CRIMINAL APPEALS AMENDMENT BILL 2021

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [12.10 pm]: I move —

That the bill be now read a second time.

The Criminal Appeals Amendment Bill 2021 will amend the Criminal Appeals Act 2004 and make consequential amendments to other acts, introducing a new statutory right for a person to make a second or subsequent appeal against a conviction on indictment in circumstances in which there is "fresh and compelling" or "new and compelling" evidence.

Members may recall that the Criminal Appeals Amendment Bill 2019, which was introduced in the last Parliament, lapsed on prorogation of that Parliament. This bill will effect the same policy as that bill, but it reflects some wording changes, including those amendments that were made in the Legislative Assembly of the previous Parliament.

A pillar of our justice system is the principle of finality, which dictates that once a court has handed down a decision, that decision is final. This is an essential element of the way our legal system works, creating certainty and consistency. However, 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. This bill seeks to provide that avenue.

As it stands, a convicted person who has exhausted all of their appeals has no further right to appeal, even if new evidence later emerges that has the potential to exonerate them or fresh evidence establishes that a substantial miscarriage of justice has occurred. Without this important bill, even when new evidence is available showing that a person is innocent, their only avenue of redress is to lodge a petition for the exercise of the royal prerogative of mercy by the Governor or petition the Attorney General to refer the case to the Court of Appeal. I have been a long-time proponent of removing politics from criminal appeals, and have been vocal about the need to create a passage of second and subsequent appeal direct to the Court of Appeal.

I have had significant involvement with two referrals to the Court of Appeal. The first was several years ago when, as a backbencher in this house, I advocated for Andrew Mallard's case to be referred to the Court of Appeal. The second, more recent example was my decision as Attorney General to refer Scott Austic's case to the Court of Appeal.

Mr Mallard was convicted of wilful murder in 1995. His appeal against his conviction was dismissed in 1996. In 1997, the High Court refused special leave to appeal. Mr Mallard's family unsuccessfully petitioned the then Attorney General, Hon Peter Foss, to refer his case to the Court of Appeal. It was not until 2002, under a new Attorney General, Hon Jim McGinty, that the case was referred to the Court of Criminal Appeal, allowing an appeal process that culminated in the High Court overturning Mallard's conviction in 2005. Six months later, the then Director of Public Prosecutions decided not to retry Mr Mallard and a subsequent cold-case review identified another convicted murderer as the perpetrator of the senseless killing of Mrs Pamela Lawrence. After almost 12 years in prison for a crime he did not commit, Andrew Mallard was a free man.

In 2009, Scott Austic was convicted of wilful murder. In 2010, Mr Austic's appeal of his conviction and sentence was dismissed. In early 2012, Austic lodged a petition with the then Attorney General, Hon Christian Porter. In September 2013, the new Attorney General, Hon Michael Mischin, refused to refer the case. In February 2018, I received a petition from Austic, which was substantively the same as the one refused by my predecessor. In April 2018, two months after Austic lodged his petition with me, I referred his case to the Court of Appeal upon advice of the then Solicitor-General. In May 2020, the Court of Appeal overturned Austic's conviction. In November 2020, Mr Austic was acquitted after a retrial.

Therefore, six years passed between Austic's first petition to Mr Porter and his second petition to me. Mr Austic waited over 19 months for his petition to be considered, only to have it refused by Mr Mischin. How many years earlier would Scott Austic's case have been heard if he had had the option to bring his case to the Court of Appeal, and not to a politician? How many more years did Andrew Mallard spend in jail because he could not convince an Attorney General to let the Court of Appeal hear his case?

I now provide some detail of what is contained in this bill. This bill will allow an offender convicted of an offence on indictment to bring a second or subsequent appeal to the Court of Appeal against conviction, not against sentence, if there is either fresh and compelling evidence or new and compelling evidence relating to the offence.

The ability to bring a second or subsequent appeal to the Court of Appeal under this bill has been limited to convictions on indictment. The policy is that the principle of finality ought be interfered with only in circumstances

in which a wrongful conviction has the most serious consequences—that is, when the absence of an opportunity to commence a further appeal could produce significant injustice. Consistent with this policy, the bill does not provide for further appeals against conviction on simple offences. Such matters are dealt with in the Magistrates Court of Western Australia, attract lower penalties and are on the lower end of offending. The scope of appealable convictions when appealing to the Court of Appeal is consistent with other legislation allowing appeals to the Court of Appeal, being section 140 of the Sentencing Act 1995 and section 23(1) of the Criminal Appeals Act 2004.

There are two categories of "fresh evidence". First, evidence is fresh if, despite the exercise of reasonable diligence, it was not and could not have been tendered at the trial of the offence or any previous appeal. Second, evidence is fresh 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 so tendered, and the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender. Evidence is new if it 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 at any previous appeal.

In either circumstance, the evidence must be compelling, meaning that it must be highly probative in the context of the issues in dispute at the trial of the offence. Evidence will be highly probative if it has a real or material bearing on the determination of a fact in issue that, in turn, may rationally affect the ultimate outcome in a case. The level of proof required for a successful appeal differs between cases based on whether the evidence is fresh or new. The Court of Appeal must allow an appeal based on fresh and compelling evidence if it is satisfied that there was a miscarriage of justice. The court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. The intent of this proviso is to ensure that technical errors do not unnecessarily result in appellate intervention, which would cause undue distress to victims and next of kin, but to allow a second or subsequent appeal when a miscarriage of justice is so significant as to warrant an exceptional incursion into the principles surrounding the finality of a conviction. The threshold for new evidence is, understandably, much higher. There must be powerful reasons for disturbing a conviction obtained after a trial that has been regularly conducted. The higher threshold will also prevent persons who have gone to trial underprepared from being rewarded for their lack of diligence. The Court of Appeal must allow an appeal based on new and compelling evidence only if it is satisfied on the balance of probabilities that, in light of all the evidence, the evidence establishes that the offender is innocent.

This bill has significant safeguards to protect against the flooding of unmeritorious appeal applications, thereby limiting the potential impact of re-traumatisation on victims and next of kin. The requirement for an application for leave to appeal in every case is designed to act as a filter for vexatious, frivolous or spurious applications. The Court of Appeal must decide the leave application before the appeal unless it considers it necessary or desirable to give leave to appeal at the hearing of, or when giving judgement on, the appeal.

The proposed amendments in the bill will operate retrospectively insofar as they will apply to any person convicted prior to the commencement of these amendments. I also point out that the proposed amendments will not alter the current powers of the executive with respect to an application of the royal prerogative of mercy and the power of the Attorney General to refer matters back to the Court of Appeal under section 140 of the Sentencing Act 1995.

As the bill introduces a new process for criminal appeals, it also incorporates a provision for a review of the operation and effectiveness of the amendments to occur within five years of the commencement of the legislation.

This bill will strike an appropriate balance between the competing interests of wrongly convicted persons and victims of crime. The framework will establish an additional mechanism for correcting substantial miscarriages of justice while respecting the public interest in the finality of litigation. My aim with this important reform is to depoliticise what has previously been a highly political process. It has been my view over a great number of years that this is a process best carried out by the judiciary, not the Attorney General of the day.

I commend the bill to the house.

Debate adjourned, on motion by **Mr P.J. Rundle**.