CRIMINAL APPEALS AMENDMENT BILL 2019

Second Reading

Resumed from an earlier stage of the sitting.

MR M. HUGHES (Kalamunda) [2.51 pm]: Given the contributions thus far to debate on the Criminal Appeals Amendment Bill 2019 by the lawyers present—I think we have a couple more to follow—I am a bit hesitant to make a contribution. I listened with interest to the observations made by the member for Hillarys and I clearly respect his position—that this government is bringing forward legislation that needs to ensure a sensitive balance between consideration of the needs of victims of crime and those of people who may find themselves in circumstances of wrongful conviction.

From where I stand, the government has a strong record on protecting the interests of the victims of crime. Our Attorney General has been a very strong advocate for ensuring that we have legislative reform in that area. Before he leaves, I have a question for the member for Hillarys. When he talks about victims of crime, I am interested to know about those members of the Western Australian public who have been wrongfully convicted and are, in effect, innocent of the crimes for which they have been convicted. I ask the member for Hillarys: is a prisoner who has been wrongfully convicted and is serving a significant term of imprisonment as a result of that conviction not also a victim of our judicial system? I would argue that such a person clearly is, and we as a Parliament should be fulsome in our support for legislation that ensures speedier access to the appeals process. I understand that the member for Hillarys is supportive, albeit somewhat cautiously.

I welcome the provisions contained in this bill. Why? 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.

We should remind ourselves that we currently have approximately 6 900 adult prisoners in Western Australia. Of those, 4 700-plus have been convicted of the most serious offences, including murder, homicide, and assault and battery; there is a whole list, and I will not go through them all. Using simple arithmetic, given a total prison population of 6 900, we can reasonably say that there are potentially between 70 to 140 people in our prisons who are currently serving sentences for crimes that they did not commit. As the member for Hillarys pointed out, some of those sentences are quite short in duration, so for some of them perhaps not any appeals process could be brought on in time for those wrongs to be corrected.

However, we are talking about serious crimes, and as an aside I would like to commend the criminal justice review project being undertaken by the Sellenger Centre for Research in Law, Justice and Social Change at Edith Cowan University. That project is committed to pursuing the exoneration of those who have been wrongfully convicted. By identifying the factors that contribute to wrongful conviction, the project seeks to facilitate law reform, equity and equality for all who encounter the justice system process. Within that, we talk about not only the victims of criminal behaviour but also, I would argue, those people who have been wrongfully convicted. They are victims of a justice system that—given that human judgement is brought to bear on it, as the member for Hillarys quite rightly put it—is not perfect. If we think of any of our children sitting in a lonely cell, knowing that they have been wrongfully convicted—I will later enunciate some of the reasons why that might be the case—we would not want to leave any stone unturned until their innocence was brought to light.

I would argue that under the procedures currently available to us, the process of righting such wrongs is fraught with difficulty, as the Attorney General mentioned in his second reading speech. Currently, the power to have a case re-examined rests essentially with the Attorney General. The member for Roe enumerated many historical cases of wrongful conviction that tell us that this process is extremely difficult to activate and that those who are ultimately proved to have been wrongfully convicted of particularly serious crimes can languish in prison for decades.

It is proper to remind ourselves that the executive government and the Attorney General of the day are elected politicians who keep one eye on the power of the ballot box.

The more timorous Attorneys General of this state—that does not include the current Attorney General—may have been disposed to want to be seen as hard on crime and, as a result, have proved extremely reluctant to grant leave of appeal. 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.

As I understand it—I can be corrected on this—the process of providing institutional solutions for the deficiencies of the criminal appeals process emerged initially in the United Kingdom, following the investigation of a large

number of convictions, many of which involved Irish terrorists. That investigation resulted in the establishment of an independent Criminal Cases Review Commission and, in turn, the number of quashed convictions increased from roughly four to five a year to between 20 and 30. The member for Hillarys was very interested in this question of how big the backlog would be and whether the court system could be potentially clogged by a large number of appeals under the provisions we are addressing in this bill. If we put the UK position into context, approximately 96 per cent of all applications to the commission were rejected. I do not believe that we will be in a dissimilar position in this state with the results of applications made for judicial review of a conviction. Of the four per cent of applications to the commission that were referred to the Court of Appeal in the United Kingdom, 70 per cent had their convictions quashed. Really, 70 per cent of a four per cent figure is not very large. I have drawn those statistics from a paper by Malcolm McCusker titled "Miscarriages of Justice", presented as an address to the Western Australian branch of the Anglo–Australasian Lawyers Society in June 2015. Of course, this bill does not propose a similar Criminal Cases Review Commission, although I understand that in 2011, the then Western Australian Attorney General was reported as favouring the exploration of the creation of such a body in this state, which might be of interest to the member for Hillarys. As I said, the proposed legislation does not explore the creation of such a body in this state.

With the passage of the bill before us, which is often referred to as the second appeal legislation, Western Australia will follow the lead of South Australia and Tasmania, which are the only jurisdictions that have legislated to solve the problem by taking the criminal appeals process out of the political arena and placing it firmly in the hands of the impartial judicial wing of government, where I believe it should firmly rest, notwithstanding that this legislation does not take away the capacity of the Attorney General to grant leave of appeal. The legislation in South Australia and Tasmania allows people convicted of crimes to apply directly to the court of appeal to determine whether there is fresh and compelling evidence sufficient to warrant an acquittal or retrial. That is important. This modern approach to post-conviction review provides a clear and, hopefully, objective pathway for a second and subsequent appeal against conviction, and promotes an emphasis on evidential matters by which to substantiate a review of, or appeal against, conviction. The advantage of the proposed change to our statute law in this area is that the decision to allow the appeal will be made openly and freely, and away from political or populist considerations, by an independent judiciary, which will not have one eye on whether it will be re-elected if it is perceived to be soft on crime.

This bill obviously takes advantage of the experiences of legislation introduced elsewhere in the commonwealth. I know that the Attorney General has ensured that the Solicitor-General has taken the time to consult on the proposed legislation with senior lawyers and members of the judiciary. Among them is the Honourable Mr Malcolm McCusker, who, commenting as recently as June 2018 to Phil Hickey of WAtoday, said that the current situation in WA regarding the appeals process has long been thought to be unsatisfactory. He went on to comment —

> "It is undesirable for a politician to be put in that position. It is far better that the question of whether the fresh evidence warrants a further appeal should be decided by the Court of Appeal itself."

One argument that has sometimes been raised against this legislation is that it might open the floodgates for a host of applications to flood the Court of Appeal. The member for Hillarys said that, but Mr McCusker thinks differently, and I choose to take his view.

Mr P.A. Katsambanis: I didn't use the term "floodgates". I questioned the number; that's all.

Mr M. HUGHES: I think the member said something about —

Mr P.A. Katsambanis: It just doesn't matter.

Mr M. HUGHES: I will find it. If I have misquoted the member, I stand corrected. I apologise, if I have misquoted him. However, should he have that thought, I want to dissuade him from that view. Mr McCusker made the point that no such thing as an opening of the floodgates has happened in either South Australia or Tasmania.

Mr P.A. Katsambanis: I asked the question.

Mr M. HUGHES: Well, he does not take that view, so the member for Hillarys should feel comforted by that.

There are some notable cases, to which a few members made reference during the course of the debate. The Andrew Mallard conviction is one that is very poignant for me at the moment because of his tragic death on 18 April 2019, when he was fatally struck by a car while crossing the road. Had it not been for his supporters and the current Attorney General in a different role, he may still have been in prison, ironically. Nevertheless, he spent 12 years in prison and was eventually found innocent, after having gone through the appeals process. We know that immediately after his conviction, he appealed to the Court of Appeal, which dismissed his appeal. He sought special leave to appeal to the High Court in 1997. This was refused. He proceeded to serve his sentence of life imprisonment, always protesting his innocence. His friends and supporters managed to find pro bono lawyers who

were sufficiently concerned about the case to persist with the legal challenge to the conviction. Eventually, a petition was presented to the state government in 2002 for the exercise of the royal prerogative of mercy on the basis of unsatisfactory features of the trial. Fortunately, the petition was referred by the then Attorney General to the Court of Appeal of Western Australia.

[Member's time extended.]

