Legislative Council

Wednesday, 10th November 2010

Criminal Cases Review Commission Bill 2010

The Hon. A. BRESSINGTON (15:59): Obtained leave and introduced a bill for an act to provide for the establishment of a Criminal Cases Review Commission and for the reference of matters by that commission to appellate courts; to make related amendments to the Bail Act 1985 and the Criminal Law Consolidation Act 1935; and for other purposes. Read a first time.

The Hon. A. BRESSINGTON (16:00): I move:

That this bill be now read a second time.

'[I]t is better a hundred guilty persons should escape than one innocent person should suffer…'

This oft quoted quote of Benjamin Franklin speaks to civil society's ideal of justice. Society's belief that the justice system grants every individual the presumption of innocence and to every accused person the right to a fair trial, so that society can have confidence in the verdict; that is, the conviction of the innocent is exceptionally rare and promptly corrected.

However, as interstate cases of miscarriages of justice are publicly exposed and local cases publicly advocated for fail to progress, leaving serious questions unanswered, the public's confidence in the courts' ability to distinguish the innocent from the guilty wanes. This can be seen in the rise of criticisms levelled at the courts and the increasing distrust in which they are held. This can also be seen in the rise of miscarriages of justice as a distinct area of jurisprudence. Notably, Flinders University School of Law will next year offer its students one of the first Australian courses focusing on miscarriages of justice, to be headed by Ms Bibi Sangha.

Ms Sangha, along with Professor Kent Roach, from the University of Toronto in Canada, and Dr Bob Moles, whom many in this chamber will be familiar with, have also just released a legal text book entitled *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality*, in which they compare and analyse the responses to miscarriages of justice in the United Kingdom, Canada and Australia and ultimately recommend significant reform, including the establishment of a Criminal Cases Review Commission. I state at the outset that I owe the truly admirable Dr Bob Moles a great deal for the assistance provided in helping me draft the Bill I introduce today.

To restore public confidence and to provide justice to those the justice system has failed, I propose we establish a Criminal Cases Review Commission, an independent body with powers to actively investigate claims of wrongful convictions and refer substantiated cases to

the Full Court for appeal. As many commentators have noted, the Criminal Cases Review Commission in the United Kingdom – which this Bill is modelled on – has served to restore public confidence in the English justice system, following a period when it was at its lowest after a succession of miscarriages of justice, including the case of the Birmingham Six and the Guilford four, who were wrongly convicted of bombings carried out by the IRA.

In prosecuting the case for a Criminal Cases Review Commission, I will of course be referring to the case of Henry Keogh. As has been reported by the ABC, I am of the opinion that sufficient doubt exists about the safety of Henry Keogh's conviction to have the verdict set aside. However, I make clear that I pass no judgement as to Mr Keogh's guilt or innocence, for it is not my job and nor should it be. The Canadian case of *R v Boucher* (adopted in substance in the UK and Australia) makes it clear that no legal practitioner or other person in authority should express a personal view about the innocence or guilt of any person. For a legal practitioner to do so could constitute unprofessional conduct. It is my contention that such judgments are only to be made by a jury following a fair trial and should not be the job of any politician, regardless of the title they don, to pass judgement and hence seal the fate of any constituent. This is however the system that presently exists, and which this Bill seeks to reform.

I do not intend to lay out the full facts of Mr Keogh's case here. Member's not familiar will find much written on the prosecution's case and the subsequent questioning of the forensic evidence relied upon by the prosecution. On the former, I encourage Members to read Dr Robert Moles' book *Losing Their Grip: The Case of Henry Keogh* – the title of course being a reference to the serious questions surrounding the forensic evidence given in Mr Keogh's trial relating to the supposed bruising on Anna Jane Cheney's leg. This book and other relevant material can be accessed on Dr Bob Moles' website netk.net.au. I instead propose to use his case and others to demonstrate to Members the structural impediments in our criminal justice system to the correction of wrongful convictions as experienced by those who claim they are victims of a miscarriage of justice.

Any reasonable person will conclude that in a human system errors will result. In the words of the former Justice Michael Kirby, a recently retired Justice of the High Court of Australia, "[human error] will never be eliminated entirely, that is a pipe dream". The recognition that mistakes are made lies at the heart of our existing appellate court structure, in which a defendant is able to appeal errors made at trial. However, as I will demonstrate, this system fails to adequately deal with the wrongful convictions that the appellate courts miss, leaving many victims of miscarriages of justice to languish in prison.

