. It is the 10 to one rule. I think other members touched on the South Australian case of Henry Keogh. He was found guilty of drowning his fiancée in the bathtub. There were numerous appeals and so forth, then the case came before the South Australian Court of Criminal Appeal—R v Keogh [No 2] (2014) 121 SASR 307. The appeal looked at the issue of granting leave for permission to pursue a second or subsequent appeal pursuant to section 353A of the Criminal Law Consolidation Act of South Australia. Our bill goes further than that section. What happened in the Keogh case has informed the decision of the McGowan government to bring this legislation before the house.

I refer to the contribution made by the member for Armadale in debate on the previous bill. In the *Adelaide Law Review*, Emily Carr states —

> Traditionally, Australian courts have been reluctant to infer any authority to entertain appeals against criminal convictions beyond their statutorily conferred jurisdiction. The courts have been at pains to emphasise, as was stated in *R v Edwards*, that an appeal court 'should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give it.' Thus, the notion that criminal appeal courts have the jurisdiction to hear subsequent appeals on the basis of fresh and compelling evidence has been firmly rejected by the High Court. This issue was further considered in *Mickelberg v The Queen*, where the High Court held that it does not have jurisdiction on appeal to consider fresh evidence which has not been put before a criminal appeal court. Therefore, subject to a single right of appeal against conviction, there was no further avenue for appealing on the basis of fresh and compelling evidence other than by way of the petition referral procedure.

That is the problem encapsulated, because of the common law jurisprudence that had been handed down by the High Court. We are saying to the courts: have this power to review these matters when they meet the necessary thresholds. The member for Cockburn outlined in clear and unambiguous terms exactly what safeguards are in place to ensure that this power is referred to and exercised by the courts in appropriate circumstances. There was an interjection in the 2019 debate to the contribution of the member for Kalamunda by the member for Hillarys. The member for Kalamunda used the word "floodgates", but the member for Hillarys said he had not used the word "floodgates". There was concern that this would lead to significantly more cases, which would put pressure on the justice system. The response to that is that there is no evidence to support that contention, referring to the fact that only one per cent to two per cent of people have been subject to wrongful conviction, so, as I said earlier, this legislation will not affect thousands of people, but it does speak to two really important philosophical positions.

One of the most high profile cases and one that the Attorney General and members of this chamber know so well is that of Mallard. I said I would return to the question about what the court's jurisdiction was. In the foreword to the book *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia*, His Honour Justice Kirby, former Justice of the High Court, made this observation of himself —

> As a judge of a final court of appeal, the *Mallard* case reminded me once more of the heavy obligations that rest upon all judges to be vigilant for error and possible miscarriages of justice so that we can prevent or repair wherever possible.

He asks himself the question whether, with further assistance and more time to consider the first application 10 years prior to the second application, he might have spared Andrew Mallard a decade of needless and unjustified imprisonment. Michael Kirby goes on to reflect on the circumstances of individual persons wrongfully convicted and those who remedy wrongful punishment of the innocent. He says —

> Sitting in their lonely cells, the victims of apparent miscarriages of the criminal justice system witness the power of the law over their freedom. When they protest their innocence, they are reliant on the operation of a complex system of law and justice that provides checks at many levels against the nightmare of serious errors and wrongs. Yet, human justice is always prone to serious error and mistaken outcomes. The lawyer assigned to the case may have been incompetent, inexperienced or overworked.

I pause to say that the legislation provides specific provision for circumstances of negligence on the part of the practitioner representing the appellant, which was also addressed by the member for Cockburn. Justice Kirby goes on to say —

> The trial judge may have made mistakes that misled the jury but which the appeal judges were willing to excuse as harmless or immaterial. The appeal bench may have been so overwhelmed with cases that the judges did not have the time to notice a basic flaw in the evidence. These facts may have made the judges over-dependent on lawyers who themselves lacked the time or imagination to consider the enormous detail about which the prisoner was endlessly protesting.

Justice Kirby also observed —

> When even conscientious judges provided with inadequate support by advocates and working under pressure with inadequate time for self-initiated speculation fail to perceive crucial flaws, it is clear that there is an institutional weakness that needs to be addressed.

That brings me back to my earlier point about whether the institutional weakness is addressed in circumstances in which we do not preserve the important principle of the separation of powers. All previous speakers talked about the importance of making sure that we do not have political interference in the judicial process. This is one of those last remaining bastions of those circumstances. The Austic case provides a good example. We did not have this information to hand when we debated the legislation in 2019, but Austic was subsequently successful in the appeal, so ultimately justice has prevailed. The issue is that the appellant in that circumstance first went to one Attorney General in the previous government, a subsequent Attorney General in the previous government and then to the current Attorney General with the appeal for the exercise of the royal prerogative of mercy. The current Attorney General had the courage of his conviction to say that it would be allowed. We are not saying that this person is innocent. All we are saying is that this matter was of sufficient interest, there was sufficient material here, to warrant an investigation, because the consequences are so abhorrent to a free society—that is, an innocent person has been imprisoned—that we needed to look at it. But we are not always going to have this Attorney General. We are not always going to have this government. The wheel will turn, circumstances will change and there will be new people. We want to remove that subjective element. We want to make sure that we are protecting the innocent in the future. The benchmark has been set, and we can see how important this will be in the operating of a fair, just and civilised society.

Great examples have already been given of the Nobel prize winner Barry Marshall and the research he undertook. It was particularly impressive to hear the contributions from the member for Cockburn and the member for Riverton, who speak with such experience about these sorts of things. There is the idea of fresh and compelling and new and compelling evidence. These terms will play an important role in the way this legislation operates. The safeguards that exist in the legislation are there to ensure that the subjective power being created by it is not susceptible to abuse.

I will quickly go through some of the checks on the exercise of this power. I go to proposed section 35E under division 2, which states —

> … an offender convicted of an offence on indictment may bring a 2nd or subsequent appeal to the Court of Appeal against conviction if —
>
> (a) there is fresh and compelling evidence relating to the offence; or
>
> (b) there is new and compelling evidence relating to the offence.

Under division 3, "Commencing and deciding appeals", proposed section 35F(1) states —

> Leave of the Court of Appeal is required for each ground of appeal in an appeal brought under this Part.

So every time there is an appeal brought and the representatives of the appellant complete the grounds of the appeal, each of the grounds of the appeal will require leave from the court before the appeal can proceed. The Court of Appeal must decide whether to give leave to appeal on a ground of the appeal prior to hearing the appeal. It needs to see that the matters, the fresh and compelling or new and compelling evidence that the appellant seeks to bring forward, satisfy the test. Proposed subsection (3) provides that there may be, only if the Court of Appeal considers it necessary or desirable, the opportunity to give leave at the hearing and when giving judgement on the appeal. The hearing can be combined, but only if the Court of Appeal considers it necessary or desirable. Proposed section 35F(4) 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 —
>
> (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
>
> (b) the ground has a reasonable prospect of succeeding.

I think the member for Cockburn has already discussed at length the question of the shifting of the onus. Proposed subsection (5) states —

> Unless the Court of Appeal gives leave to appeal on at least 1 ground of appeal, the appeal is taken to have been dismissed.

Automatically in proposed section 35F of the legislation there are a number of checks in place to make sure that this legislation will only operate appropriately.

[Member's time extended.]

Mr S.A. MILLMAN: The final check on the exercise of the discretion by the court and an opportunity for appellants to reflect on the consequences of their actions in bringing these sorts of matters before the court is that costs may be awarded against the appellant. If an appeal is dismissed under section 35F(5), the court may order the appellant to pay another party's costs of or relating to the appeal. We can see there are a number of checks and balances in place to make sure that this legislation is applied appropriately.