Mr M. HUGHES: That court dismissed the petition once again and confirmed the conviction. For the second time, Andrew Mallard invoked the appellate jurisdiction of the High Court of Australia. He complained that the Court of Appeal had failed to consider the whole of his case. This time the special leave was granted—a process that took over a decade. He was an innocent man convicted of a crime that he was not guilty of because of a combination of the nature of the man and the preparedness of the police in his case to effectively suppress evidence that they had collected or to minimise it. It was an absolute disgrace. He was a victim of our judicial system. In commenting on the case, which he heard on the first and second application, His Honour Justice Kirby said —

> … for me, the most important feature of the *Mallard* appeal was the demonstration of the near impossibility of reconciling the established movements of Mr Mallard on the day of the offence that showed that, in terms of the time of the homicide and the times of the accused's sightings, the factual mosaic did not fit together. This was a feature of the evidence which, with more time and clearer focus, should have been brought out in the earlier appeals.

While fresh evidence was considered, ultimately the outcome of the appeal "did not depend on laboratory or scientific proof."

The Andrew Mallard case demonstrated the imperfections of any system of criminal justice. No system dependent on human judgement is therefore ever free of error. It was only by close analysis of the evidence produced at the trial that Andrew Mallard's counsel demonstrated convincingly that the prisoner could not have been at the murder scene at the time of the homicide, given other objective evidence of timings and sightings of him elsewhere in Perth that day.

In the foreword of the book *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* by Sangha and Moles, His Honour Justice Kirby, speaking of himself, observes —

> 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. In the same foreword, Michael Kirby reflects 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. 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.

I believe that the right of criminal appeal on second and subsequent occasions will assist in improving the criminal appeal processes that we have available to ourselves in this state, particularly in providing the removal of an outcome that is more within the political arena because the more timorous Attorneys General are fearful of a public response to them being seen to be soft on serious criminals. It is to the weakness of the current criminal appeals process and the repairs essential to cure it that the Attorney General has directed his energies. The Criminal Appeals Amendment Bill 2019, in amending the Criminal Appeals Act 2004, will introduce a new statutory right for an offender convicted of an offence on indictment to bring a second or subsequent appeal against conviction to the

Court of Appeal if there is either fresh and compelling or new and compelling evidence relating to the offence. I thank the member for Hillarys for providing me with a clear understanding of the differences between those two concepts.

Mr P.A. Katsambanis: It will get murkier when we go through the Attorney General's amendments.

Mr M. HUGHES: I am amazed that I am daring to speak in an arena filled with lawyers, but here we go.

This bill creates, as we have heard, a second and subsequent appeal directly to the Court of Appeal. Although the concept of finality is an important element of the legal system, as the member for Hillarys quite rightly pointed out, this needs to be balanced against the evident occurrences of miscarriages of justice when a person has been found guilty of a crime that they did not commit. As the Attorney General observed in his second reading speech —

> … there are limited circumstances in which the principle of finality must be put aside for the purpose of allowing justice to be served, however belatedly.

It is not going to open a floodgate.

I do not think there is any merit in the finality of a conviction of an innocent person or a legal indifference to their plight. Protecting the innocent is a hallmark of a civilised society that upholds universal human rights. I think that really says it all. If we have the means before us to improve the processes by which a person is appealing against conviction because there is new or fresh compelling evidence, it should be brought immediately before the Court of Criminal Appeal rather than being adjudicated, if that is the correct term, by an attorney who has one eye on the ballot box.

The bill allows a person convicted of an offence on indictment to bring a second or subsequent appeal to the Court of Appeal against a conviction, not against sentence, if there is either fresh and compelling or new and compelling evidence relating to the offence and conviction.

I do not think I need to go into the detail provided in the Attorney's second reading speech about safeguards against unmeritorious or vexatious appeal applications. He dealt with that substantially in his opening remarks in his second reading speech. As has been observed, the proposed amendments will not alter or remove the power of the executive with respect to an application of the royal prerogative of mercy—which is a good thing—and the power of the Attorney General, should he or she be so disposed to refer matters back to the Court of Criminal Appeal under section 140 of the Sentencing Act 1995. I am pleased that the amendment bill will operate retrospectively. As we need to give this sufficient time to operate, I support the view that the practical operations of the legislation under the provisions made in the bill will be reviewed within five years of its commencement. Any shorter time would not be advantageous in improving the process.

From a layperson's point of view, I think the bill strikes the right balance between the public interest in correcting miscarriages of justice and that of bringing finality to criminal matters before the courts. Balancing the rights of victims of crime and those of innocent persons wrongfully convicted is no easy matter, but this bill strikes the right balance. The creation of a right to a second or subsequent appeal provides a public and pragmatic solution, by way of a judicial approach, to revisit a conviction outside the executive or political sphere. These reforms will ultimately provide a simpler, direct and more transparent process than currently exists.

To conclude, this legislation seeks to place the appeal process fully in our courts, acknowledging there will forever remain the capacity for the courts to make the wrong decisions, but it will remove the dead hand of those who have responsibilities under the current regime in the executive branch of government from yielding to the court of populist opinion when exercising the discretion whether to allow or not allow an appeal.

DR A.D. BUTI (Armadale) [3.21 pm]: I also rise to contribute to the Criminal Appeals Amendment Bill 2019. I thank the member for Kalamunda for his very comprehensive contribution and also the other speakers today. The member for Hillarys is always eloquent in his very forensic examination of bills before the house. I am sure that this bill will be further examined with the Attorney General during the consideration in detail stage.

In many respects, this bill comes to the house as a result of a South Australian case, which I will talk about shortly. We probably should start framing this debate by the famous words of a great British jurist, William Blackstone, who, in his commentaries, said —

> It is better that ten guilty persons escape, than that one innocent suffer.

That is known in legal circles as the ten-to-one rule. In a South Australian case, Henry Keogh was found guilty of drowning his fiancée in the bathtub. There were numerous appeals et cetera. 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 1935. The bill before the house today goes much further than that section. In many respects,

what happened in the Keogh case has led our Attorney General to bring this bill before the house. I refer to an article written by Emily Carr in the Adelaide Law Review (2015) 36(1) 257. A paragraph from page 258 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.

In his second reading speech, the Attorney General said —

> The Criminal Appeals Amendment Bill 2019 will amend the Criminal Appeals Act 2004, 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.

The distinction between new and fresh evidence is quite interesting. There are a number of authorities on this issue. Ordinarily, an appeal court will only decide an appeal on the basis of evidence already given at trial. The court will decide, in the light of the evidence, whether the decision of the trial court was incorrect. In addition, the appellant can introduce fresh but not new evidence to show that the decision should have been different. Fresh and new evidence is evidence that was not led at the original trial. Fresh evidence is evidence that could not have been discovered by an appellant with reasonable diligence. This would be the case, for example, if the evidence either did not exist or it had not been disclosed by the prosecution prior to the original trial. New evidence is the corollary of this test; that is, evidence that could have been discovered with reasonable diligence prior to the original trial and therefore evidence that was reasonably available to the appellant at trial but it decided not to use it. It cannot be used as evidence in an appeal, although this is not a hard and fast rule.

This legislation seeks to allow the possibility of fresh and compelling evidence and also new and compelling evidence to be utilised. The meaning of "fresh and compelling evidence" under proposed section 35D states —

> … evidence … is —
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> (a) ***fresh*** if, despite the exercise of reasonable diligence, it was not and could not have been made available at the trial of the offence or any previous appeal;

That is quite standard. Under part 3A of the bill, fresh evidence used in a second appeal cannot be resubmitted as fresh evidence in a subsequent appeal. Each subsequent appeal may be brought only on fresh evidence that was not and could not have been adduced at the previous appeal. Evidence will be compelling if it is highly probative in the context of the issues in dispute at the trial of the offence. That makes sense because so-called fresh evidence cannot be used in one appeal and then used again at a subsequent appeal. That is just re-trialling the same evidence in trying to get a different verdict.

Under part 3A, proposed section 35E, "Meaning of new and compelling evidence", it states —

> For the purposes of this Part, evidence relating to the offence against which the offender was convicted is —
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> (a) ***new*** if —
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> (i) it was not adduced at the trial of the offence; but
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> (ii) with the exercise of reasonable diligence, could have been adduced at the trial of the offence or any previous appeal; and

The new evidence used in the second appeal under part 3A cannot be resubmitted as new evidence in a subsequent appeal. Each subsequent appeal may only be brought on new evidence that was not adduced at the previous appeal, which of course makes sense. The proposed section continues —

> (b) ***compelling*** if it is highly probative in the context of the issues in dispute at the trial of the offence.

Fresh evidence is evidence that was not available, even with due diligence. New evidence is evidence that was available in the exercise of reasonable diligence. But issues such as incompetence of the legal team for the appellant—which would have been the defendant at the original trial—does not necessarily mean that the barristers were incompetent personally, but often these defences are run on limited budgets; they do not have the support staff to troll through voluminous evidence. Police have to provide all the evidence that they have gathered. Even though defence lawyers may have to get through a mountain of evidence, they may not have the support to do so.