As is common knowledge, a criminal appeal following trial must be initiated within 30 days. This restrictive period allows defence teams little time to discover new evidence, which in many of the well known cases of a miscarriage of justice took years to uncover. An appellant claiming to be wrongly convicted at appeal will also encounter the high standard required to set aside a conviction, that being that the conviction is unreasonable, or cannot be supported by the evidence, that there has been a wrong decision on a question of law, or on any ground there has been a miscarriage of justice. In deciding this, the court must satisfy itself that it

was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. Without new evidence of their innocence, appellants rarely meet the standard required.

The next structural impediment to the correction of miscarriages of justice is the inability of the Full Court to reopen an appeal once an appellant's initial appeal has been finalised. The appeal provisions, which are uniform across all the States, have been interpreted to allow the intermediate appellate courts to hear one appeal only. This is so even if the Court has finalised the appeal on an incorrect factual basis.

This was recently demonstrated in the New South Wales case *Burrell v The Queen*, in which the Court of Appeal assumed that a document on the prosecution file represented facts accepted by the prosecution, but were in fact a submission by the defence. The Court of Appeal realising its error, recalled its decision and reissued the judgement. However, on appeal in the High Court it was found that the Court of Appeal should not have done so, as once it has entered judgement is has no jurisdiction to reconsider the matter. As Justice Kirby stated, "*I regard it as unfortunate that the inherent power of the appellate court does not extend to varying its own order when the interests of justice require it*".

If, as can and does happen, victims of a miscarriage of justice fail to have their conviction overturned at a Full Court appeal, as a result of this rule the only legal right left available to them is to seek leave to appeal to the High Court of Australia. Given that the High Court only hears cases involving broad principles of public importance, few applications for leave to appeal in criminal cases are granted, although the number has been steadily increasing over time.

If an appellant is able to secure leave, they will encounter another structural impediment to the correction of wrongful convictions in that any new evidence that has come to light since their appeal in the intermediary appellate court, regardless of its relevance or weight, is inadmissible in the High Court. This stems from the High Court's narrow interpretation of its appellant jurisdiction under s 73 of the Commonwealth Constitution. So even if a person wrongly convicted is in possession of new and compelling evidence that would lead to their exoneration, if this evidence was not discovered prior to and admitted in their Full Court appeal, they are unable to have that evidence heard and considered by the High Court. While many have argued against this limitation, including Justice Kirby who described justice as "truly blind" as a result, this impediment remains.

The only way to get this evidence back before a court is for the wrongly convicted to petition the Governor for an appeal. It is this process that I take particular issue with and which the Bill before the Council seeks to reform.

As I have said, once a person wrongly convicted has exercised their appeal rights, the only option available to them to have their case reviewed is to prepare and submit a petition on the merits of their claim to the Governor for the exercise of 'her Majesty's mercy'. This is then referred to the Attorney-General, who under s 369 of the *Criminal Law Consolidation Act 1935*, and I quote:

...may, if he thinks fit, at any time, either:

> a) *Refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or*
> b) *If he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of the them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.*

This wording is consistent across the Australian State's and is similar to that which existed in Britain prior to the establishment of the Criminal Cases Review Commission. The power to refer cases to the court of appeal is claimed to be entirely at the discretion of the Attorney-General, meaning that it is not subject to judicial review. It is for this reason that a petition to the Governor is not considered a legal right *per se*.

The Attorney–General is the chief law officer of the State and when acting to determine an application by way of a petition, he is acting in a quasi-judicial capacity. As such he must act in accordance with the relevant legal principles, and only in accordance with the relevant legal principles. This is clearly the intention of the petition process. However, given that the multiple petitions made by Henry Keogh have not been referred to the Full Court, I contend that this intention has been forgotten.

It is clearly established at law that if evidence going to the credibility of a prosecution witnesses has not been disclosed at trial, that trial was unfair and must be set aside. In Mr Keogh's case, the Coroner inquiring into the baby deaths cases concluded, shortly before Mr Keogh's trial, that the forensic pathologist, Dr Manock, had completed autopsy reports which achieved the *opposite* of their intended purpose – that is they closed off lines of inquiry instead of opening them up. Additionally, the Coroner said that the pathologist had apparently seen things which could not have been seen, such as bronchopneumonia, because it did not exist. He even said that some of the answers given by the pathologist on oath were spurious, that is not truthful. But the Coroner then held back his official report on the baby deaths until after the conclusion of the Mr Keogh trial.

