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

A n attractive young lawyer drowned in a bathtub. Her playboy financier fiancee was 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 lilter 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 a minimum 30-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 1984, Keogh was a 38-year-old divorced father of three about to marry his younger lover Anna-Jane Chessey. After an evening at the local pub, she went home about 8pm and he returned a bit later. Soon after, a friend of 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 Manook, noted bruises on Ms Chessey’s legs that he later testified were consistent with Keogh holding her under water. Since then, experts have questioned the evidence of the bruising and contended that Ms Chessey fell into the bath after an amphetamine shock or some other natural cause.

Dr Manook, who retired after the time of the 1985 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 Manook and the South Australian prosecution and governments have vigorously defended the integrity of the Keogh conviction. Dr Manook was chief forensic pathologist in South Australia from 1969-90 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 fiancee 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 Chessey has been distressed by Keogh’s consistent claims of innocence.

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 inherent part of the judicial system. 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 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 miscarriages of justice scandals including the Birkettina 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 250 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 application must produce fresh and compelling new evidence that indicates a potential
misconduct of justice in the legal profession. "

Lawyer Tom Percy

It’s far more politically palatable to say ‘no’.

Attorney-General Michael Mischnin said it was insulting to suggest he would not refer a case if there was a proper basis 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 had a different outcome in WA under our present system."

Mischnin was one of the ‘innocent’ people languishing in prison as a result of decisions not to refer 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.”

Mischnin said reopening cases that had been tried and appealed created distrust 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 have a legal right not available to people in WA.

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

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 Volski

Amanda Banks

"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 appointed 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 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 Mischnin, in September last year.

Mr Mischnin 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 attorney-general are keen 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.”

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