Sitting suspended from 6.00 to 7.00 pm

MR P. LILBURNE (Carine) [7.00 pm]: I rise in support of the Criminal Appeals Amendment Bill 2021, brought to the house by the Attorney General of Western Australia. As a fifth-generation Western Australian, I am personally very proud to have our current Western Australian Attorney General, Mr John Quigley, creating bills for the citizens of Western Australia to protect the key concepts of justice and the associated right of appeal.

What does the bill seek to do? The Criminal Appeals Amendment Bill 2021 seeks to amend the Criminal Appeals Act 2004 by introducing a new statutory right for a person to make a second or subsequent appeal against a conviction on indictment in circumstances in which fresh and compelling or new and compelling evidence has come to light. As a starting point to developing this bill, consideration was given to the schemes introduced in South Australia in 2013 through the Statute Amendment (Appeals) Act, Tasmania in 2015 with the passing of the Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Bill, and, lastly, in Victoria in 2019 with the Justice Legislation Amendment (Criminal Appeals) Bill.

There are four key principles behind Australia's justice system. Firstly, all individuals are equal before the law. Secondly, individuals have the right to a fair hearing. Thirdly, the judiciary—the court system—is independent and impartial. Fourthly, individuals have the right to a reasonable appeal. The goal of these four key principles behind Australia's justice system is justice. People in our society want to believe in the concept of justice. In an attempt for cases to be resolved in a fair and unbiased manner, the Australian court system allows people who are dissatisfied with the outcome of their case to appeal to have their case reviewed by a higher court, providing reasonable grounds for an appeal exist.

The concept of justice—what does it look like? Throughout my career in teaching and at the former Department for Child Protection and Family Support, I utilised the concept of mind maps in my lesson structures because the features of a concept are inherently complex. When we are dealing with a concept such as justice, we start to look at concepts and thoughts of morality, boiling down to what is inherently right or wrong. The bill before the house is attempting to resolve the very key element of what is right or wrong in an individual case. Justice is inherently important for our society. It makes active citizens believe in the structures for an effective community. When we discuss justice, we must think of equality, in that we are all equal before the law, and that any inequality before the law cannot be tolerated. When some people think of justice, they think of rich versus poor. It is very important that all people in our society feel protected by the justice system. When we think of justice, we have to look at the different perspectives. We heard from the previous speakers, whom I acknowledge, that different perspectives in

the quality of evidence are critical and, on appeal, new avenues or new, different perspectives on that evidence may well be gleaned, which give good grounds for appeal.

Within justice, we have the concept of the socialisation process to form a functioning community. Within that socialisation process, the core is families. Families, be they rich or poor, must be treated equally for a functioning community. They must feel supported and trust the system that they have before them in Western Australia and Australia under the Constitution. Within the justice concept and the socialisation process subtopic, there is family and peer pressure. People must feel that they are able to approach the justice system when there is some inequality and they feel that the mood is asking them just to be quiet. The justice system reinforces that belief in our society.

Lastly, in terms of the justice system, it is important that socialisation is taught in schools. I have had the pleasure and honour of being associated with schools all my life. From an early age, students are taught about the consequences of their actions. If someone at primary school or high school is unjustly accused of an action, they are able to access an appeal system through the internal structures within a school, be that the head teacher, the deputy principal or, ultimately, the principal. Schools in this state reflect that belief in the concept of justice. When we think of justice, we must think about fighting prejudice. Later in my speech in support of this bill, I will come to the subset of prejudice. When we think of justice and appeals, we must think about rehabilitation. Is there sufficient recourse? Is there sufficient compensation for a poor judgement or a judgement made with inaccurate evidence? Retribution further reinforces the concept of justice in our society.

I had the pleasure of knowing a former Australian Army colonel who had served during World War II. He used to visit my grandfather's home. He was involved in dealing with criminal acts that had occurred during World War II. People used to refer to him as "The Colonel" when he visited my grandfather's home. I found out later that he was indeed involved in those criminal proceedings. Justice is inherently associated with historical events.

We heard today that some appeal processes can take years and years. We heard today that some efforts to get justice have taken three terms of Attorneys General. It is historical. When we think of justice, we also think of injustice. That is why I support this bill in its entirety. It attempts to reinforce the mechanism in our society that says that if a mistake has been made, we will endeavour to fix it; we are but human.

When we think of justice, we place our trust in judges. We have trust in the justice system and judges because we, as a society, hope that unbiased decisions will be made. We have mechanisms in this state, which I am proud of, that ensure a corruption-free environment. If anyone dares to go down a corrupt path, there are mechanisms to deal with those people. As a citizen of this state, I believe that is fantastic.

As a child growing up in the Carine electorate, I was a distant neighbour to the Mickelbergs. I used to ride down Mullaloo Drive and see the media outside their home. I would watch the Channel Seven news, amongst others, and followed the intrigue associated with that case. In Mickelberg v The Queen [2004] WASCA 145, the appeal was upheld partly on the basis of fresh evidence that showed that crucial police testimony was false and that the notes of interview had been rewritten to include falsely supplied incriminating statements. I hope that is a good example that reinforces some of our belief in the justice system. How are the Mickelbergs associated with the concept of justice? They fought for what they believed in—that is, morality about what is right or wrong. They held, ultimately, that the judges would not allow incriminating evidence to stand. I believe that there has been appropriate retribution and rehabilitation for those victims.

What is justice? Justice is just behaviour or treatment; a concern for justice, peace and genuine respect for people. Justice is often used interchangeably with the word "fairness". In any situation, be it in a courtroom, the workplace or in line at the local canteen at school, members of society want to be treated fairly. We should not be judged more harshly because of the colour of our skin, we should not be paid any less because of our gender and we should not wait longer for a drink because of what we are wearing. As humans, we feel that we deserve equal and impartial treatment.

Mohandas Karamchand Gandhi was born on 2 October 1869 and lived through to 30 January 1948. He was venerated as Mahatma. This honorific means "great soul" or "venerable". It was first applied to him in 1914 in South Africa, and is now used throughout the world. Mr Gandhi was an Indian lawyer, an anti-colonial nationalist and a political ethicist who employed nonviolent resistance to lead the successful campaign for India's independence from British rule and, in turn, inspired civil rights and freedom movements across the world. He said that if someone does something bad to you, do not do it back, as then you would be as bad as they are; treat others the way you want to be treated, not the way they treat you.

We also see systems and symbols of justice, such as Lady Justice herself. She represents the statement "innocent until proven guilty". She has three significant objects. The first is a blindfold, which symbolises objectivity so that justice is or should be meted out without fear or favour, regardless of money, wealth or power—I mentioned these things

earlier. Lady Justice also has a set of scales, which symbolises a balanced trial. Lastly, she has a sword. It symbolises punishment. It is held below the scales to show that evidence and the court is always held before punishment.

Nelson Mandela taught us a few lessons about fighting for justice. He dedicated his life to fighting for equality and justice in South Africa and, today, his legacy lives on not only in his country but also across the entire world. The inspiring lessons about passion, courage and leadership that he left behind are especially relevant in the world we are living in right now. Though best known for his struggle to end the racist apartheid system in South Africa, Mandela fought tirelessly throughout his life on the broader issue of equality for the world's most vulnerable populations.

[Member's time extended.]

Mr P. LILBURNE: In honour of Nelson Mandela, here are just a few of the infinite lessons the brilliant leader taught the world about fighting for justice. Firstly, it always seems impossible until it is done. That links perfectly with appeal. Secondly, it is not where you start but how high you aim that matters for success. This would suggest, in relation to the matter before us in the Legislative Assembly, that if wrong has been done to you by the court system, hold strong because you have the right of appeal. Thirdly, he said that we must use time wisely and forever realise that time is always ripe to do right; in other words, this would suggest, like in the Mallard case, which others have given a very good account of, go forth if you believe you have been wronged. Fourthly, he said that a winner is a dreamer who never gives up. Lastly, in a letter sent to his then wife, Winnie, while he was still incarcerated in 1969, he wrote —

> Remember that hope is a powerful weapon even when all else is lost.