Additionally, both of the pathology witnesses for the Crown have admitted on oath before the Medical Board and in submissions to the Supreme Court that they did not disclose at Mr Keoghs trial or to his defence an important exculpatory scientific test result, namely that one of the slides said to have been from the thumb mark of the grip showed no evidence of bruising. Again, it is clear from the principles laid down by the High Court that that alone would justify the setting aside of the verdict at trial. In a recent ABC radio program, entitled Beyond Reasonable Doubt, the former High Court Justice, Michael Kirby, explained the reasoning of this principle by stating:

> *Because you don't know how the jury reasons, if one way of reasoning to a conclusion is kicked away by the evidence then because that is a possibility of the way the jury*

> *might have reasoned then you have to consider whether a miscarriage of justice has occurred...*

In evidence before the Medical Board the chief pathologist said that it was always his opinion that the bruises to the left leg of the deceased had been caused by a *left* hand. His evidence at the trial was that they were caused by a *right* hand. Again, that conflict alone would justify the setting aside of the verdict at trial.

In evidence before the Medical Tribunal, the chief pathologist said that he now accepts that his evidence at trial of determining unconsciousness by damage to the outer surface of the brain was wrong. This again, on the principles laid down the High Court would justify the setting aside of the verdict at trial.

It is clear that if the Attorney-General was assessing Mr Keogh's petitions solely in accordance with the law, he would have referred them to Full Court for appeal. However, as I said, because the power to refer cases to the court of appeal is claimed to be entirely at the discretion of the Attorney-General, he or she can literally dismiss these points of law with a wave of the hand, as I believe has occurred in the case of Henry Keogh, without the petitioner having any recall or right of review.

Although the Attorney-General when deciding upon a petition should do so on the legal merits of the case, one of the many criticisms levelled at the current petition process is that it is inherently political. As I have explained, a person wrongly convicted is left to pin their hopes on a petition to the Attorney-General, a politician, who, undoubtedly, has at the fore of his mind political considerations. A petitioner is effectively asking a state politician to validate their criticisms of a prosecution conducted by state officials. In this era of law and order, where it is fashionable to be tough on crime and the Attorney-General is often the Government's representative of this agenda, is it any wonder that in this term of Government not a single petition to the Attorney-General has been referred to the Full Court? Are we so delusional to believe that not a single person has suffered a miscarriage of justice in this time, or do we recognise that this process fails to meet the needs of the wrongfully convicted?

As a comparison, in the last 12 years in the United Kingdom some 300 convictions have been overturned following references by the Criminal Cases Review Commission – 50 of those were murder convictions and 4 of them involved those who had been hanged after they were convicted. In that same period of time, not a single case has been referred back to the courts under the petition process here in South Australia.

Because the petition process is so politicised, the wrongfully convicted and their supporters are effectively required to run a political campaign to improve the prospects of their petition being referred to the Full Court. Every recent miscarriage of justice case I have researched has demonstrated this point. As an example Andrew Mallard in Western Australia, who was wrongfully convicted of murder on the weight of false confessions and evidence withheld by the proscution, had to enlist the support of Colleen Egan, a journalist with the Sunday Times, and then the Labor MP John Quigley, who was instrumental in lobbying the then Western Australian Attorney-General.

A South Australian example is the case of Edward Splatt, who had to recruit the support of the Advertiser journalist Stewart Cockburn, before his claims of innocence were given credence. Stewart Cockburn ran a campaign in the paper for two years before the incoming government agreed to a Royal Commission. That Commission, which discredited all of the forensic evidence relied on at trial - ultimately found in favour of Ted Splatt and in 1984 brought to an end seven long years of wrongful imprisonment. It is worth noting that his trial took 11 days, the Commission hearings took over 190 hearing days. While I have been unable to confirm this, and I will happily be corrected if I am wrong, it is my understanding that this was the last South Australian case in which the Attorney-General exercised his discretion under s 369 of the *Criminal Law Consolidation Act.*

While such examples exist, no one could argue that these cases demonstrate that the petition process delivers justice. This would be to ignore the fact that these cases were the exception. It is not justice if it is not equal. Whether it be due to the nature of their crime, the perceived weight of evidence against them, prior offending or something as basic as illiteracy, not all persons wrongfully convicted are so fortunate to be able to recruit journalists who able to apply media pressure or members of government able to get the ear of the Attorney-General.

