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South African prosecutor Gerrie Nel is called the Pit Bull – with good reason

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Justice on the line

WA lawyers are watching a historic murder appeal, **Colleen Egan** writes

An attractive young lawyer drowned in a bathtub. Her playboy financier fiancé convicted of murder. Claims of discredited science and a political cover-up.

It is the stuff of novels that has gripped South Australia for two decades. The case of clean-cut lifer Henry Keogh — cold-hearted killer or victim of cruel injustice, depending on who you believe — has made legal history in Adelaide and now has Australia's legal fraternity watching.

Last month, after serving 19 years of a minimum 25-year sentence, Keogh won the right to have his claim of wrongful conviction heard by three judges in the South Australian Supreme Court. The historic hearing scheduled for August will be the culmination of a long campaign by retired law professor Bob Moles and others to challenge that State's justice system.

In 1994, Keogh was a 38-year-old divorced father of three about to marry his younger lover Anna-Jane Cheney. After an evening at the local pub, she went home about 9pm and he returned a bit later. Soon after, a frantic Keogh called 000, telling the operator that his fiancee had drowned and he had dragged her from the bath and tried to resuscitate her.

The case was initially considered an accident but the State's senior forensic pathologist, Colin Manock, noted bruising on Ms Cheney's legs that he later testified were consistent with Keogh holding his lover under water. Since then, experts have questioned the evidence of the bruising and contended that Ms Cheney fell into the bath after an anaphylactic shock or some other natural cause.

Dr Manock, who retired about the time of the 1995 trial, has become a controversial figure in South Australia, having his work questioned in other cases, including three baby deaths examined by that State's coroner.

However, there has never been an adverse finding by a medical board against Dr Manock and the South Australian prosecution and governments have vigorously defended the integrity of the Keogh conviction. Dr Manock was chief forensic pathologist in South Australia from 1968-95 and estimates he was involved in more than 400 convictions.

In addition to the forensic evidence, the jury heard that Keogh was dishonest, cheating on his fiancée and that he had forged her name on five life-insurance policies before her death. Many South Australians still believe steadfastly that he is guilty and the family of Ms Cheney has been distressed by Keogh's consistent claims of innocence.

Convicted: Henry Keogh with fiancee Anna-Jane Cheney. Picture: 60 Minutes

Dr Moles said if he was on the jury, he would have voted to convict Keogh. "The problem is, the jury were presented with incorrect information," he told *Agenda* this week.

Over the 14 years he has worked on Keogh's case, including writing two books on the subject, Dr Moles' team has lodged four petitions with State attorneys-general for an appeal.

Anyone convicted of an offence in Australia has the right to appeal to a higher court to argue their case: appeals are an inbuilt system of judicial review. But the system dictates that the appeal process cannot go on forever — the umpire's decision needs to be final and once an attempt has been made to the High Court and failed, the end of the legal process has been reached.

So, what happens when fresh evidence is discovered?

Across Australia, State attorneys-general have been the only officials with the power to refer an old case back to the court — and one problem with that, say lawyers and some of the judiciary, is that they are politicians who may well take political considerations into account.

"There are definitely political considerations," Dr Moles said.

"When Keogh's conviction is overturned there will be an irresistible pressure for a royal commission. Once that first domino falls, they can't stop anything happening other than opening up many other cases."

Refusing to accept "no" for an answer, Dr Moles set about

> With Keogh we're in uncharted territory.
> **Dr Bob Moles**

changing the system and lobbied the Parliament to legislate to give South Australians a new statutory right of appeal.

In the UK, which was rocked in the 1990s by miscarriage of justice scandals including the Birmingham Six and Guildford Four, a taxpayer-funded Criminal Cases Review Commission was established to investigate claims of wrongful convictions.

"It's worth noting that since the CCRC was established over the last 14 years or so, the UK Court of Criminal Appeal has overturned about 350 convictions, including 70 murder convictions, nearly 50 rape convictions and (posthumously) the convictions of four people who had been hanged," Dr Moles said.

"What initially started as a Bill to establish a Criminal Cases Review Commission in South Australia gradually changed to a Bill to establish a new right of appeal in criminal cases."

To qualify, the applicant must produce fresh and compelling new evidence that indicates a potential

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Fair: Attorney-General Michael Mischin says WA's appeals system is already comprehensive.

Successful appeal: Andrew Mallard was released after nearly 12 years in jail.

Political concern: Tom Percy

Still in jail: Arthur Boycott Greer

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miscarriage of justice to the Supreme Court — something Keogh's lawyers did last month.

"With Keogh we're in completely uncharted territory," Dr Moles said. "People have often asked why I am focused on the Keogh case, but I'm actually focused on the legal system that's not working properly that needs to be fixed.

"What we've identified is that if fresh evidence emerges that you're in fact innocent, you don't have a right to go back to correct the error. Even blind Freddy knows that must be wrong.

"Everybody assumes that if you have evidence that you've been wrongly convicted, you would have an automatic right to have that corrected, but the legal system has all these policies to prevent that from happening."