When discussing former President of South Africa Mr Nelson Mandela, former President of the United States of America Mr Barack Obama described President Mandela as a symbol of justice, equality and dignity. I quote from *The Guardian* of Friday, 6 December 2013 —

> The story told by Mandela's life is not one of infallible human beings and inevitable triumph. It is the story of a man who was willing to risk his own life for what he believed in, and who worked hard to lead the kind of life that would make the world a better place.
>
> In the end, that is Mandela's message to each of us. All of us face days when it can seem like change is hard—days when our opposition and our own imperfections may tempt us to take an easier path that avoids our responsibilities to one another. Mandela faced those days as well. But even when little sunlight shined into that Robben Island cell, he could see a better future—one worthy of sacrifice. Even when faced with the temptation to seek revenge, he saw the need for reconciliation, —

That connects to my earlier point —

> and the triumph of principle over mere power. Even when he had earned his rest, he still sought to inspire his fellow men and women to service.

I would like to speak on the Andrew Mallard case and, indeed, his legacy. An article in *The Sunday Times* of Sunday, 2 June 2019 titled "Appeal law offers new hope" states —

> THE grieving family of Andrew Mallard—who spent 11 years in jail over a wrongful murder conviction before being killed in a California hit-and-run—hope WA's new "second appeal" laws could become his life's greatest legacy.
>
> …
>
> The genesis for its introduction in WA came through Attorney-General John Quigley's involvement in the Mallard case, which began with his conviction in 1995 for the murder of Pamela Lawrence, and ended with the High Court ruling quashing the conviction 10 years later.

Andrew Mallard walked free after 11 years in prison. In relation to my topic of justice, Andrew Mallard inherently believed in the concept associated with right and wrong. He had a different perspective and he must have lived with that perspective for 10 years, waiting for something to change. I cannot begin to quantify the peer pressure that he and his family experienced. Within the concept of justice, there is rehabilitation and some form of compensation.

Mr Quigley said that he did not believe a second appeal based on new, fresh and compelling evidence should be in the gift of a politician. He said also that as it stands, it might be that, for a political reason, that person might want to keep it from court, and that this way is more pure and will stand as a legacy to Andrew Mallard's life. How poignant.

Reverting back and discussing the Mickelbergs' victory after their 20-year fight to clear their names, an article in *The Sydney Morning Herald* of 3 July 2004 states —

> Ray and Peter Mickelberg were not present in the West Australian Supreme Court of Criminal Appeal today when their eighth appeal was upheld.
>
> …

> The brothers had always maintained their innocence, and in a 2–1 split decision, Chief Justice David Malcolm and Justice Christopher Steytler today agreed the conviction should be quashed and no retrial ordered.
>
> …
>
> The justices' findings centred largely on the sworn confession of self-confessed crooked detective Tony Lewandowski, who admitted in June 2002 that he and another detective—former Perth chief of detectives Don Hancock—had framed the three Mickelbergs.
>
> "In these circumstances, and given my conclusion that the fresh evidence now available plainly casts doubt upon the police evidence of admissions made … it seems to me, once again, that there is a substantial possibility that the jury reached its verdict in reliance upon false evidence and was consequently misled in the manner in which it reached its conclusion," Justice Steytler wrote in his judgement.
>
> He went on to state, "I would consequently allow both appeals and quash the convictions of Raymond and Peter".

The article demonstrates that enhanced appeal mechanisms are needed in the Western Australian legal system and our Attorney General, Mr John Quigley, is solving that very need. I commend the Criminal Appeals Amendment Bill 2021 to the house and I thank the Attorney General for his efforts.

MS C.M. ROWE (Belmont) [7.28 pm]: I rise this evening to make a contribution also to the Criminal Appeals Amendment Bill 2021. I, too, would like to take this opportunity to acknowledge the Attorney General for not only his work in bringing this important bill, along with so many others before it, to our house, but also his important work before coming to this house, as many of us already know, in rectifying miscarriages of justice that have occurred and, most notably, the Mallard case in the state of WA.

This bill seeks to provide a framework for a further appeal against conviction. The bill will allow an opportunity for an appeal to be provided. The absence of such a mechanism would lead to a significant injustice. It will give someone convicted of a crime the right to a second chance to appeal against a conviction if fresh and compelling, or new and compelling, evidence has come to light. As other members have already touched on, the evidence cannot have been tendered at the original trial or any of the previous appeals, and it must be compelling; that is, it is very likely to have a material impact on the ultimate outcome of the case. Importantly, the threshold for new evidence is much higher in this instance of appeal. This is designed, of course, to act as a deterrent to a person going to trial in the first instance when they are ill-prepared for the trial.

Currently, once a person's avenue of appeal is exhausted, the person has no right to a second appeal against that conviction even if evidence later emerges that could potentially exonerate them, or it becomes obvious that a substantial miscarriage of justice occurred. Imagine a person serving a jail sentence for a crime that they did not commit and their options were exhausted for appeal, even if new technology or scientific advancement could prove they were not guilty. That person's only option would be to lodge a petition with the Attorney General of the day to seek his or her support in referring the matter to the Court of Appeal. The Attorney General, however, is not required to refer a petition to the Court of Appeal. This bill will mean that the Court of Appeal will determine a second or subsequent appeal instead of the matter being considered simply by the Attorney General.

It does not make sense that a decision like this should be made by a politician. Politics should, quite simply, not be part of the equation at all. The last thing we would want is a decision of this magnitude, when somebody's life and freedom are truly in the balance, to be politicised. This was no more evident than in the case of Scott Austic, who, in 2009, was convicted of wilful murder. In 2010, Mr Austic's appeal against his conviction and sentence were dismissed. Mr Austic lodged a petition with the then state Attorney General, Hon Christian Porter, at the start of 2012. In 2013, the new Attorney General, Hon Michael Mischin, refused to refer the case. In February 2018, the current Attorney General, Hon John Quigley, received the same petition from Austic. It was almost identical to the one that was refused by the former Attorney General. In April 2018, two months after Austic lodged his petition with the Attorney General, the Attorney General referred his case to the Court of Appeal, upon advice from the then Solicitor-General. In May 2020, the Court of Appeal overturned the conviction and, in November 2020, Mr Austic was acquitted after a retrial. Tragically, though, it was six long years after the initial petition to Mr Porter and Mr Austic's second petition to the current Attorney General. It is clearly a major flaw that a right of appeal is at the mercy of the politics of the day. The member for Mount Lawley went into quite a lot of detail around this point: it should not be something that is subjective. Prior to the introduction of this legislation, it has been very much subjective and highly political.

Although it is crucial that our criminal justice system can be trusted to find the right answer, it also needs the ability to correct previous mistakes, especially when these mistakes are so devastatingly life-changing. Unfortunately, history shows mistakes like this happen. The names John Button, Darryl Beamish, the Mickelbergs and Andrew Mallard,

and, most recently, Scott Austic will be forever etched in our history. John Button and Darryl Beamish were convicted of murders that were later found to have been committed by Western Australia's most notorious serial killer, Eric Edgar Cooke. Members will recall that 19-year-old John Button was convicted of the 1963 hit-and-run murder of his teenage girlfriend, Rosemary Anderson, in Shenton Park. Darryl Beamish, an 18-year-old deaf-mute, was convicted of the 1959 murder of Jillian Brewer in Cottesloe. Both served long sentences in Fremantle Prison before they were paroled. It was not until years later that the truth was finally revealed.