And as the case of Henry Keogh demonstrates, even when your supporters include prominent media identities, law professors and forensic scientists from around Australia and overseas and a public campaign has been run, including numerous exposés on the popular current affairs television program Today Tonight, this is no guarantee that a tough on crime Attorney-General will not hold-out against the public pressure and even go so far as to effectively campaign against you.

Demonstrating the politicised nature of the current petition process, the former Attorney-General on numerous occasions reaffirmed the prosecutions version of how Ms Cheney came to pass, dismissed all evidence to the contrary, and denounced Mr Keogh as a murderer. Having so publicly nailed his colours to the mast, it is my understanding that the former Attorney-General was forced to agree to delegate the consideration of any future petitions by Mr Keogh to a bureaucrat in the Attorney-General's department because of perceived possible prejudice. Indeed many Members in this place and the other have not shied from stating their beliefs and opinions on Mr Keoghs conviction. The current leader of the opposition no less, interjected in the other place, that she believes Mr Keogh is guilty. She apparently also stated as much to Mr Keogh's family. I repeat, how dare any politician pass judgement on the guilt or innocence of someone claiming to be wrongfully convicted. It is not our role, and nor should it be.

While having a family member incarcerated for committing a crime must be difficult, having a family member incarcerated when you truly believe in their innocence and your belief, and the evidence underpinning that belief, is belittled by the authorities must be devastating. Alexis Keogh, the youngest daughter of Henry Keogh was just nine when her father was arrested for murder. She has prepared a statement which I would like to read out for the benefit of Members:

My name is Alexis, I am 25 years old and the very first thing I want on public record and for you all to hear is that I am proud to be Henry Keogh's daughter.

I am sure a good many of you here heard the name "Henry Keogh", and have intuitively tuned out, as after 16 years of hearing about his case you are probably sick of it. I wonder if you can please pause for a moment, put your preconceptions aside and listen to a voice you haven't yet heard.

Seeing my dad arrested at the age of nine is an event I won't forget.

Being teased and threatened in primary school with cruel and cutting words has not been easy to outgrow. Watching my dad give a eulogy in handcuffs at my grandmother's funeral is a picture I can't erase from my mind. Seeing my sister walk down the aisle alone at her wedding broke my heart. Knowing my dad is innocent and the pain of the last 16 years is indescribable…

When someone is wrongfully imprisoned, there are many hidden victims and you need to know, and remember, that the collateral damage is very real, and is just as, if not more devastating.

Once you're caught up in the Criminal justice system the price paid to prove your innocence is almost beyond belief and over the years we have been ignored, ridiculed and those fighting for the truth even personally scrutinized in parliament by the previous AG.

And that is my experience of how our "justice" system operates. It crushes and consumes you by trying to outlast you. Once the system swallows you up, time is on their side. You have no voice, no power, and no value. You're invisible.

The evidence to prove the death my dad was convicted for was not a murder at all is overwhelmingly obvious. You may think it, but you have never heard it all. Long before my dad was even convicted, he was vilified by the media because of the distortions, half truths and outright lies that were fed to them. Seeking justice in a state that would rather just forget the name Keogh has been painfully impossible.

When the very person whose duty it is to refer my dad's case back to the courts publically criticizes anyone who challenges the evidence used to convict him, what hope do we have of getting justice?? When the same man stands in parliament and makes apologies and commitments to the Cheney family, can he honestly be considered to be impartial and without bias?

We are foolish if we give anyone in that position the right to act merely by their will or personal feelings, especially in matters connected with duty, trust and justice. I

long for the day we have a justice system that seeks truth and not just someone to blame. It merely produces more victims.

In our society it seems it is only by luck that a wrongful conviction gets overturned. Usually a journalist takes on the story out of interest and the deeper they look, they see the terrible miscarriage of justice and feel compelled to do all they can. Graham Archer and the team at Today Tonight have had the courage to do this in regards to my dad's case, and have been vilified and criticized for doing so. What other avenue does someone have when they are innocent and no one wants to know? In my dad's case, such journalists have continued in our fight for justice for over 10 years when no one else has cared, and that should be applauded, not condemned.