It's a change that is wanted in WA by lawyers frustrated that only one petition is known to have been granted since the Barnett Government won office in 2008.

Some petitions known to have been lodged — including those on behalf of convicted murderers Scott Austic, Gary White and Arthur Greer — have been the source of frustration among lawyers who believe fresh appeals could potentially expose injustice, incompetence or even corruption.

Successful petitions referred under previous governments — including John Button, Darryl Beamish, the Mickelberg brothers and Andrew Mallard — resulted in overturned convictions and some systemic reform.

Australian Lawyers Alliance State president Tom Percy told *Agenda* if the South Australian model was adopted in WA, it would bring such decisions into the open courtroom and quell the disquiet. It would be "a win-win" because if claims of innocence were found to be without merit, the system would be vindicated.

"There is a groundswell of concern in the legal profession," Mr Percy said. "It is a very deep concern that deepens with every new rejection. It is in the interests of transparency that these decisions should be made by a judge and not a politician. I would think the attorney-general would be happy for it to be taken out of his hands. South Australia is leading the way and I would expect all States will follow.

"Had the Mallard decision fallen to the present Government, there is no guarantee it would have been granted. He would still be in prison, which really is a shocking thing. This Government ran for office on being hard on crime and

> There is a groundswell of concern in the legal profession.
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> **Lawyer Tom Percy**

it's far more politically palatable to say 'no'."

Attorney-General Michael Mischin said it was insulting to suggest he would not refer a case if there was a proper base for doing so. He would not provide statistics on how many applications had been made or granted. He said he was not persuaded the South Australian scheme was necessary or desirable.

"There is already a comprehensive appeal system available in WA, and a capacity to refer cases to the Court of Appeal once those appeals have been exhausted if cogent fresh evidence of a miscarriage of justice evidence comes to light," he said.

"I shall await with interest the outcome of the Keogh case and see if anything concerning it would have been dealt with differently in WA under our present system. I am satisfied there are no 'innocent' people languishing in prison as a result of decisions not to refer their cases back to the Court of Appeal.

"Submissions for a reference to again have a court look at a case must be backed by fresh evidence and sound argument, not merely claims and allegations, and certainly not ones that have already been tried and have failed, or do not sit with other evidence that led to the conviction.

"That is why they are investigated and why I obtain advice on not only the evidence but how it relates to the issues at the trial, and must decide whether there is an issue that ought reasonably be resolved by the Court of Appeal."

Mr Mischin said reopening cases that had been tried and appealed created distress for victims and their families who may have expected finality and ought not to be done lightly.

Dr Moles said there was an inherent unfairness that South Australians now had a legal right not available to people in WA.

Colleen Egan spent eight years investigating the Mallard conviction and wrote the book Murderer No More on the case

AGENDA

Years to wait, then appeal denied

Petition: Robyn Austic has been fighting for five years to clear the name of her son Scott Austic. Picture Astrid Volzke

Amanda Banks

For mother Robyn Austic, it took heartbreaking years before a petition for a fresh appeal against her son's murder conviction made its way to the desk of an attorney-general.

Another 18 months later, Mrs Austic was left shattered after the petition — drafted by Malcolm McCusker before he was appointment WA Governor — was denied.

The bid for clemency by Scott Douglas Austic is the latest case to stir concern in the legal fraternity about the process for seeking a new appeal in matters allegedly involving fresh and compelling evidence.

Austic is serving life with a minimum of 25 years behind bars after being convicted of wilfully murdering his pregnant partner Stacey Thorne in Boddington in December 2007.

Austic's petition alleged there had been a serious miscarriage of justice because key evidence in the circumstantial case against him had been planted, withheld or misrepresented.

It included a forensic review which raised doubts about four key pieces of evidence. This included a cigarette packet stained with Ms Thorne's blood which was taken from Austic's veranda, but which did not appear to be present in a video and photographs taken during an initial search of his home.

The petition, which renewed

Life sentence: Austic was convicted of killing his pregnant partner.

heartache for Ms Thorne's grieving family, was lodged with former attorney-general Christian Porter in January 2012 and was dismissed by his successor, Michael Mischin, in September last year.

Mr Mischin considered material in the plea for clemency, the trial evidence and Austic's original appeal. He also took into account a Corruption and Crime Commission investigation into Austic's case, which did not find evidence of misconduct by police but highlighted concerns about two pieces of evidence.

Mrs Austic said the process of dealing with bids for fresh appeals needed to be changed and the South Australian model, which refers applications to an appeal court instead of an attorney-general, would remove the possibility of "politics" influencing decisions.

Shadow attorney-general John Quigley is drafting a private member's Bill based on the South Australian model. He said the Austic case was a classic example of a matter that should have been considered by the Court of Appeal.

Mr Quigley said decisions about whether there is fresh and compelling evidence which justifies an appeal should be a matter for the courts.

"The conservative attorneys-general are loath to make these references and have a history of refusing to make these references to the Court of Appeal," Mr Quigley said. "Politicians can't be the gatekeepers because they are concerned about whether they are perceived to be soft on crime by allowing a murderer another appeal."

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