I now refer to a case that is very close to the heart of our Attorney General—Andrew Mallard. As members know, Mr Mallard spent 12 years in jail for the 1994 murder of Pamela Lawrence at her jewellery shop. Mr Mallard endured a lengthy fight to have his name cleared. The High Court finally quashed his conviction in 2005. Like Mr Button, Andrew Mallard moved away from his home in Western Australia because of the difficulties he had in being accepted by society. Tragically, his freedom was cut short when he died in a hit-and-run car accident in 2013 when he was living overseas, I think in Los Angeles. As the Attorney General has previously said, this legislation could well be Mr Mallard's lasting legacy. There are clearly no winners in wrongful conviction cases. The impact of a wrongful conviction and the time served in prison does not end with acquittal. John Button has described the devastating and long-lasting impacts he lives with in his day-to-day life—the nightmares, struggling to find work or make friends, ongoing depression, and being shunned from the community. Despite all this, when a person is finally acquitted, they might finally feel as though justice has been done. But, of course, the victim's family have had to relive the distress through the appeal, only to be left with more unanswered questions and without probably any sense of justice. Understandably, victims want reassurance that someone has been found guilty; however, we can assume that victims want the right person to be found guilty. They want the right person to be punished for the awful crime.

This bill strikes an important balance between correcting miscarriages of justice and the public interest in the finality of the justice system and providing justice for victims' families. It is an important part of our justice system that once a court hands down the decision that it is final. However, as the Attorney General outlined in his second reading speech, it is important that the principle of finality must be put aside in some circumstances for the purpose of allowing justice to be served, however belatedly. The legislation contains important safeguards to protect against appeal applications that are without merit or are vexatious or frivolous, ultimately to protect victims and their next of kin from re-traumatisation. A really important element of this bill are the safeguards that have been built into its framework. Amongst other things, this includes that the evidence must not have been raised at the trial or at any previous appeals. The court has the power to order the applicant to pay the other party's costs. One would assume that would act as a significant deterrent to frivolous or vexatious claims coming forward. It also requires leave to be obtained for each ground of appeal, and for the application for leave to be heard in advance of the appeal itself.

We all want our justice system to get it right and we want to see guilty people punished and innocent people retain their freedom. When we get it wrong, innocent people and their families suffer unimaginable anguish, and for many years, well beyond the time since they were exonerated. We also want to protect the victims and their families. We want them to have peace that justice has been served. Those people who were wrongly convicted, people such as John Button and Andrew Mallard who had their lives turned upside down and, quite frankly, torn apart, are victims, too.

Unfortunately, this legislation cannot prevent wrongful conviction, but it is about ensuring that innocent people who find themselves in the nightmare of a wrongful conviction will have a fair opportunity to prove their innocence. It seeks to do this in a way that is fair and just for everyone involved and, indeed, the wider community. I commend the bill to the house.

MR G. BAKER (South Perth) [7.39 pm]: I rise to speak in support of the Criminal Appeals Amendment Bill 2021, introduced by the Attorney General. The Criminal Appeals Amendment Bill 2021 seeks to amend the Criminal Appeals Act 2004 by introducing a new statutory right for a person to make a second or subsequent appeal against a conviction on indictment in circumstances in which fresh and compelling or new and compelling evidence has come to light. It was my privilege in the last term of government to work for some time for the former Minister for Police and current Speaker, the member for Midland, and to play a small part in the administration of the justice system in Western Australia. It was eye-opening to see the Western Australia Police Force at work. Their professionalism in tackling the extremely wide range of crimes is extraordinary. "Volume crime" is a term I wish did not exist, but it is the daily duty of the WA Police Force to investigate and prosecute these crimes. Further, I was impressed by the meticulous way in which the WA Police Force investigates the most serious of crimes, such as homicide. One need only look at the newspapers to see stories of investigations that have examined the most minute details of crime scenes for forensic clues, to solve murders and find evidence essential to a successful prosecution.

Above this, I cannot imagine a better Commissioner of Police than our current commissioner, Chris Dawson. It is a very difficult role, with additional burdens added all the time, yet I cannot imagine anyone exercising better or more consistent judgement than he has. I know that he holds himself to the highest standards of integrity. The Western Australia Police Force and the Director of Public Prosecutions serve the WA community in the pursuit of

justice. However, there are rare cases in the justice system in which someone has been convicted and, after the appeals process has been exhausted, fresh evidence comes to light that calls into doubt the conviction, and it becomes clear that justice has not been served. For these rare cases, this bill is a sound reform.

Currently, once a person's avenue of appeal is exhausted, the person has no second right of appeal against conviction, even if evidence later emerges that could potentially exonerate them, or it becomes obvious that a substantial miscarriage of justice has occurred. The convicted person's only option in those circumstances is to lodge with the Attorney General a petition for the exercise of the royal prerogative of mercy, and for the Attorney General to refer the matter to the Court of Appeal. However, the Attorney General is not required to refer a petition to the Court of Appeal.

This process has flaws. It is possible for the views of an Attorney General to be tainted by the politics of the day. It is not so difficult to imagine that some Attorneys General, in weighing their decision, may consider matters outside the facts before them. For an Attorney General to get involved in a topical court case might, in the language of *Yes Minister*, be considered courageous. This bill takes the decision-making nexus for such appeals from the Attorney General and gives it to the courts. This reform removes politics from the process, so instead of the Mallards, Mickelbergs, Buttons or Beamishes of the justice system waiting for an objective Attorney General to consider new, fresh evidence, they can expect a different, fairer and more objective process.

Let us look at one particular case—that of Scott Austic; this case has been mentioned several times already in this debate this evening. He was convicted in 2009 of a murder committed in 2007. He was imprisoned, but subsequent to conviction, fresh evidence came to light. Three Attorneys General were petitioned with the same new evidence, in 2012, 2013 and finally in 2018. In 2020, the Court of Appeal overturned the conviction, with the jury acquitting the defendant after only two and a half hours. As a result, Scott Austic was released from prison in 2020, after 13 years of imprisonment.

The same new evidence was given to three different Attorneys General, and on two occasions it was knocked back; it was only on the third occasion that it went forward, and the case was referred to the Court of Appeal. This case, as much as any other case, highlights the limitations of the current system and also highlights the need for justice to be served by removing the politics of the Attorney General from the process. It is very brave for the Attorney General to actually remove himself from a step in the appeals system, and I congratulate him for that. With the passing of the Criminal Appeals Amendment Bill 2021, a convicted person may submit an appeal directly to a court and avoid the political step of submitting to the Attorney General.

How will this scheme operate? The proposed legislation will confer a new jurisdiction on the Court of Appeal to determine a second or subsequent appeal by a person convicted of an offence on indictment. An offender may bring a second or subsequent appeal against such a conviction if there is fresh and compelling evidence, or new and compelling evidence, relating to the offence. The offender must seek leave to appeal. In order to obtain leave, the applicant must satisfy each of the following criteria: the ground identifies fresh and compelling, or new and compelling, evidence; it is in the interests of justice to consider the evidence; and the ground has a reasonable prospect of succeeding.

I am mindful that this may be regarded by some as an automatic right to a second appeal; I would consider that to be a worse outcome. If it were an automatic right to a second appeal, it would painfully prolong the justice process for many victims of crime, which would be horrible and serve no purpose. It would also result in excessive consumption of the resources of the Western Australia Police Force and the Director of Public Prosecutions, so I was pleased that the Attorney General included safeguards against unmeritorious appeals. The safeguards are a requirement to obtain leave for each ground of appeal; that the evidence must not have been raised at the trial or any previous appeal; that the court has the power to order the appellant to pay the respondent's costs, which are a significant burden; that the application for leave is to be heard in advance of the appeal itself; and the higher bar for new evidence of positively having to prove innocence on the balance of probabilities. That is a very high bar to clear.

Given these safeguards, I feel that this bill will not open up an automatic right to a second appeal; but, most importantly, the bill will provide justice to those people who have been unjustly convicted. This is an overdue reform, and I commend the bill to the house.