The indescribable frustration, confusion and despair I feel right now is outweighed only by a hunger for justice and truth and my love for my dad. I began a cause online a few weeks ago to support the bill for a Criminal Cases Review Commission. I emailed everyone I could think of with my story. Since then, almost 600 people have joined the group and I have been flooded with emails of support and encouragement. Given more time I know hundreds more will join…those that haven't joined simply haven't had the opportunity yet. They still assume our system gets it right and mistakenly believe that if it makes a mistake the people in power to correct it have the compassion and integrity to do so.

Thankfully, there could be a way. But that decision is in your hands. We need a Criminal Cases Review Commission. Other countries have one, why don't we?

My message is that there is nothing to fear or to lose in the recognition of error, or the need for change.

There is everything to gain.

As I asked earlier, are we so arrogant to believe that not a single person has suffered a miscarriage of justice here in South Australia. Or do we accept, as has the United Kingdom, Scotland and Norway, and to a lesser degree Canada, that the traditional petition process fails to correct wrongful convictions.

It is for this reason that I propose we establish a Criminal Cases Review Commission. Modelled on the commission established in the United Kingdom in 1997, a South Australian Criminal Cases Review Commission will be independent of government and the judiciary and be empowered to impartially review and investigate claims of wrongful conviction and refer substantiated cases back to the Full Court. A Criminal Cases Review Commission will do nothing to advance the case of those who are guilty of the crimes for which they were convicted following a fair trial. It will, however, provided a non-politicised process by which those who allege a miscarriage of justice can have their claims investigated and if warranted put back before the courts.

Unlike other proposals for reforming the petition procedure, such as what has occurred in New South Wales and in Canada, the value of a Criminal Cases Review Commission, other than its impartiality, lies in its powers to actively investigate claims of innocence, rather than simply making a determination on material presented to it by an applicant, as is the case presently. While many cases will be dealt with by the expertise of the Commissioners, of which there will be five or the Commission's staff, if technical expertise is required then the Criminal Cases Review Commission will be empowered to engage suitably qualified professionals, including police officers, to examine the evidence and report on it. This includes forensic examination of evidence.

If evidence relating to the case is held by a public body, the Criminal Cases Review Commission will be empowered to instruct that body to keep the materials safe and to allow the investigating officer access to it. This includes access to police files. On the later, it was evidence derived from police files that was improperly withheld from the defence at trial, which led to Mr Mallard's exoneration in Western Australia.

Prior to the establishment of the Criminal Cases Review Commission in the United Kingdom, the wrongfully convicted were required to petition the Home Secretary, an executive body, for their case to be reviewed. Not dissimilar to here, few cases were referred to the courts. Since the establishment of the Criminal Cases Review Commission that number has increased dramatically, with a 2005 study finding a three-fold increase in the number of cases referred. As of 31st of October this year, the Court of Appeal had heard 428 cases referred by the Criminal Cases Review Commission, resulting in 304 quashed convictions. Four of these were historical cases in which the wrongly convicted had tragically been hung for another's crime.

While I cannot predict how many applications will be made to the Criminal Cases Review Commission if this Bill passes, based on the United Kingdom's and Norway's experience I am confident that provided it is adequately resourced (a guarantee I am unable to write into the Bill), the Criminal Cases Review Commission established here will be able to deal with each application without significant delay. While many predicted the United Kingdom Criminal Cases Review Commission would be inundated with applications this has not been the case. Bearing in mind the population of the United Kingdom, only 13,072 applications have been made to the Criminal Cases Review Commission since its inception in 1997. Additionally, not all victims of wrongful convictions will apply to the Criminal Cases Review Commission. This is particularly true in non-homicide cases, where victims of wrongful convictions have served their sentence and simply want to focus on getting their lives back together.

Just as one cannot predict the number of applications the South Australian Criminal Cases Review Commission will receive, it is simply impossible to know the number of miscarriages of justice that currently go uncorrected – although researchers have attempted to estimate the percentage of United States cases, with figures ranging from less than 1% to as high as 5% of all criminal convictions. While there are of course significant differences between the United States justice system and ours, there is no reason to believe that miscarriages of justice do not

occur in this range here. I know Dr Bob Moles has detailed numerous unresolved South Australian cases in his book *A State of Injustice* and on his website that raise serious questions about the evidence put at trial.