They may miss something that was there, so yes, it is incompetence in a general professional manner but we would not necessarily say that that lawyer was an incompetent lawyer. If that new evidence has a compelling highly probative value, it could be used in subsequent appeals. However, what is important is that by bringing this before Parliament, the Attorney General is trying to take politics out of it in the sense that the Attorney General does not become the arbiter on whether there has been a miscarriage of justice that needs to be rectified. That is very important. We can understand the dilemma that an Attorney General and a government face. As the member for Hillarys mentioned, there are the rights and concerns of the victims, vis-a-vis the rights of the appellant or the accused. Towards the end of his second reading speech—this is important because it goes to the nub of the philosophy behind the introduction of this bill before the house—the Attorney General states —

> In introducing these amendments, I have had to balance the public interest in correcting substantial miscarriages of justice, and the public interest in the finality of litigation. I have considered the right of victims of these crimes to feel confident in the finality of the court's findings and to not be re-traumatised. I have also had to consider the potentially innocent person, who, unless through a successful petition, has no recourse against the injustice served upon him or her. There is the overarching and inextinguishable right of all members of our society, offenders and victims included, to have absolute belief in the judicial process that the right outcome will always be found.

It is a balancing act. The Criminal Appeals Amendment Bill before the house seeks to strike that balance. As we know and as has been mentioned by other speakers before me, there are a number of examples of miscarriages of justice in Western Australia. I would like to provide a bit of chronology of those miscarriages of justice. Often the cases referred to are Beamish, Button, Mickelberg and Mallard. We can even include cases such as Christie and Walsham. I go back to the Beamish case. Daryl Beamish, a deaf mute, was convicted of the 1959 murder in Cottesloe of Jillian Brewer, the heir to a chocolate fortune. I think the apartment still stands, does it not, member for Cottesloe?

Mr R.R. Whitby: It is quite close to the home of the former Premier.

Dr A.D. BUTI: That is what I thought. That murder took place in 1959. In a trial in 1961, Beamish was found guilty. The court case was in August 1961 and Beamish commenced an appeal in the Court of Criminal Appeal in September 1961, which he lost, and he was incarcerated at Fremantle Prison. Remember, he was sentenced to death but because of his disability, his sentence was commuted to life imprisonment. That is important because, as we know, later on, his conviction was quashed. He was convicted to capital punishment. The Jillian Brewer murder of 1959 was a precursor to a spate of violence and murders that occurred in the early 1960s. As we know, on Australia Day, 26 January 1963, five people were shot in one night in Cottesloe and Nedlands. Two of them were murdered and another suffered severe brain damage and died three years later. Many people say that two weeks after 26 January 1963, Perth lost its innocence. Of course, I am referring to the murders by serial killer Eric Cooke, who had a role to play in the Beamish and Button subsequent appeals. On 9 February 1963, Rosemary Anderson, aged 17, was deliberately run down on Stubbs Terrace in the Perth suburb of Shenton Park. She died from her injuries at Royal Perth Hospital later that night. Her boyfriend, 19-year-old John Button, was arrested and was eventually charged. His trial took place on 29 April 1963. He was found guilty of manslaughter and sentenced to 10 years of hard labour.

In both the Button and Beamish trials, the defence raised concerns about the confessions. Both alleged that the confessions were the result of police pressure and, in the case of Beamish, the result of police prompting or suggesting answers. On the night of 31 August 1963, the police apprehended Eric Cooke. As we know, he was involved in a number of murders. He was eventually arrested because he had hidden a rifle in the Canning River, Mt Pleasant, and that led to him making a mistake when he went to try to retrieve it and he was arrested. He admitted to a stream of murders. He also admitted to the murders that Button and Beamish were convicted of. It is interesting that the prosecutor in the Eric Cooke, Beamish and Button trials was Ronald Wilson, who later became WA's first High Court Justice and was known as a ferocious prosecutor. Some people were quite critical of the way he prosecuted cases. Before Ronald Wilson came to the prosecuting Crown Solicitor's team, it was seen that the prosecutor should be quite neutral and present the facts so that they lay where they lay. He was seen to be somewhat zealotry in his prosecution. Because he was such a strong advocate, it was seen that maybe some people were prosecuted when they should not have been. It was quite interesting that when Cooke admitted to the murders for which Button and Beamish were convicted, they, of course, subsequently appealed. I cannot remember which one it was, but Eric Cooke was put on the stand and admitted to the murders of Brewer and Anderson, and Sir Ronald Wilson, being probably the foremost ferocious prosecutor at that time, cross-examined him and said, "You're not guilty of those crimes", and Eric Cooke said, "I am guilty of those crimes." It was a really interesting interplay between the two.

[Member's time extended.]

Dr A.D. BUTI: Subsequently, Beamish and Button served time and were eventually released from prison. They continued to argue their innocence and they lost on subsequent appeals. However, later, through the petition

process, their cases came before the court again. Quite alarmingly—it would never happen today—the second Beamish appeal that commenced on 17 March 1964 in the Supreme Court, was heard by Chief Justice Wolff, Judge Jackson and Judge Virtue. It is interesting that Chief Justice Wolff was the trial judge in the Beamish trial. In other words, Chief Justice Wolff was the judge in the trial of Beamish and sat on the second appeal of that conviction. The other two, Jackson and Virtue, had sat on the first appeal. The bench was being asked to overrule themselves. So much for the independence of the judiciary at the time. Of course, the appeals were unsuccessful. I am not sure when Beamish was released from prison, but Button was released on 20 December 1967. He married in 1968. After a chance meeting in 1992 between his younger brother and Perth journalist Estelle Blackburn, his story ended up in the book *Broken Lives* in 1998, in which Estelle presented a compelling case that Cooke had killed Rosemary Anderson.

In light of that, the Attorney General at the time, Peter Foss, QC, MLC, referred the matter for reopening. The decision was handed down on 25 February 2002. The court held that if all the evidence that had been presented to the appeal court had been available for the jury's consideration at the original trial, there was a significant possibility that a jury acting reasonably would have acquitted Button. They considered the verdict unsafe and unsatisfactory on the ground that there had been a miscarriage of justice, and there was no retrial. It is important to repeat the decision that the verdict was unsafe. Of course, the way the system works is that people are either guilty or innocent. Because a decision is found to be unsafe does not necessarily mean that the person is innocent, but of course under our criminal system, one is either innocent or guilty. In regards to a later case, I refer to the member for Roe on that.

Beamish had success later. His success came on April Fools' Day, ironically, in 2004. The court also held that there was a substantial miscarriage of justice. It held that the confession of serial killer Eric Cooke to the murder, including his gallows confession 15 minutes before he was hanged, was decisive. He was the last person to be hanged in Western Australia. He was not seeking to have a retrial of his own conviction. Obviously, it gave much weight to the fact that he held the view that he had killed Jillian Brewer.

On other occasions I have mentioned Christie, Walsham and Mallard. Andrew Mallard was unfortunately involved in a hit-and-run in Los Angeles.

Mr P. Papalia: The driver gave himself up.

Dr A.D. BUTI: He gave himself up, did he? Of course, the Mallard case was a much celebrated case. As mentioned by the member for Roe, local journalist Colleen Egan became very involved in that case. I want to read a bit about that case. Mallard was convicted of the brutal murder of Pamela Lawrence. He appealed in September 1996 to the Court of Appeal. The court rejected the appeal and said that there was no miscarriage of justice. In 1997, the High Court denied Mallard special leave to appeal. Malcom McCusker, QC, joined a growing number of people questioning the admissibility of the confessional evidence. Mallard underwent a polygraph test in 2001. The results support his claim of innocence. In July 2003, he passed a second polygraph test; however, the court would not consider the results of either test as they considered it to be inadmissible as evidence in criminal matters. I am reading from a book about this topic —

> In 2002 the stubborn and sometimes testy state Labor politician and former Police Union lawyer John Quigley (earlier involved in Police Union attempts to sue Lovell over *The Mickelberg Stitch*) agreed to review the Mallard case. Mallard could not have done better. Quigley took apart the undercover investigation the police ran on Mallard in 1994. He found the operation gleaned nothing the police could use against Mallard but plenty that could have worked in his favour—except the police and DPP never gave this information to Mallard and his defence team.
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> Particularly damning was Quigley's discovery that the police failed to disclose evidence demonstrating that, according to the state Chief Forensic Pathologist Clive Cooke, the weapon police claimed Mallard confessed to using could not have caused the injuries that killed Lawrence. The pathologist had carried out extensive tests in which he used the alleged weapon, a large wrench, to inflict wounds on the head of a pig. The experiments conclusively established that such a weapon could not have inflicted the wounds suffered by Lawrence.
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> As a result of the new evidence, Attorney-General Jim McGinty agreed to refer the case back to the Supreme Court for a new appeal. During the hearing in 2003, McCusker for Mallard suggested that there might be a perception of bias as former DPP John McKechnie, who gave advice on whether to charge Mallard and appeared for the prosecution at his first appeals, was now a Supreme Court judge. However, McKechnie's colleagues on the bench held his submissions had no basis and the rehearing went ahead.
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> The three justices hearing the case, Justices Kevin Parker, Christine Wheeler and Len Roberts-Smith, were unimpressed by the new evidence and, after a long and drawn-out hearing, refused Mallard's appeal.