MR R.H. COOK (Kwinana — Minister for Health) [7.47 pm]: I rise to speak on the Criminal Appeals Amendment Bill 2021. I think it is a very important bill, and one that will make a good, important contribution to the development of law in Western Australia. I take this opportunity to commend some of the contributions that have been made tonight. The member for Carine did a very worthy job in a very difficult and complex area. The member's insights into the principles associated with this legislation were very important. As he said, all these things are embedded in the principles of justice, and he drew upon some very worthy contributions from people such as Gandhi, Nelson Mandela and so on. The members for Belmont and South Perth also provided very important insights

and foundational contributions that really pointed to the important issues as they affect us all, whether in respect of the Mallard case or others that the Attorney General has been involved with. I commend the bill to the house.

MR J.R. QUIGLEY (Butler — Attorney General) [7.48 pm] — in reply: I thank the Deputy Premier for his helpful contribution, as I thank all members for their contributions. As a society and community, we are all offended when we learn that someone has been imprisoned wrongly and had years of their life stolen from them as a result of false imprisonment. Until now, and until the passage of this bill when it eventually gets through the other place, as the member for Belmont and I have said, the gift of further appeal has been the gift of a politician, which should never be the case. If something has misfired in the courts of law, those errors should be corrected within the halls of justice. It should not be left to politicians to decide a person's fate when other issues might be bearing down on them like fealty to the prosecution service or to the police or whatever. As the member for Carine said, it should be looked at objectively blindfolded and, in the interests of justice, balanced. In these particular cases of second appeal, I think that the operative word to new and fresh evidence is that it must be "compelling" of a person's innocence.

With that, because I know that we will be going into consideration in detail, I commend the bill to the house and suggest that we get on with it.

Question put and passed.

Bill read a second time.

[Leave denied to proceed forthwith to third reading.]

Consideration in Detail

Clause 1: Short title —

Mr R.S. LOVE: With a bit of forbearance on the Attorney General's part, I would like to raise some general points in this discussion on the short title about some issues that I have not seen outlined anywhere in the briefing note that I received from Hon Nick Goiran, who had a briefing through the Attorney General's department, or in the explanatory memorandum or in any other documents that I have read. I refer to the potential impact of the bill on the victims of crime who may have received some compensation in the past. What will potentially be the effect on them if the conviction that led to their compensation is overturned? Can the Attorney General explain whether there will be any ramifications for either the victims or the families who may have received some compensation in the past on the understanding that an offender had caused an offence and damage to a particular person or family?

Mr J.R. QUIGLEY: The Criminal Injuries Compensation Act does not authorise the assessor to recover the money.

Mr R.S. LOVE: I thank the Attorney General. To follow up on the subject of the victims of crime, in the consultations that the Attorney General has had around the bill, did he receive any information or feedback from victims of crime and also the Commissioner for Victims of Crime, and can the Attorney General detail them?

Mr J.R. QUIGLEY: Yes and no. The feedback that I have had from the victims of crime comes from those victims whose cases I have been involved in. The feedback has been only about the stress and unhappiness over that which they thought had been resolved, and having moved on with their lives after having obtained resolution, it was then re-ventilated in all its gory detail. I was personally the subject of that sort of vitriol during the Andrew Mallard matter. I am sure that the family of Pamela Lawrence detested me and Colleen Egan, my chief of staff, who was the chief mover for it at the time, but I understand that the daughter later reached out full of remorse when she found out that Andrew Mallard was innocent. It is a mixed bag for the victims of crime. The secondary victims feel bad that they had channelled their antipathy towards an innocent person.

We have consulted with the Commissioner for Victims of Crime. She was helpful in the Scott Austic matter because relatives of the deceased were terribly upset that I was even contemplating referring the matter back to the court. It was the Commissioner for Victims of Crime who went and saw the family and explained the necessary processes.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Part 3A inserted —

Mr R.S. LOVE: During the second reading debate, I referred the Attorney General to questions on notice that had been asked in the other place by Hon Alison Xamon. I might ask the Attorney General to answer those questions here, as they did not get much of a response on the record anywhere that I can see. They might have been responded to in a briefing given to Hon Alison Xamon, but there is no response on the record. I will put these questions to the Attorney General to see whether he can give a response.

Mr J.R. Quigley: I have the questions here and can go through them one at a time.

Mr R.S. LOVE: Is the Attorney General happy to do that?

Mr J.R. QUIGLEY: Yes. I will go through the questions (a) to (n).

Mr R.S. Love: We have covered (n) already.

Mr J.R. QUIGLEY: Okay.

Hon Alison Xamon asked —

(a) can a Royal Commission quash the conviction;

In Western Australia, royal commissions are a form of non-judicial and non-administrative governmental investigation under the Royal Commissions Act 1968. The powers of a royal commission are outlined in the act. A royal commission does not have the power to quash a conviction, only to investigate matters referred to it under its terms of reference.

Hon Alison Xamon asked —

(b) will the Bill apply to who have already completed their sentence;

Yes. The bill applies to anyone who has been convicted of an offence on indictment, including those who have completed their sentence.

Hon Alison Xamon asked —

(c) in what "special circumstances" can the decision on the application for leave be made during the appeal or when giving judgment on it, rather than as a separate matter;

Under the 2021 bill, the decision on an appeal can be given at the same time as the application for leave when the court considers it necessary and desirable to do so. This is a matter for the court to determine based on the circumstances of the particular case before it, and what will be the most expedient way to deal with the application. The intention of the requirement for the court to consider it necessary or desirable is that appeals that are obviously unmeritorious can be dismissed without the court having to hear the full appeal. Conversely, when there is strong evidence that the person is innocent, the matter can be heard as one and the conviction quashed as soon as possible. In other words, the application for appeal and the appeal itself can be heard jointly.

Hon Alison Xamon asked —

(d) is the special leave decision itself appellable:

(i) if yes to (d), in what circumstances; and

(ii) if no to (d), what is the policy reason …

The answer is yes. Appeals will be allowed against the decision of the Court of Appeal to refuse leave to appeal in accordance with the ordinary principles. That is, the decision of a single judge of an appeal can be reviewed by the Court of Appeal and a decision by the Court of Appeal can be reviewed by the High Court. We keep all those steps of appeals in place.

Hon Alison Xamon asked —

(e) is the special leave decision reviewable under South Australia's similar law;

The information is not available but it is most likely that appeals will be allowed in accordance with the ordinary principles of that jurisdiction, but I do not have the detail of its legislation here.

Hon Alison Xamon asked —

(f) regarding the requirement that the application for special leave must be served on any other person the court requires (as well as the parties to the trial):

(i) who is this likely to be; and

(ii) if it could include victims, what would their role in the proceedings be and what is the position of the Victim Support Service regarding that;

This is for the court to determine in the circumstance of the case. Yes, "any other person" could include victims. It allows the court to order that the application be served on anyone the court thinks fit. The victim's role depends on the case. On occasion, the victim will be a witness. At other times they might just be interested in the proceedings. This bill contains safeguards to help prevent successive meritless claims that have the potential to re-traumatise victims. The victim support services advise that they will continue to provide their usual services to victims during second and subsequent appeals.

Hon Alison Xamon asked —

(g) what if any impact does the Bill have on either the criminal injuries compensation or civil damages process, for example:

(i) is there any change regarding when or how the victim can apply;

(ii) what happens if the victim has received compensation/damages and afterwards the conviction is quashed …

We have already dealt with that, member, by saying there is no ability for the assessor to recoup the money. The question continues —

(iii) what happens if the previously convicted person has reimbursed criminal injuries compensation paid to the victim or paid damages to the victim, and afterwards the conviction is quashed, especially if it's on the basis the person is likely innocent;

The Criminal Appeals Amendment Bill 2021 does not seek to alter the current operation of the Criminal Injuries Compensation Act. There will be no change to the victim's right to apply for criminal injuries compensation. That can be awarded even when the perpetrator has not been identified.

Mr R.S. LOVE: I would like to hear a little more from the Attorney General.