One such case is that of Derek Bromley, who was convicted of murdering Steven Dacoza in 1984. Mr Bromley has consistently protested his innocence, pointing to the unreliability of the two supposed eye witnesses, one of whom was a schizophrenic who was hospitalised soon after the incident with acute exacerbation of his symptoms. Mr Bromley supporters have also called into question forensic evidence put at trial by Dr Colin Manock, with the eminent pathologist Professor Plueckhahn disputing the cause of death, stating "that there is no scientific basis in the post mortem findings for an unequivocal diagnosis of death from drowning" as was sworn by Dr Manock.

Mr Bromley submitted a petition to the Attorney-General in 2006, however this was rejected. Although he completed his prison sentence in 2008, Mr Bromley remains in prison because he maintains that he is innocent of the crimes for which he was convicted, meaning that he is unable to complete the mandatory pre-release programs and as such is not eligible for parole. Bearing in mind that a Criminal Cases Review Commission will be impartial, I am convinced that on the weight of the evidence and on the legal principles invoked in Mr Bromley's petition, that a Criminal Cases Review Commission would refer his case for appeal. It is interesting to note that at the request of the Attorney-General's department Mr Bromley is resubmitting his petition this week.

Another example is the case of David Szach, which has previously been raised in this place by the Honourable Dennis Hood. Despite his release on parole for murder over 17 years ago, Mr Szach continues to protest his innocence and agitate for a review. A former commissioner on the United Kingdom's Criminal Cases Review Commission, David Jessel, recently stated that the continual protestation of innocence, even when it appears no one is listening, is a hallmark of a wrongful conviction. Unsurprisingly, Mr Szach's 2007 petition to the Attorney-General, in which the forensic evidence of Dr Mannock is again called in to question by a prominent pathologist, was also rejected. Again, Mr Szach plans to resubmit his petition.

While current cases would of course take priority, the Criminal Cases Review Commission would also be able to undertake a review of the evidence and report to the Attorney-General on the case of Elizabeth Woolcock, a petition for pardon for whom is currently before the Attorney-General. As some Members may be aware, Ms Woolcock was the first and only woman to be hung in South Australia. In 1873, Ms Woolcock was tried and found guilty of murdering her husband by poisoning him with a mercury solution that she had purchased to treat the families head lice and ring worm on the family dog. However, it is now contended that mercury poisoning was never established as the cause of death and that her husband's symptoms were consistent with tuberculosis, dysentery and typhoid, however only typhoid was ruled out in the autopsy.

Two recently discovered letters sent by Sir Samuel Way to relatives in England shortly before he was appointed Chief Justice of South Australia provide insights into the concerns held at the time that a miscarriage of justice may have occurred. Commenting on the reports

commissioned by the government of the day and headed by his brother Dr Edward Way, Sir Samuel Way wrote that his brother concurred with the analytical chemist that the evidence on administration of the poison was "unreliable" and the "medical evidence mistaken". The obvious implication being that Ms Woolcock did not poison her husband and that evidence put at her was wrong.

In 2004, a mock retrial was held as part of law week in the old Adelaide Gaol. The Police Journal, which covered the well attended event, reported that the jury empanelled from the audience took no time at all to find Ms Woolcock not guilty on the weight of the evidence. As I said, a posthumous petition for pardon has been lodged with the Attorney-General by Police Historian Allan Peters which could be referred to the Criminal Cases Review Commission for determination.

While it will not of course be the primary role of the Criminal Cases Review Commission, the Commission will also be empowered to conduct post-exoneration examinations and make recommendations to the Attorney-General on reforms that may be undertaken to prevent future wrongful convictions. The Criminal Cases Review Commission, under section 24 of the Bill is able to report to the Attorney-General on any matter and importantly can do so of its own volition. Additionally, the Attorney-General or either house of this Parliament may refer matters, including Bills, to the Criminal Cases Review Commission for consideration. Since entering this place, I have witnessed an escalation in the law and order rhetoric and the subsequent encroachments on established civil liberties and rights, many of which were central to a defendant's right to a fair trial. The current trend of reversing the onus of proof being one such example. I can think of numerous Bills which we have debated in this place that I would have liked to have had considered by the Criminal Cases Review Commission.