> They concluded there was no miscarriage of justice and that there was plenty of evidence to support the conviction. As a result, Mallard remained in gaol.
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> In October 2004, Mallard again applied for special leave to appeal to the High Court. This time he was successful and in November 2005 the High Court unanimously overturned the WA Supreme Court's decision to deny Mallard's appeal. In a judgment critical of the state's Supreme Court, prosecution office and police, the High Court quashed Mallard's conviction. They ordered a retrial but suggested the DPP might decide not to proceed on the evidence, given its doubtfulness and the fact that Mallard had already spent considerable time in gaol.

That was a celebrated more recent case of a miscarriage of justice before the Supreme Court of Western Australia. WA has a history of cases that have involved a miscarriage of justice. The Mickelberg saga went on for 25 years. Ray, Peter and Brian were convicted of the so-called Perth Mint swindle. All were given lengthy terms of imprisonment. Brian was released shortly after imprisonment but died in a plane crash; he was a pilot. Ray and Peter kept firm on their innocence and that they were physically abused by the police and that confessions were basically fabricated. They had seven or eight appeals, including to the High Court, without success. The two investigating officers in the Mickelberg case were Don Hancock, who came to a violent death at the hands of some bikies, and —

Mr R.R. Whitby: Lewandowski.

Dr A.D. BUTI: Tony Lewandowski. The member for Baldivis was working for Channel Seven at the time. An allegation had been made that Hancock had killed a bikie in a pub outside Kalgoorlie on the opening night of the Sydney Olympics. He was never charged. The bombing of the car that he was in when he was coming home from the Belmont races was basically payback. Tony Lewandowski then made an admission that they had fabricated the witness statements of Peter and Ray, but Lewandowski said that he still believed there was sufficient evidence that the Mickelbergs were guilty. This is often known as noble cause corruption. It is described by Seumas Miller as the paradox whereby police necessarily use morally problematic methods to secure morally worthy ends. Noble cause corruption is reported by Porter and Warrender as the most frequent source of police misconduct. It is an attempt to justify corruption in some instances when a cause is noble in light of the apparent greater good. It obviously involves a philosophical dilemma. It is when the police think that someone is guilty, but they do not think they have enough evidence. Obviously, the problem with that is that sometimes innocent people are going to go to jail, and sometimes guilty people will not go to jail. That is why police should never engage in so-called noble cause corruption.

After the Lewandowski admissions, the case came back before the Court of Appeal as a result of the referral by the Attorney General of the day. In a 2–1 decision, it was found that the convictions were unsafe because, basically, the story was that if the jury at the time had known of the so-called behaviour of Lewandowski and Hancock with regard to the fabrication of the evidence, they may not have convicted Peter Mickelberg in particular. Steytler, who wrote the leading judgement in that case, said that even though there was a lot of other evidence that pointed to the guilt of Peter Mickelberg, the fact that Peter and Ray Mickelberg's convictions were interlinked meant that it would be up to a jury, and reason for a jury to find it unsafe to also convict Ray Mickelberg.

The Criminal Appeals Amendment Bill 2019 is important legislation. Obviously, yes, victims have to be considered. The Attorney General's statement, which I read out previously, referred to victims wanting finality, but surely victims want the right person to be found guilty. Although they may be at peace because someone has been found guilty and they think that that person is the guilty party, I am sure that if they knew that the person who had been found guilty was not the guilty party, they would not want them to be in prison. There are enough safeguards in the legislation to respect victims' feelings. It is important and, as William Blackstone said, it is better that 10 guilty persons escape than one innocent suffers. Some people may not agree with that. It would be better if no innocent person suffered and all guilty people were found guilty. It is hard to have a 100 per cent foolproof justice system. The bill before the house should be commended. I look forward to the consideration in detail stage.

MR R.R. WHITBY (Baldivis — Parliamentary Secretary) [3.50 pm]: I rise to speak on the Criminal Appeals Amendment Bill 2019. We have high expectations of our justice system. We expect it to get it right—to free the innocent and punish the guilty. It is a sad fact of life that citizens of this state sometimes inflict horrific crimes on other citizens of this state. As a community, a Parliament and a police service, we all want the offender caught, charged, tried and convicted in a timely manner. We have a troubled history over many decades of getting it wrong when it comes to some of the worst crimes committed in this state. I listened to the member for Armadale and I found his contribution very fascinating. Anyone who has spent time in Western Australia will know of the long history of miscarriages of justice. They hang like a long shadow over our state. Earlier, there was mention of serial killer Eric Edgar Cooke. As a young boy, I remember hearing tales of "Cookee" and the impact that he had on Western Australia. Indeed, the impact of his actions and the associated charges against others and the miscarriages of justice in relation to Eric Cooke's activities have cast a very long shadow—the damage, the corrections and the mopping up of that history has continued until very recent times. This long history that has cast a shadow over the state has meant that the innocent have sometimes had to deal with an unimaginable wrong—they have been

accused and rejected by their community and sometimes even their friends and family as someone who is guilty of a terrible crime. A few names come to mind—they have been spoken about this afternoon—Western Australians whose lives have been ruined by a failure of justice. The ones I will mention are Daryl Beamish, John Button and Andrew Mallard. There are others and, indeed, some former journalistic colleagues of mine—Estelle Blackburn, Colleen Egan and Bret Christian—have played very significant roles, as has the Attorney General, in securing a correction of those miscarriages of justice.

In criminal law, as the member for Armadale has already mentioned, there is Blackstone's ratio. The English jurist published in the 1760s the assertion that it is better that 10 guilty persons escape than one innocent suffers. There is a long history of similar sentiments in law that predate Blackstone's ratio. The general message is that governments and the courts must err on the side of innocence. Benjamin Franklin echoed the principle when he said that it is better that 100 guilty persons should escape than one innocent person should suffer. It is interesting that in recent years, there has been an attempt by some people to reverse Blackstone's ratio and turn it on its head. I refer to former Vice President Dick Cheney, who commented on his support of enhanced interrogation techniques against suspected terrorists, and the fact that some 25 per cent of those detainees were estimated to be innocent people, or people who were later proven to be innocent, including one who died from hypothermia in CIA custody. The former vice president believed that it was acceptable that there was a proportion of innocent people if the CIA was going to interrogate mainly guilty people. Former Vice President Cheney said —

> I'm more concerned with bad guys who got out and released than I am with a few that, in fact, were innocent.

I find that a very troubling view and perspective. I am not sure that the Western Australian judiciary or community wants to apply the Cheney doctrine, whereby we would ignore the risk of punishing the innocent. Effectively, this is what these amendments are about.

The Criminal Appeals Amendment Bill will allow a convicted person who has exhausted their appeals to seek further appeal if certain key considerations are met. At the moment, a convicted person who has exhausted their appeals has no further right of appeal even if fresh or new evidence comes to light. Imagine that. Imagine a convicted murder, for instance, sitting in jail unable to appeal even though new DNA technology exists that proves they are not a killer. Currently, the only way forward for the convicted person to appeal is to lodge a petition for the exercise of royal prerogative, or to petition the Attorney General. They would have to rely on political intervention to progress the appeal. Mixing politics and the judiciary has never been a good idea. Imagine the innocent condemned man serving a sentence for a notoriously sickening crime—perhaps a crime of child molesting or child murder—getting major media coverage for seeking an appeal from a so-called tough-on-crime Attorney General in an election year. What are the chances of that Attorney General making a fair and considered decision to grant an appeal? What would be the fallout for a government that made a fair and appropriate decision to grant an appeal in a heated public atmosphere when crime is a hot button issue? These amendments remove politics from the criminal appeals process. The changes that we are debating will allow a convicted person the right to a second or subsequent appeals against conviction to the Court of Appeal. An appeal will require fresh or new evidence. Fresh evidence is evidence that was not or could not have been made available at the initial or a subsequent appeal. A classic example that has been spoken about is DNA evidence. Such technology did not exist in previous years, but because of technological advances, there may be evidence to prove someone's innocence. New evidence is evidence that was not adduced at the trial or subsequent appeal, but with reasonable diligence could have been adduced at the trial or appeal. In either case the evidence must be compelling to the probable outcome. The level of proof required differs depending on whether the evidence is fresh or new. Fresh evidence will require the Court of Appeal to hear an appeal if it is satisfied that there was a miscarriage of justice. The threshold for new evidence is higher because the court must be satisfied that the evidence establishes that the offender is innocent.