The ACTING SPEAKER: I gather that the member for Moore has another question for you, Attorney General. Your time has restarted, so you can continue your answer.

Mr J.R. QUIGLEY: I did not realise I was taking so long, sorry. Thank you very much.

Regarding the payment of a fine, if an appeal is allowed against conviction, the consequential effect would at least be, generally, that the orders made at the first instance by the court that convicted the person, consequential upon his conviction, such as those sentencing a person, would no longer have effect, except in possibly very limited purposes.

In ordinary course, a fine is paid into the consolidated account. In these circumstances, it is open to the accused to recover the fine from the state; however, under section 67 of the Sentencing Act, if a fine is retained as required under section 6 and then paid to a person, fund or account other than the consolidated account, it is not recoverable from the state even if on appeal the sentence concerned has been set aside or quashed. That is obviously because the money has passed on to a third person. Depending upon the circumstances of the case it may, in any event, be open to a person whose conviction was set aside to bring civil recovery action to recover a fine actually paid by way of restitution or compensation to another person.

Hon Alison Xamon asked —

(h) if the appeal is successful, is there (still) no compensation for the previously convicted person unless an ex gratia payment is made by Government;

The Criminal Appeals Amendment Bill 2021 does not seek to provide an avenue for compensation of a wrongly convicted person. An ex gratia payment from the government is the only avenue to pursue compensation for a wrongly convicted person in Western Australia. The bill will not change this position. However, certain legal costs are recoverable under the Suitors' Fund Act when there is a successful appeal quashing a conviction for an indictable offence, but this does not provide compensation for wrongful conviction; it just pays for the lawyers' fees at the trial that misfired.

Hon Alison Xamon asked —

(i) regarding legal aid:

(i) in what circumstances will legal aid be available for these criminal appeal cases;

(ii) how many cases are expected to be brought immediately; and

(iii) does Legal Aid WA need increased resources to meet this need;

The availability of legal aid will remain the same for first appeals to the Court of Appeal. There is no way to ascertain the number of convicted people who may seek leave to appeal under the new provision. A consideration of appeals brought under the legislation in Tasmania and South Australia that introduced somewhat similar provisions as contemplated in this bill has shown a relatively small number of criminal appeal applications as a result, with six in South Australia and one pending in Tasmania. Although no additional resources have been budgeted for this bill in particular, the Department of Justice will keep a close eye on whether any future resource requirements arise, which will then form any part of the usual budgetary process.

Hon Alison Xamon asked —

(j) was the 2012 report of the South Australian Parliament's Legislative Review Committee on the *Criminal Cases Review Commission Bill 2010*, which discussed a variety of models in other jurisdictions for dealing with this sort of issue, considered when developing this Bill:

(i) if yes to (j), is any of the information about those models now outdated;

The department has reviewed the report and noted the committee's recommendation that a criminal cases review commission not be established in South Australia and that a statutory further right of appeal be created instead. This was subsequently implemented in South Australia with the Statute Amendment (Appeals) Act 2013, in Tasmania with the Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015, and in Victoria with the Justice Legislation Amendment (Criminal Appeals) Act 2019. The government agrees with this approach and has no plans to introduce a criminal cases review commission.

Hon Alison Xamon asked —

(k) what was the motivation for the Attorney General's amendment in the other place to include negligence/incompetence of defence as a ground;

Mr R.S. LOVE: I would like to continue to hear from the Attorney General if possible.

Mr J.R. QUIGLEY: Thank you, member for Moore.

In light of the principle that the client should not have to bear the consequences of having ineffective legal representation, this amendment is proposed to provide that evidence that was not tendered at trial or on a previous appeal due to the incompetence or negligence of the offender's lawyer, constitutes fresh evidence. In the usual course, an alleged error by an offender's lawyer in failing to tender evidence would relate to new, not fresh, evidence. As provided in proposed section 35H(4), in order to be successful on appeal based on new evidence, the offender has to prove that he or she is innocent. The second category means that evidence that was not tendered at the trial due to the incompetence or negligence of the offender's lawyer instead constitutes fresh evidence and thus attracts a lower threshold of having to prove a miscarriage of justice. This is a different situation to a case when an offender has made an informed decision not to deploy evidence known to the offender at the time, which, rightly, should have a higher bar. Sometimes, a tactical decision might be taken in a trial not to call certain evidence, because it is too risky to call that evidence. The accused cannot appeal after that sort of tactical decision, but if their lawyer has been negligent or incompetent and not gone to the right evidence, that should not hold an innocent person away from the Court of Appeal.

The next question asked by Hon Alison Xamon was —

(l) what is the policy reason for Western Australia taking a different position on substitute verdicts from Tasmania's version of this law;

Our bill will give the Court of Appeal the same powers as it has when hearing an initial appeal. The Court of Appeal therefore has the option of entering a substitute verdict when it is satisfied that the jury must have been satisfied on the elements of the substituted offence. This will create consistency with initial appeals and have the effect of saving resources, as the court does not have to order a retrial if the substitute verdict is clear. If the Court of Appeal is not convinced that a jury would have been so satisfied, it will have to order a retrial. It is also noted that given that the Court of Appeal provides written reasons for its decision, this process is more transparent than a jury verdict. However, it is also possible for leave to appeal to be granted without any reasons being provided. That often happens in the High Court. It either grants or rejects leave to appeal, but it does not give reasons; people just have to wear it. That deprives counsel of having a set of rules that will show when special leave will be granted or not granted. However, it also provides the High Court with the flexibility in justice of saying yes or no without having to fit it into a menagerie of rules.

The next question was —

(m) will this Bill apply to a case of tainted evidence as that term is understood in section 46H *Criminal Appeals Act 2004*; and

Section 46H refers to tainted acquittal rather than tainted evidence. A tainted acquittal is when the accused has committed an administration of justice offence—in other words, he has got his acquittal by perjury or by conspiring with defence witnesses to tell a crook story, and this has been subsequently unmasked—which is likely to lead to them being acquitted.

Mr R.S. LOVE: I would like to hear more from the Attorney General.

Mr J.R. QUIGLEY: An administration of justice offence includes threatening a witness or jury members, corruption, bribery, perjury or perverting the course of justice et cetera. If any of those offences is committed with the object of having the person acquitted, that is a tainted acquittal. The question is wrongly framed as "tainted" evidence. It is not tainted evidence. It is dealing with people who have been acquitted, but on tainted evidence.

The next question is (n). The member is right. I have answered that. I hope that has been helpful for the member.

Mr R.S. LOVE: I did have some further questions on clause 4, but I have to say that the Attorney General has knocked out most of my reading from the early hours of this morning to try to get on top of this stuff. Still on clause 4, the Attorney General mentioned the difference between fresh and new evidence. Proposed section 35D, "Fresh, new and compelling evidence", states in subsection (1)(b)(ii) that evidence is fresh if —

> the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

Subsection (2) states that evidence is new if —

> … 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.

The Attorney General touched upon that in answering the previous questions from Hon Alison Xamon. I am trying, as a layman, to get a bit more of an understanding of what the exercise of reasonable diligence actually means. Does that refer simply to the offender or could it also refer to the offender's legal counsel or to a combination of both? How far beyond the point of exercise of reasonable diligence could we go before we get to incompetence or negligence?

Mr J.R. QUIGLEY: It is very hard for me here at the minister's table to give a descriptor that would cover it all, but I could give the member examples.

Mr R.S. Love: That would be good.