I have attempted to establish here today that our current justice system fails adequately deal with the wrongful convictions that the appellate courts miss, leaving many victims of miscarriages of justice nowhere to turn. While the calls for the establishment of a Criminal Cases Review Commission are yet to meet the deafening roar of the demands for an Independent Commission Against Corruption, I have no doubt that as time progresses and the community becomes aware of the flaws in our current justice system, particularly its inability to correct miscarriages of justice without the intervention of a politician, the calls will grow. As more high profile people argue for reform, such as Justice Michael Kirby, and more cases of wrongful conviction are exposed, I believe this is inevitable.

Fitting both of these criteria is Lindy Chamberlain, who, as I am sure Members are aware, was wrongly convicted for the murder of her baby daughter Azaria, who was in fact tragically taken by a dingo. My office recently contacted Ms Chamberlain informing her of my plans to introduce this Bill, and she responded with the following statement:

> *It is wonderful to see that South Australia is taking the lead and making the attempt to begin bringing the justice systems of our great country into the 21st century at last. There are many well-documented mistakes made in the judicial system we currently have, of which mine was just the most visible. It is a system bound by rules that can no*

longer cope in this day and age of highly skilled and technical evidence. Our system needs a complete overhaul, but until that day comes we badly need what this bill proposes. Without the public and therefore media interest in my case I would still be in prison with nowhere to turn. The media kept my case in the public attention. The public responded by sending funds for me to keep fighting. It cost over 5 ½ million dollars for my legal expenses despite cut rates by my lawyers. As an ordinary person, without the public's support I had no hope of finding that kind of finance. Too many people are also in our criminal system with little heard of cases pleading for someone to listen and treat them fairly. I receive letters on a regular basis from people like this hoping I may somehow be able to help. I can't, but this proposed commission surely can. We desperately need somewhere unbiased for the innocent to turn, and have a fair go. You cannot appeal to the very people who have put you where you are, and the court system as it stands does not allow you to tell the truth, the whole truth and nothing but the truth. The whole truth is presently gagged. A commission where all the facts can be reviewed is desperately needed in this country, a place of last resort; properly protected against abuse by the guilty, but available when the system has failed the innocent. We pride ourselves on being a country that gives everyone a fair go. I sincerely hope you support this bill and 'put your money where your mouth is' as the saying goes.

This is a Bill I truly believe in. If, like me, you recognise that our judicial system is not infallible – that mistakes can and do happen – and that our present system can fail to correct these mistakes and if, like me, you find the statement by the late English Lord Denning '*It is better that some innocent men remain in jail than the integrity of the English legal system be impugned*' repugnant, then I implore you to support the establishment of a Criminal Cases Review Commission.

In closing I would like to again quote Justice Kirby, this time from his foreword from the book *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality*, who so eloquently surmises the choice this Bill requires you to make:

In the end, the choice before society may be as brutal as this: do we care about the cases like Mr. Mallard's enough to draw the inference that there may be other such cases that never had a chance of similar repeated scrutiny? Where the prisoner was odd and could not convince anyone to support a protest? Where funds could not be procured to attract sufficient legal interest? Where the over-worked pro bono schemes of the legal profession could not be engaged? Where the talent and / or commitment of the prisoner's supporters waned with the passing of time and a realisation of the difficulty of storming this particular stable citadel? Where the over-worked appeal judges missed factual inconsistencies or mistook the governing law? Where the High Court, emphasising once again that it is not a general court of criminal appeal, declines special leave? Where the Executive could not be persuaded to institute a post-conviction enquiry? Where the government, in the midst of another law and order electoral campaign, declined to create an ad hoc enquiry or Royal Commission.

Do we care enough to create a permanent, expert agency with the patience, determination and skill to review contested convictions? In the United Kingdom, the answer to that question was in the affirmative. The result has not been an intolerable flood exhausting the resources of the new Commissions. It has been the correction of a number of wrongs. The authors make a compelling case for the establishment of such a body in Australia. It would re-affirm the commitment of our society to the highest standards of justice and law in all serious criminal proceedings. If, from the study of individual cases requiring action, systemic improvements of the criminal justice system can be identified and achieved, the result in the end may be an enhancement of justice beyond the sum of the cases like Mr. Mallard which our institutions can correct. Affording real protections from serious miscarriages of criminal justice is a true test for the civilization of a society, such as ours. But will we face and meet that test?