The bill has protections against spurious applications. As we all know, if we ask them, everyone in jail is innocent. Some of the protections against spurious applications include the requirement for an applicant to seek special leave to appeal; the provision to have the applicant pay for the other party's costs; the ability of a single judge to hear special leave applications; the requirement for the special leave to be ruled on before a full hearing of a court; the requirement for applications to be heard on the papers; and the refusal of special leave itself not being subject to appeal. The bill will operate retrospectively, so that those currently convicted of a crime may be able to seek an appeal. The bill's amendments will be reviewed after five years.

I will now refer to some of the more infamous cases of wrongful conviction in WA, when justice was delayed for many, many years because the current system stood in the way. One would hope that these amendments would have brought swifter justice to these innocent Western Australians, who suffered for many years before their innocence was finally established. As we heard from the member for Armadale, in 1959, Darryl Beamish was an 18-year-old deaf-mute. A young woman was murdered in her bed with an axe and scissors. Jillian Brewer was 22 years old. She was murdered in her flat on Stirling Highway, as we mentioned before, opposite the home of a former Premier.

Technically, I think it is in Claremont. Two years after the murder, Mr Beamish was convicted by a jury and sentenced to death by hanging. It was a crime he did not commit. It took more than 40 years and six appeals to establish his innocence. During his trial, respected detective Owen Leitch said he had four confessions from Beamish. Owen Leitch later became a police commissioner. Darryl Beamish spent 15 years in jail after his death sentence was commuted to life imprisonment, and he was finally released in 1977. He was free, but still guilty of a brutal murder. Forty years later, the Court of Appeal ruled Beamish had not committed the murder, saying it believed that serial killer Eric Edgar Cooke had committed the crime. The appeal decision created at the time the longest gap between a conviction and an appeal victory anywhere in Australia. After his exoneration, Mr Beamish said —

> "All I ever wanted was truth and justice. I have just wanted everyone to know for sure that I did not kill anyone. Now they know.
>
> "The appeal court judges say that they believe me. I always told the truth. The deaf have many problems being understood by people who can hear. There are always mix-ups. I did not understand what was happening at the police station, or at my trial in court."

In five previous appeals, Cooke's account of how he killed Ms Brewer was discounted by the court as the work of a "palpable and unscrupulous liar". We know that at the time before his hanging in Fremantle Prison, Eric Edgar Cooke made a wide range of confessions of murders and serious crimes. But for the judiciary of the day, they were an inconvenient truth; the courts already had their men for those crimes. After hearing this example, is there any doubt at all that this bill is needed? Our courts get it wrong—very wrong—and sometimes they get it wrong again and again and again.

John Button was a teenager in 1962 when he confessed to the hit-and-run death of his beloved fiancée Rosemary Anderson. Mr Button served 10 years in jail and was exonerated 44 years later. He was accused of running down his then fiancée on Stubbs Terrace in Claremont along the railway line, where Shenton College stands today. Mr Button said after his successful appeal, 44 years later —

> "I really thought that if I made a confession it wouldn't be of any good to them, because there was no evidence to back it up," … "I hadn't run Rosemary down, so in order to get away from them I said, 'OK, whatever you say. If you want me to say I did it, I did it.'"

And, of course, there is Andrew Mallard. Mr Mallard's crime was to explain to police how he thought Pamela Lawrence might have been bashed to death in her Mosman Park shop in 1994. It was a theory, not a confession, but it was enough to convict him of a murder he did not commit.

Those are three Western Australians whose lives were ruined by wrongful convictions. All three of them were vulnerable: a young deaf-mute man; a young teenage boy, bullied and under pressure; and a loner and drifter who was on cannabis. We rely on our police and justice systems to carry a very great burden—to find the perpetrators of crime. Human failings mean that they will not always get it right. Our system needs to be resilient enough to accept this truth and offer avenues to justice for those innocents who fall through the cracks during the initial investigation and prosecution. The right to appeal, to smooth the way to accept fresh and new evidence, has already been introduced in South Australia and Tasmania, and now Western Australia is at last moving forward. We know the record in our state on these issues. Now, with this bill, we will have an extra safeguard. It is not to prevent wrongful conviction, but to provide a more efficient way out of the nightmare of conviction of the innocent. I commend the bill to the house.

MR S.A. MILLMAN (Mount Lawley) [4.06 pm]: There is a reason that the symbol of justice is a set of scales. The reason is that the administration of justice is a fine balancing act. I rise to speak in support of the Criminal Appeals Amendment Bill 2019. I suspect that my contribution will be relatively brief because a lot of what is necessary to say in support of this bill has already been said in the excellent and erudite comments by the member for Kalamunda, who outlined a sound philosophical foundation for this bill; by the member for Armadale, who recited with great alacrity the legal precedent that forces this Parliament to consider such innovative legislative reform; and by the member for Baldivis, who with his lengthy service to the community in the media knows all these cases so well, as he just outlined to us this afternoon. I thank the Attorney General for bringing this bill before the house. I also thank my parliamentary colleagues who have demonstrated once again that on this side of the chamber we bat very deep.

I want to expand on a theme that I have raised when making my contributions to the Attorney General's impressive legislative agenda. As members in this place are well aware, I am a strong believer in the rule of law, the separation of powers and other important traditions that are vital to the well-functioning of a free society. I am also a strong believer in democratic accountability and an activist government. The McGowan Labor government was elected with a strong law and order, and community safety platform that was overwhelmingly endorsed by the voters. The evidence of that is the number of members of the Labor Party who were elected to this chamber. We have delivered on that platform and continue to deliver. Without doubt, one of my proudest moments in the short time I have been

a member of Parliament was speaking in favour of the legislation that lifted the statute of limitations on claims arising from what are known as historical sexual abuse cases. This legal innovation was designed to deliver justice. In much the same way, the current bill is also designed to deliver justice. Our Attorney General, as the member for Armadale has quite rightly said, is well qualified for his role because he came to this place with a long history as a fearless advocate. It is a reputation enhanced by the work he did as a member of Parliament seeking justice for those wrongly accused. It is not often that one sees a member of the executive branch readily cede power or authority, but this Attorney General has a deep appreciation of the fine balance between the executive and legislative branches of government, and our legal system. He recognises that although he may enjoy the power of the royal prerogative of mercy or the power of petitions—powers that stretch back centuries—it is more just for people wrongly convicted to not have to have recourse to the executive branch of government, but rather to have legislative protection. This is precisely the point raised by the member for Kalamunda, the member for Armadale and the member for Baldivis. These are the very last sorts of claims that we want to politicise. The Attorney General gets the point.

The current process was described by the member for Hillarys in his contribution as difficult and cumbersome, and I do not cavil at that. But worse than that, the current process is arbitrary. The legislation before this chamber delivers legislative protection. I want to touch on the fine balance that is struck by this bill, because it is a delicate response. On one hand, it is an important principle of the justice system that there be finality in litigation. Other members have discussed this principle at length, so I will not go over it again. Endless litigation serves neither the parties to the litigation, the court system, nor the community generally.

The member for Hillarys touched briefly on this element of the justice system. It is an unarguable proposition of administrative law that an inflexible application of policy may give rise to a denial of natural justice. I would describe the finality principle as a policy imperative. This legislation ensures that that principle is not applied inflexibly.

I was concerned that the member for Hillarys in his contribution appeared to be somewhat lukewarm on what is proposed by the Attorney General on account of the opposition's expressed concern for victims of crime. I challenge the member for Hillarys to identify any Attorney General who has done more than this Attorney General to comfort and support victims of crime. He has left no stone unturned in his pursuit of a criminal justice system that rebalances the scales of justice firmly in favour of the victims of crime.