Mr J.R. QUIGLEY: I will give the member an example. In today's criminal investigation law, a lot of technology is used. Since the Mallard case, there has been a lot of obligation on the prosecution to disclose everything to the accused person. The member might remember that in the Mallard case, there was a pig's head test that was not revealed to the defence. In the Austic case, what happened is that all the materials were bundled up in a box and served upon Austic or his lawyer. Those materials included a DVD, on which every photograph and video that had been taken during the investigation was loaded. Mr Austic was sitting in his cell without access to something that could play a DVD, and his lawyers were working hard. On that DVD, which had gigabytes of images on it, there was the movement of a camera as it had passed over a table. At trial, no-one saw that there had been a cigarette packet on that original video. After Austic had been convicted and his appeal had been disallowed, his parents were still saying, "We know our son didn't do it", so the lawyers pored over every little thing again and found the cigarette packet and said, "Oh! Look at this!" That is new evidence. That evidence was available back then in that box, but in using reasonable diligence in looking through the box of all the materials that were going to be used against their client, it could be overseen.

Mr R.S. Love: Does that then constitute fresh evidence?

Mr J.R. QUIGLEY: No, that is new evidence, because it was there and available but it was overlooked. When we ask what is reasonable diligence, it is an attempt to strike a balance between conducting efficient legislation and ensuring that the parties are properly prepared. It reflects the principle that there might be an end to litigation and recognises that the pursuit of perfect justice can come at too high a price if it prolongs the litigation with attendant cost, interference or uncertainty. It also prevents parties who have gone to trial underprepared from being rewarded for their lack of diligence with a second chance before another jury, since the trial is not a dress rehearsal for a second trial. If someone was paid to sit down for two days to go through all these DVDs, they might find it, but if they went through the brief with due diligence, there is every chance they would not see it.

Mr R.S. Love: I think I'm getting an understanding of what you are saying.

Mr J.R. QUIGLEY: Fresh evidence is evidence that was not available at the original trial. If I can take the member to a classic example of fresh evidence, this was in the Mallard case. This did not come up in the appeal, because we did not find out about it until the cold case review, which came after the appeal. The palm print of the murderer was fresh evidence, which the police had the whole time but in a different file.

Mr R.S. LOVE: I would appreciate hearing more from the Attorney General.

Mr J.R. QUIGLEY: It was fresh in the sense that it was not available at the original trial. If fresh evidence comes forward, it can affect the appeal. People can be imprisoned and, years later, come up with scams as to why they are innocent—I have heard it all—but if the fresh evidence is to sway an appeal, it has to be compelling of the person's innocence. If we take that Mallard case again, and the palm print of a convicted murderer who was convicted of murdering another woman a week after Pamela Lawrence's murder, the defence could say, "The palm print's there; what's he doing in that shop?" That was compelling.

Mr R.S. LOVE: Further, on the same point, the Attorney General previously mentioned that the offender and the legal team could exercise a tactical move and knowingly not bring evidence. Perhaps that is always done by the offender and the legal team making the decision together; I have not been in that situation, so I do not know. But

if there were advice to not include certain evidence, could that advice itself be negligent enough to actually trigger the provisions of the fresh evidence?

Mr J.R. QUIGLEY: Yes, it could be. It certainly could be, if there were evidence available and the lawyer advised the defendant not to call it. The Mallard trial took about 28 days before the Court of Appeal. His murder trial was over in three days. Decisions were made along the way. One could say that they were pretty poor decisions. It can amount to negligence. Whether a lawyer's considered decision not to tender certain evidence was incompetent or negligent depends upon what a reasonable person in the position of the lawyer would or would not have done in the same circumstances. That is someone with the same knowledge, of course; what would a reasonable lawyer in the same circumstances have done? If there is a reasonable explanation for the lawyer's decision, even if the decision is regretted with hindsight, it is not going to constitute incompetence or negligence. They may have had a reason for doing it. But if someone said, "I didn't know what I was doing"; "That thought never occurred to me"; or, "I never thought of that point of law", that on the other hand could be incompetent or negligent.

Mr R.S. LOVE: Again, on this same point, I am just trying to get an understanding of the differences here. If this is to be considered as either fresh or new evidence, at what point is that decision made? Is it made by the Court of Appeal when someone is seeking leave to appeal? Is it part of the argument that the person would put? Can the Attorney General explain the mechanics of how this would actually play out?

Mr J.R. QUIGLEY: Sure. It depends firstly on how the court deals with it, because the court will get the paperwork and decide whether it is going to go before the full Court of Appeal or before a single judge or two judges of the Court of Appeal. Some cases are totally unmeritorious. There are people in prison drawing up grounds of appeal all the time. Some of them might have no credibility in law because the law is wrong or whatever. They might just send one judge in there to hear the application for leave.

At the leave application, the defendant has to make out their grounds. At the leave application, they will have to identify whether the evidence is fresh or new and whether it was available at the original trial or whether this is something fresh that has come up out of the garden. That is going to have to be identified to the court so that the proper test can be applied by the court.

Looking over the page, proposed section 35F(4) 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 —
>
> (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
>
> (b) the ground has a reasonable prospect of succeeding.

It does not have to be a lay-down misère, but there is a reasonable prospect of it succeeding. If I take the member back to the Mallard case, what had been kept from the defence was the fact that the state pathologist, Dr Cooke, had asked the police to go away and purchase a wrench that Mallard had drawn in interview as the murder weapon, and acquired a pig's head to see whether he could inflict the same wound pattern as found on the deceased, the late Mrs Lawrence. They went to the abattoir and got the head and to Bunnings to get the wrench, and they kept on belting the pig's head. They put a report back to the police saying that this weapon could not have caused the injuries. That was never shown to the defence. The Court of Appeal in Western Australia got it wrong, but as soon as the High Court of Australia saw this, it said, "We won't go through all the other grounds of appeal. At the very least, shouldn't this have been shown to the defendant? You've put his drawing of the wrench to the jury and said that's what he confessed to killing her with. Shouldn't you have shown the defence the report that said that it was impossible?" When the High Court looked at that, it said that he is going to get leave, because there is a reasonable prospect of success. Having said that, I was in Canberra for the appeal. The lead application was heard in Perth, and that was put to Mr Justice Hayne, as I recall. As soon as he saw that, he said to the prosecutor, as I recall, "Mr Prosecutor, you've got a bit of lead in your saddlebags, haven't you? I'm going to grant special leave."

Mr R.S. LOVE: I turn to proposed section 35E(2), which states —

> 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.

Could the Attorney General explain a little of the circumstances that that provision may apply to?

Mr J.R. QUIGLEY: Certainly. Section 35E(2), which the member has taken us to, provides that evidence is not precluded from being admissible just because it would not have been admissible in an earlier trial. It confirms that the admissibility of evidence can be tested in the further appeal, and the admissibility of evidence that had been tendered at the previous trial plays no part in this inquiry. The provision is similar to that under current section 46I(3), which is part of the double jeopardy provisions, and is also consistent with the provisions in South Australia. Just

because a judge at the trial has ruled the evidence to be inadmissible—"I'm not going to allow that into the trial because it's not relevant enough", or whatever—the Court of Appeal is not bound by that ruling. Just because it was not admissible in the earlier trial does not tie the hands of the Court of Appeal. It is looking at the matter de novo.

Mr R.S. Love: That is a provision in other acts.

Mr J.R. QUIGLEY: That is correct.

Mr R.S. LOVE: Proposed section 35H(3) states —

> … the Court of Appeal, may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Proposed section 35H(4) refers to the balance of probabilities being a test in other cases. Again as a layman, I would like an understanding of the difference between those two matters. What constitutes a substantial miscarriage of justice? I do not expect the Attorney General to explain all the principles of common law, because the explanatory memorandum says that it is a test that is used by courts in other ways. Perhaps the Attorney General could explain the key differences between what constitutes a substantial miscarriage of justice and what on the balance of probabilities would establish an offender to be innocent?

Mr J.R. QUIGLEY: I will proffer this answer on proposed section 35H(3). The High Court affirmed in Van Beelen v The Queen [2017] HCA 48 that the test for a substantial miscarriage of justice in the context of fresh and compelling evidence is that in Mickelberg v The Queen [1989] 35–167 CLR 259; that is, there was a significant possibility that a jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial. This has to be established by the accused on the balance of probabilities.

A finding that there is no miscarriage of justice usually means that the accused would, but for the error, inevitably have been convicted, although there are instances when even that conclusion would not be sufficient—that is, when there has been some significant departure from a fair trial, according to law. If on the balance of probabilities, after looking at all the evidence—not to a criminal standard—he probably would be innocent, there would have been a substantial miscarriage of justice. But some people bring forward technical legal grounds for an appeal—little things that happened in the trial. The court can say, "Yes, yes, we see all these little errors, but looking at the bulk of the evidence, he is guilty, so there has been no miscarriage of justice. Although, Mr Quigley, you can identify five or six small errors in the trial, there has been no miscarriage of justice because the guilty person has been convicted." That is the difference between the two. Although in the latter, if the trial is not conducted fairly, under proposed section 35H(4), the Court of Appeal must allow an appeal based on new and compelling evidence. The high bar is because there is no miscarriage of justice in a failure to call evidence in the trial if the evidence was available or, with reasonable diligence, could have been available. There is no miscarriage of justice if due care has not been exercised. Because the accused at a criminal trial is entitled to decide how the case will be conducted, in particular what evidence will be called at the trial, there must be powerful reasons for disturbing a conviction. He was there making the calls, so there has to be powerful reasons to disturb the conviction, which is what occurs after a proper trial.

It also prevents parties who have gone to trial underprepared being rewarded for their lack of diligence with a second chance before another jury, since the first trial is not a dress rehearsal. In the trial, the accused will have the benefit of the presumption of innocence with the prosecution having to prove his or her guilt 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. If they cannot prove that, there is no miscarriage of justice.

Mr R.S. LOVE: That concludes my questioning on clause 4.

Clause put and passed.

Clause 5: Section 53 inserted —

Mr R.S. LOVE: This provision deals with the review of amended provisions. Proposed section 53(1) states —

> The Minister must review the operation and effectiveness of the amendments made to this Act by the *Criminal Appeals Amendment Act 2021*, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which the *Criminal Appeals Amendment Act 2021* section 4 comes into operation.

The minister said that there were very few cases in some other jurisdictions. I wonder whether five years is a reasonable time frame or whether, in fact, there should be a number or a rolling number of reviews, given the small number of cases likely to be captured. There will not be a Mallard case or some such case every year. I know other cases will not be successful and make the papers in the same way, but I wonder whether five years is a sufficiently lengthy time or whether there should be another review period?

Mr J.R. QUIGLEY: I do not think there should be another review period within five years for the very reason that the member explained—that is, there will be a dearth of these cases. We certainly hope that there is not going to be a flood of these cases. Because they are rare, as the member identified, there must be a number of years in which several of these cases can come up. We think that five years is appropriate so that things do not get lost in the mists of time and so that any comments that come from the court—because often the court will say, "This section is a bit difficult", or "I do not understand", or "This is poorly drafted"—can be dealt with in a reasonable time.

As for the number of cases, as we said, there are six in South Australia, one in Tasmania and there will be a welter of them in Victoria coming from the Witness X case. Victoria introduced the legislation in 2019 because of Witness X and her outrageous conduct of taking all her clients' instructions back to the police. We think there might be a few banked in the system from people who write to me from time to time. Whether they will get by the special leave points will be another issue altogether. We know the predilection in the other place for review clauses, but we think that five years is a proper time within which to do it.

Clause put and passed.

Clauses 6 to 14 put and passed.

Title put and passed.

[Leave granted to proceed forthwith to third reading.]

Third Reading

MR J.R. QUIGLEY (Butler — Attorney General) [8.40 pm]: I move —

That the bill be now read a third time.

MR R.S. LOVE (Moore — Deputy Leader of the Opposition) [8.40 pm]: I want to wrap up the debate tonight by thanking the Attorney General for the manner in which he answered my questions about the question asked by Hon Alison Xamon previously that I mentioned in my contribution to the second reading debate I wanted to go through. Obviously, he has researched all of that. I do not know whether it was there before, but it certainly —

Mr J.R. Quigley: We researched it.

Mr R.S. LOVE: Very good; it was a good effort and it saved a lot of time in going through various parts of the legislation. I thank the Attorney General's advisers for their efforts in doing so.

I want to correct a couple of things from my contribution to the second reading debate, if I may. Apparently, I did not make it clear to the member for Mount Lawley that the opposition supports the Criminal Appeals Amendment Bill 2021. Member for Mount Lawley, for the record, we support the legislation.

I was going to do this by way of a personal explanation, but given that we are now talking about the bill, I might do it now. During my contribution to the second reading debate, I noted that a police commissioner had not backed a review of a police investigation of the Gibson case. That was an error on my part. It was the Austic case, and I then went on to refer to it. I apologise if anyone was offended by that. I had intended to highlight that in the Gibson case, the police commissioner —

Mr J.R. Quigley: Which case was that?

Mr R.S. LOVE: The case of Gibson and Josh Warneke. My concern was the eventual promotion of the police officers who were involved in that flawed investigation. That was what I was trying to get to, but I picked up the wrong article and read from it, so I apologise for any confusion that may have arisen with that particular matter. It was to do with the subsequent promotion of those detectives rather than a failure of police to undertake a review of the investigation.

With that, I conclude my contribution to the debate and commend the bill to the house.

MR J.R. QUIGLEY (Butler — Attorney General) [8.42 pm] — in reply: I would like to thank all members who have spoken on the Criminal Appeals Amendment Bill 2021: the members for Moore, Cockburn, Riverton, Mount Lawley, Carine, Belmont and South Perth and—how could I forget?—the Deputy Premier, who saved me by stepping in at the last moment while I went to the bathroom. I thank them for the passion with which they spoke, because, as I said in my reply to the second reading debate, the thought of our whole system imprisoning an innocent person and that person languishing in a cell for a decade or more horrifies all of us sitting in this Parliament. Back in the mists of time, when it was a different town, I can understand that it was pretty hard when it was up to the Attorney General to grant or not grant an appeal. It might have been unremarkable, but in this day and age we have moved on.

As you would know, Mr Acting Speaker (Mr D.A.E. Scaife), the Criminal Code was written by Sir Samuel Griffith, copying the Criminal Code of India. A lot of people do not know that. He wrote it, of course, while he was the Attorney-General of Queensland. A little known fact is that while he was the Attorney-General of Queensland,

he also appeared as the appellant's counsel to appeal against the death sentence, which his own government was responsible for invoking. We cannot imagine an Attorney General today going down to the courts to defend a criminal or to conduct an appeal. I think the member for Moore would have something to say if I waltzed out of here to go and do that as Attorney General. The point that I am trying to make is that time has moved on. Although that might have been acceptable in about 1898, I think, it is certainly not acceptable in 2021. It is certainly not acceptable in 2021 that a politician can have the appeal papers sitting on the desk in his or her office. They are burdensome to look at. It is very difficult for the Attorney General to sit there, almost as a single judge of the Court of Appeal, and determine whether there are reasonable prospects, especially when they are getting advice from the Director of Public Prosecutions, who will always seek to argue—because, as has been said in the debate, it is an adversarial system—the integrity of the conviction that they secured at trial. The Attorney General listens to their director, but they have to come to an independent decision. It is enormously stressful and hard.

Some cases have been referred to in this place. I think there has been one referral by a Liberal Attorney General. I think it was Hon Cheryl Edwardes, the former member for Kingsley, who referred one of the Mickelberg appeals. Apart from that, conservative Attorneys General have always sought to protect the conviction. Jim McGinty sent Button, Beamish and Mallard to court. It should not happen anymore, and it will not happen anymore when this bill passes. I think we will all be relieved in that if there is a misfire in the courts, the courts will fix it, not this Parliament and not the executive.

I commend the bill to the house.

Question put and passed.

Bill read a third time and transmitted to the Council.