Members, let me recite the impressive legislative record of the Attorney General in the short time he has been in office: the Statutes (Minor Amendments) Bill 2017; the Sentence Administration Amendment Bill 2017; the Child Support (Adoption of Laws) Amendment Bill 2017; the Coroners Amendment Bill 2017; the Domestic Violence (National Recognition) Bill 2017; the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017; the Dangerous Sex Offenders Amendment Bill 2017; the Courts Legislation Amendment Bill 2017; the Court Jurisdiction Legislation Amendment Bill 2017; the Corruption, Crime and Misconduct Amendment Bill 2017; and the Historical Homosexual Convictions Expungement Bill 2017; numerous bills in respect of the suitors fund; the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017, which I have already spoken about; the Financial Transaction Reports Amendment Bill 2018; the Criminal Law Amendment (Intimate Images) Bill 2018, otherwise known as the revenge porn legislation, for which we have seen the first prosecution this week; the Child Support (Commonwealth Powers) Bill 2018; the Gender Reassignment Amendment Bill 2018; the Births, Deaths and Marriages Registration Amendment (Change of Name) Bill 2018; the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018; the Consumer Protection Legislation Amendment Bill 2018; the Legal Profession Amendment (Professional Indemnity Insurance Management Committee) Bill 2018; the Sentence Administration Amendment (Multiple Murderers) Bill 2018; the Criminal Code Amendment (Child Marriage) Bill 2018; the Bail Amendment (Persons Linked to Terrorism) Bill 2018; and even today, the Criminal Law Amendment (Uncertain Dates) Bill 2019.

When we look at the no body, no parole legislation, the National Redress Scheme and justice for victims of child sex abuse, the expungement of historical homosexual convictions and the revenge porn legislation, there can be no doubt that there has never been an Attorney General who has been so focused on ensuring justice for victims.

The member for Hillarys has recognised the efforts of our Attorney General by congratulating him on the legislation that he has introduced. We know that he appreciates the Attorney General's efforts on behalf of victims because he said, in respect of the Criminal Code Amendment (Child Marriage) Bill 2018 —

> I congratulate the Attorney General for bringing this bill to the house. It has the full support of the opposition, obviously.

In respect of the Criminal Code Amendment Bill (No. 2) 2013, he said —

> Suffice to say that I am supportive of the bill before the house. I congratulate the Attorney General and the government for bringing it before us …

Frankly, the member for Hillarys has not been anywhere near as effusive as the Attorney General's extensive work deserves. I call on the member to be more congratulatory in future for the Attorney General's tireless efforts on behalf of victims.

Mr A. Krsticevic interjected.

Mr S.A. MILLMAN: This is an activist government that is doing a fantastic job, as the member well knows. I had the opportunity to refer to that only yesterday when I was commending the work of the Minister for Police.

I want to remind the member for Hillarys of the numerous times that he has invoked—he knows this—the golden thread, or cardinal principle, of our criminal justice system. Remember, member, that an accused is innocent until proven guilty. This legislation balances the scales of justice ever so finely. It continues the McGowan Labor government's commitment to a fair, efficient and effective criminal justice system and does so in a way that delivers justice for all parties and for the community as a whole. On that basis, I commend the bill to the house and congratulate the Attorney General.

MR J.R. QUIGLEY (Butler — Attorney General) [4.15 pm] — in reply: I would like to thank members for their contributions to the debate on the Criminal Appeals Amendment Bill 2019. I particularly want to thank the opposition spokesperson, the member for Hillarys, for his contribution. It was very helpful and I will address some of those matters that he raised in short form. I thank the member for Roe for his support. I thank the member for Kalamunda, who was mentioned by the member for Mount Lawley, for his approach to the philosophical basis of this bill. There was a nice contribution from the member for Baldivis; he went through some of the injustices we have witnessed in Western Australia. I would like to thank very much the member for Armadale, Dr Buti, for his analysis of the bill and the apposite law around fresh evidence and new evidence. I shall not traverse that; I thought that was laid out very well by the member for Armadale.

The member for Mount Lawley was very effusive in his praise of me. He read out a lot of bills, which made me feel old and tired, actually. Although one never likes to interrupt someone who is praising or speaking well of them, or wants to criticise such a speech, I want to say this in response: it is a very humbling and deeply held honour and privilege to be the Attorney General in Western Australia, and, more so, that I am Attorney General in a government that is so committed to a law reform agenda. I came to office not wanting to be a shopkeeper, as it were, and maintain the status quo, but to do what Paul Keating said to do; that is, if you ever find yourself in office, do not waste your time, pull those levers that make a difference, try to improve society and move it on.

I am particularly proud of this bill, because, as has been mentioned by more than one speaker, two other states have similar legislation—not exactly the same as this. The first of those is South Australia and the second is Tasmania. I would like to briefly mention the background of those particular pieces of legislation and why I am so proud of this legislation. The first legislation in South Australian related to the conviction of Mr Keogh for murder, at least, of his fiancée or girlfriend, who drowned in a bath. At trial, there was no admission by Mr Keogh—he always maintained his innocence—but there was bruising on the deceased's body, and a pathologist gave evidence that these were markings of a handprint and that she had been held under water and drowned. Mr Keogh appealed, and his appeal was knocked back. I believe the pathologist in question ultimately was struck off the medical register for his professional incompetence. In fact, the bruises were not bruises at all. From memory, I believe they were caused by lividity. When a body settles, the blood settles and there is a circumstance called lividity—it looks like bruising but it is the settling of the deceased's blood. Once the work of this particular pathologist was exposed, Mr Keogh sought to appeal again, and his only pathway was by petition to the Attorney General. Attorneys General generally seek to protect the conviction and the integrity of the court. That is their default position, and rightly so. When Mr Keogh petitioned the Attorney General of South Australia—more than one Attorney General was involved in South Australia—the second last Labor Attorney General, Mr Atkinson, was strident in his opposition to the petition given to him and refused to refer the matter to the Court of Criminal Appeal. A member of the Parliament then introduced a private member's bill, not a government-sponsored bill, to allow for a second appeal. That private member's bill got through. It was not a government bill. Subsequently, Mr Keogh did appeal. As the member for Armadale has pointed out, his appeal was allowed and the conviction was overturned. Mr Keogh is now a free man in South Australia, having spent many years in custody. There was a case of an Attorney General who did everything he could to protect the conviction, whereas once it got back to the court and the judges looked at the evidence, they overturned the conviction.

In Tasmania, a woman by the name of Sue Neill-Fraser was convicted of murdering her partner on a yacht moored in Sandy Bay in January 2009. She was convicted of murdering her partner by belting him over the head with some object—never proven—and then throwing him overboard and scuttling the yacht to sink it. The coastguard, or whatever it is there, saw the partly submerged yacht. The woman's partner was missing. Nine months later, she was charged with murder. She appealed, but was knocked back by the High Court. Then, new evidence came to light,

being that the police had found DNA of another person on the yacht—a vagrant woman. The Attorney General in Tasmania refused to refer the matter to the Court of Criminal Appeal and so, in Tasmania, like in South Australia, a member of Parliament brought forward a private member's bill to allow second appeals, and that legislation passed. The members of Parliament in both those states could see the wisdom in allowing a subsequent appeal when there was fresh and compelling evidence. That case has recently been back before the court. Indeed, one of our own local famous Queen's Counsels, Mr Tom Percy, travelled to Hobart and appeared pro bono for Sue Neill-Fraser. We congratulate Mr Percy for donating his time pro bono to this cause. He won leave to appeal. The judge there referred it on to the court to determine the case.

There we have the only other two states that have this legislation. To cut back to the point of why I am so proud, this government has taken it on as a government bill, introduced by the Attorney, not a private member's bill, to seek to find another route to filter cases that are seeking a second appeal, other than under the hand of the Attorney General. I do not know what to do. I have had a number of these come forward to me. Sitting in my office, there are masses of paper, and it is for the Attorney General to sift through and work out whether there is a reasonable prospect of an appeal and its basis et cetera. All the while, we have criticism from the opposition for having done so. This happened in the Austic case, which I referred to the court and which is before the court at the moment. My shadow was critical; he had refused to refer Austic when he was Attorney General. When I became Attorney General, I took advice from the Solicitor-General, and I abided by his advice and referred it to the Court of Appeal, but I was criticised for having done so. That case will be heard in July.

Members have correctly pointed out that this bill allows a different way for a convicted person who has fresh and compelling evidence, not to mount an appeal, but, instead of asking the Attorney General for leave to appeal, to ask a judge of the Supreme Court for leave to appeal. We will place our faith in the justices of the Supreme Court. As the member for Hillarys has always pointed out, the state always retains a reserve power to make a reference in an exceptional case. I think that such a case would be really rare. I cannot imagine that a person who has gone to the Supreme Court with fresh evidence and asked a judge for leave to appeal to the Court of Appeal would, having been knocked back, then go to an Attorney General who then exercises what has been known as the prerogative of mercy and makes the reference contrary to the decision of a judge.

We have sought to balance this by requiring the convicted person to seek leave to appeal. They do not have an appeal of right. There is another provision in the bill for leave to appeal not to be heard at the same time as the appeal. Usually when a person seeks leave to appeal, the court hears the whole case and at the end of the case says that either leave to appeal is granted and the appeal is allowed, or leave to appeal is refused and it would, in any event, have refused the appeal. Under this bill, a person must go down to the court at stage 1 and seek leave to appeal. We think this will lighten the burden on the Supreme Court and give it the capacity to filter out those who are just the normal suspects coming back again and again, without bearing down too heavily on the resources of the state.

The member for Hillarys raised a very good point, and that is the consideration of victims. This is what Attorneys General do in these situations. When the petition comes, the secondary victims are advised. The secondary victims then write to the Attorney General saying that it is disgraceful that this person is agitating for an appeal, and it is causing the family immense grief, and ask for the appeal to be rejected. Attorneys General say, while thinking of the secondary victims, that this is all too disturbing for them, and there will be no appeal. This overlooks the fact that amongst the secondary victims—not only mum, dad and the sisters, but also the class of people who are secondary victims—could be an innocent person who has been wrongfully convicted of murder, like Andrew Mallard. He was a secondary victim. He suffered over 10 years' imprisonment for a crime that —

Mr P.A. Katsambanis: I'd say he was a primary victim.

Mr J.R. QUIGLEY: Pamela Lawrence was the primary victim of the murder, but he was a victim and suffered 10 years' imprisonment as a victim. When we talk about victims, we are talking about not only the relatives of the deceased, but also those rare occasions upon which an innocent person is incarcerated.

After Andrew Mallard's conviction was overturned by the High Court, I remember that people were still going around calling him a murderer. When the Director of Public Prosecutions said that he would not be charging him again, people still said that Mallard was a murderer they could not get the evidence on. Then there was a Corruption and Crime Commission inquiry. During that inquiry, a cold case review identified another set of fingerprints. There was no physical evidence of Mallard having been at the late Pamela Lawrence's shop. There was a palm print of Simon Rochford down there, who had been convicted of murdering his girlfriend in Scarborough two weeks after Pamela Lawrence's death. They were able to associate the forensic death at Pamela Lawrence's shop with Simon Rochford, the prisoner in Albany. As soon as he got wind of this, he committed suicide in Albany, because

he had nearly served the minimum term for the murder of his girlfriend. He realised that he was about to be charged again and suicided.

Until that time that Rochford was identified, a lot of people—I am not looking for sympathy—were really angry at me. I am talking about the family. I am talking about Pamela Lawrence's daughter. They were really angry at me and others for re-agitating this whole Mallard case and for the additional grief that I was causing this family. When all this came out and the ABC produced an *Australian Story* segment on the case, members can imagine the grief that the family felt then. All their anger had been directed to an innocent, mentally infirm person and to me, not that I do not deserve people's anger from time to time—I get it regularly—and they realised that all I was doing was advocating for justice. When we talk about victims, we always have to bear in mind that a victim can be an innocent person wrongly convicted and incarcerated. None of us would like to endure that.

I thank members of the opposition for coming into Parliament and indicating that they would not be opposing this bill. It just makes sense. If an error has occurred in the criminal justice system and in the courts, let it be corrected in the courts, not in a politician's office. Let the action start in the courts, not in a politician's office.

As to resources, member for Hillarys, this has been a matter of much discussion because there are two areas of resources that we have to think of—firstly, the resources of the court itself. As the member knows, we have done a jurisdictional shift, having taken all crime out of the Supreme Court, apart from homicide, to lighten its load, and we did that with this in mind. I will soon present another bill to Parliament. I will not go into it at the moment. That will change the resource burden on the office of the DPP.

Mr Z.R.F. Kirkup: Bill 35.

Mr J.R. QUIGLEY: I have leave from caucus to introduce a couple of bills next week. They do not include bill 35 but I will get there. This other bill will be important. I will tell members about it afterwards. We are looking at lightening the burden of the DPP and some of her responsibilities. We have lightened the burden of the Supreme Court to a degree. We expect there might be a little spike to start with, as the member for Hillarys rightly pointed out. In South Australia, I think there were two or three in the first year and then maybe one a year. The numbers have been very low, and there have been only two in Tasmania on my information. We are not expecting a flood of applications here. We expect that a few will come forward to seek leave for appeal, but whether they pass the first test that there is a strongly arguable case is another matter. Prisoners in their cells dream up all these fanciful arguments as to why the prosecution case against them was full of holes, but a Supreme Court judge can soon sift those out and decide. We have a review clause in this bill. We hope that things will pan out like this with the bill, but it depends upon the rules of court and how the judiciary conduct themselves. We are hopeful that it will pan out something like, member for Hillarys, applying to the High Court for special leave. Special leave applications do not take days and days to be determined. Points have to be made in front of the High Court counsel and they then determine whether it is a matter that attracts their attention.

Mr P.A. Katsambanis: Two hours, if you're lucky.

Mr J.R. QUIGLEY: They get two hours if they are lucky and if they do not attract their attention, there is no special leave and no reason is given for the decision—it is just the end. We have put these provisions in the bill to at least offer the court a process by which it can filter out the unmeritorious applications.

Finally, a distinction was drawn between fresh evidence and new evidence. I thought the member for Armadale fleshed that out very well. I do not want to take up the chamber's time traversing that again, but when we were working through the final preparation to bring this bill into Parliament, we had yet a further look at it. We were left uncomfortable with the proposition of new evidence, as opposed to fresh evidence, as pointed out by the member for Armadale, that was available at the time and passed this hugely high test of compelling of innocence whereby fresh evidence is the lesser test. What about those cases in which new evidence was available at the time but, for one reason or another, as pointed out by the member for Armadale, a counsel overlooked it? It was not a strategic decision to keep it out of the trial, but counsel overlooked it and we can say that it was incompetence. In my day, we used to get a murder brief that was about an inch thick. Today it contains masses of forensic evidence.

Mr P.A. Katsambanis: It's about one million documents.

Mr J.R. QUIGLEY: It is one million documents. It is like that clever chap who worked out that one little faint word on the $50 note was misspelt. All of Australia overlooked it, but one nerd looked at the note under a microscope and said, "There's a spelling error there", and the newspapers were onto it. In those one million documents, one could overlook one little thing that could be compelling of the innocence of the accused. We changed the definition to bring new evidence, which was there all the time but was overlooked by the incompetence of counsel, into the basket of fresh evidence so that it has the more liberal test than new evidence has. I have discussed that with the Director of Public Prosecutions. We discussed all of this with the stakeholders. In fact, I sent the bill to the leading Queen's Counsel defenders of the city—Mr McCusker, Mr Vandongen, Mr Percy and maybe one or two others—

for their feedback. Of course, I also consulted with the Director of Public Prosecutions and the Chief Justice about the bill's suitability. It was only at the last gasp, as it were, when I was looking at this again that I said I was not happy with it. If an incompetent counsel overlooked something, it could not be classed as fresh evidence because it was there to be found but, through incompetence, it was not, so in fairness we should call that fresh evidence and have the more liberal test. For that reason, we will need to go into consideration in detail, at least to give me the opportunity to move the proposed amendments that stand in my name on page 11 of today's notice paper. I ask to go into consideration in detail.

Question put and passed.

Bill read a second time.

Leave denied to proceed forthwith to third reading.

Consideration in Detail

Clauses 1 to 3 put and passed.

Clause 4: Part 3A inserted —

Mr J.R. QUIGLEY: I move —

Page 3, line 17, to page 4, line 14 — To delete the lines and substitute —

35D. Terms relating to evidence

(1) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***fresh*** —

(a) if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal; or

(b) if —

(i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and

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

(2) For the purposes of this Part, evidence relating to an offence of which an offender was convicted 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.

(3) Despite subsection (2), evidence is not new evidence if it is fresh evidence under subsection (1)(b).

(4) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***compelling*** if it is highly probative in the context of the issues in dispute at the trial of the offence.

Mr P.A. KATSAMBANIS: The Attorney General gave a pretty good explanation of what changes have been made to the definition of "Terms relating to evidence", both fresh evidence and new evidence, in his summing up of the second reading debate. We do not need to repeat that. I note that there has been a bit of a change in the style of drafting. Previously, there had been a separate proposed section 35D defining "fresh and compelling evidence" and a separate proposed section 35E defining "new and compelling evidence", whereas now it has all been incorporated into one proposed section. That way "compelling" does not have to be defined twice. In fact, in subclause (4) it makes it very clear that the term "compelling" means exactly the same as "fresh and compelling" and "new and compelling". That is all fine and good. Both the term "fresh" and the term "new" are defined primarily in the same way that they were defined in the original draft of the bill, except for one important difference. One discrete type of evidence that would have been deemed to be new evidence will now, by this amendment, be deemed to be fresh evidence.

Mr J.R. Quigley: Correct.

Mr P.A. KATSAMBANIS: I will read from new proposed section 35D(1)(b), which states —

if —

(i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and

Essentially, that is the definition of new evidence. It has that character, plus the following character —

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

Mr J.R. Quigley: It can't be a strategic move.

Mr P.A. KATSAMBANIS: Yes. We hope that in those instances, the appropriate action had been taken against that lawyer if they were still practising and subject to any form of action. That part would have already been ventilated. I think that is a good move, for what it is worth. It is my personal opinion.

Mr J.R. Quigley: Thank you, member.

Mr P.A. KATSAMBANIS: I think it is a good move because, as the Attorney General pointed out, the test for fresh evidence upon appeal is slightly more beneficial to the appellant than the test for new evidence, or more small "l" liberal, whichever way he wants to put it. That is fair enough. We should not hold people to account for the incompetence or negligence of someone they hired purporting to be an expert in that area. The only question I have, and I realise we are looking at very rare, minute possibilities, is: was any consideration given to including actions not taken by the representatives of the defendant at first instance or the appellant at first appeal, for that matter—the accused person—but also actions taken by either the prosecution, or evidence gatherers before the prosecutors got to this, that may well have also kept what otherwise would have been new evidence, bar this provision, from being ventilated at the original trial or the original appeal? I guess that is the nub of the question.

Mr J.R. QUIGLEY: Yes. I believe and am sure that that category of evidence in which the prosecution has been negligent or the investigators have been negligent and subsequently discovered will be classed as fresh evidence, as indeed it was in the Mallard case when the prosecutor had a 32-page brief from the police. In that brief, it said that the forensic pathologist said the spanner could not have been the murder weapon. The prosecutor did not disclose that document to the court. The court held that that was a negligent failure. In fact, the practitioner lost his spot as a prosecutor and ended up being disciplined. He is a good bloke; he is a nice chap, but he did not do that case right. I will not name him here. He now practises as a solo practitioner. But his failure to disclose—I think it answers the member's question—was categorised by the High Court as fresh evidence.

Mr P.A. KATSAMBANIS: I think it is important to put it on the record, because although it was a High Court determination, in this legislation we are now co-defining a definition of "fresh" and "new". As we said in an earlier debate on a bill today, it is quite important that this stuff be put on the record. It saves court time in having to argue about what the legislature meant. I thank the Attorney General for that clarification. With that, I think people could argue this either way—it is fresh; it is new. As I said, I think when a defendant and their legal team did not have the information to hand, that ought to be fresh evidence. I agree with that part. I also think that when there was negligence or incompetence by someone who was hired to represent this person, someone who purported to be an expert in the area, again, the benefit should go to the person who missed out in the first instance because of that negligence and incompetence. With that, I indicate support for the amendment.

Amendment put and passed.

Mr J.R. QUIGLEY: I move —

Page 5, lines 6 to 11 — To delete the lines and substitute —

(2) The Court of Appeal may decide whether or not to give special leave to appeal with or without written or oral submissions from the parties to the appeal.

(2A) Except as provided in subsection (3), the Court of Appeal must decide whether to give special leave to appeal before the hearing of the appeal.

Mr P.A. KATSAMBANIS: This is an issue that I raised in the briefing. I am not taking credit for that leading to this amendment, but I think it is a good amendment. The first part effectively preserves what is already there; that is, the Court of Appeal may decide whether to give special leave to appeal with or without written or oral submissions from the parties to the appeal. The second part then clarifies what was in the original draft paragraph (b), to read —

Except as provided in subsection (3), the Court of Appeal must decide whether to give special leave to appeal before the hearing of the appeal.

That amendment makes it really clear. I thought that was the intention and I hope that is the practice in the court. I see the Attorney General's adviser looking at me and smiling because we had a little bit of a chat about this.

I think as lawyers we all expect that that is how it would work in practice, but this spells out that the hearing for special leave is not an opportunity to hear the appeal de novo. It is a special leave application. The amendment offers strong reassurance that that is the case.

Following on from that, in the same amendment —

Mr J.R. Quigley: That is a new amendment.

Mr P.A. KATSAMBANIS: Yes, I am going on to a new amendment, so I will leave that one until later.

I am glad this came about. As I said, I do not want to take credit for bringing it into being because I am sure it had been contemplated, but it clarifies what we all thought was the case. It spells it out in black and white so there is no argument or debate or any subsequent appeal from that later on. I thank the Attorney General for bringing this to the house.

Mr J.R. QUIGLEY: The member for Hillarys' words were taken on board in the process of workshopping this in my office and then in the back-and-forth with the Office of the Director of Public Prosecutions about how things would work. We were talking about the same cases of the usual suspects sitting in their cells and them coming up with a new appeal and a new one. We wondered how to unburden the court from this and we decided the best way was the way that the High Court does it—that is, to seek special leave as a separate matter. With normal criminal appeals in the Court of Appeal, leave is sought during the argument of the substantive appeal. As I said before in my reply to the second reading, often at the end of the judgement there will be leave granted and appeal refused or denied, so it is part of the same ruling. In this case the judges will have to make a separate and preliminary ruling about whether there is an arguable case to go to the Court of Appeal. The member will notice that the amendment states, in part —

> (2) The Court of Appeal may decide whether or not to give special leave to appeal with or without written or oral submissions from the parties to the appeal.

Like in the High Court, this can be a fairly brutal and sudden thing and the court may say, "No, you are not getting special leave." There might have been somewhere at some time—I say, rarer than hen's teeth—a case in which the judge was so dismissive without listening, but we always have the backstop of the state saying that it can do a referral itself. With the quality of the judiciary in Western Australia now, I do not envisage that happening. The quality of the Supreme Court in Western Australia is outstanding. We have outstanding judges, led by Chief Justice Quinlan. I will not name them all, but we have a great President of the Court of Appeal, Justice Michael Buss. We could have left it to the rules of court and let the judges make the rules, but we thought that it was appropriate for Parliament to set out that there has to be a first stage, which can be a relatively quick stage. If a matter attracts the judge's attention, they will delve into it further before making their decision to refer. I thank the member very much for his contribution.

Amendment put and passed.

Mr J.R. QUIGLEY: I move —

> Page 6, line 31 to page 7, line 1 — To delete "satisfied that in light of all the evidence," and substitute —
>
> satisfied on the balance of probabilities that, in light of all the evidence,

Mr P.A. KATSAMBANIS: I recognise what the Attorney General is getting at here, but for completeness and for people reading *Hansard*, perhaps it is worthwhile the Attorney General putting on the record why this amendment is required, because it ensures that the test of the balance of probabilities is included. We are talking about the criminal jurisdiction and, as we know, for conviction we have a higher test of beyond reasonable doubt. Firstly, why are we using the test of the balance of probabilities? Could the Attorney General put that on the record so that it is very clear? Secondly, in the absence of the words being inserted, what was the risk and what could the court have done in the absence of "on the balance of probabilities" that it cannot do now?

Mr J.R. QUIGLEY: The reason for the amendment was that during this workshopping process, we decided that there had to be new evidence and it had to be compelling of innocence. Therefore, the member is quite right that the appellant would bear a burden of proof in the criminal court environment. Whenever the prosecution carries an onus, it carries it beyond a reasonable doubt. We want to spell it out that we are providing a scheme for an appeal that would be allowed if the appellant could bring forward evidence compelling of innocence. We want to confirm what that standard would be. The member for Hillarys does not come from a code state, but he has been here long enough to be well apprised that whenever the Criminal Code throws a burden onto an accused person—that is, if someone pleads the defence of insanity under section 27—to prove anything during the course of the trial, it must be proven to the civil standard of the balance of probabilities. Whether it is displacing a presumption of trafficking or whatever, when the burden falls on the accused, it must be proven on the balance of probabilities. Here we have an accused or a convicted person, and the legislation is throwing a burden on that person to

demonstrate that this new evidence is compelling of innocence. To what standard? It is not in the Criminal Code. We wanted to make it abundantly clear—it is as normal. The accused person or the criminal would have to prove it on the balance of probabilities.

Mr P.A. KATSAMBANIS: That is the reason I wanted that there. I do not want the Attorney General or me or anyone else to go out of this place and be accused of bringing in a weaker standard than usual. Any burden on the accused is on the balance of probabilities. It is welcome in this case. I do not necessarily think the absence of the words would have been fatal to the legislation, but since we are tidying things up and making them clearer, I welcome its inclusion. I welcome the Attorney General's explanation that it is not changing anything or making it any easier than it would have otherwise been for an accused person in any of these sorts of proceedings.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 5 to 14 put and passed.

Title put and passed.

House adjourned at 5.02 pm