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THE INAUGURAL FRANK WALKER MEMORIAL LECTURE

"A GOLDEN ERA OF LAW REFORM"

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My remarks tonight are chiefly about Francis John Walker, Attorney General for New South Wales from 1976 to 1983, and partly about his friend and colleague Peter Duncan, Attorney-General of South Australia between 1975 and 1979. Both were instrumental in effecting major social law reforms. Both held numerous ministerial and other appointments and you can consult "Who's Who" for those details. I am concerned tonight particularly with some of their state law reform achievements while Attorneys-General in the Wran and Dunstan governments respectively. The two of them shared a house in Canberra during the Hawke government when both served as commonwealth ministers in the 1980s, but that period is another story.

Their respective periods of service as state Attorneys-General represented something of a golden age of progressive law reform, continuing in the spirit which prompted some of the law reforms of the Whitlam federal government between 1972 and 1975.

Of course I need hardly tell this audience that I use the term "golden age" as it might have been employed by EG Whitlam – that is, communicating awareness that the expression is in a sense inflated and faintly comical, but nonetheless that it contains a central core of truth.

Both Walker and Duncan were brave law reformers and they needed to be. The areas in which they had their greatest successes involved overcoming entrenched opposition. It may seem in 2014 obvious that aborigines should have land rights, that homosexuals should be free to have personal relationships and that women should have social equality and freedom from domestic oppression. It was not self-evident in the 1960s. On the contrary.

Nonetheless despite entrenched social conservatism change was possible. There was a "youth bulge" in the Australian population, and considerable impatience with restrictions such as prudish censorship of art and literature. Possibly the single most potent factor pushing towards changed attitudes was the decision of the Menzies government in 1964 to conscript eligible 19 and 20 years old Australian males potentially to serve in the war in Vietnam.[1] The then Federal government wrongly

[1] National Service Act, 1964 (Cth). The tensions between Indonesia and Malaysia known as *Konfrontasi* were also a factor in the Menzies cabinet's decision to reintroduce conscription for overseas service. Fortunately for Australia the "confrontation" did not proceed far. If it had, the commitment of Australian troops – conscripts or otherwise – in a war against Indonesia would have been even more misguided than the involvement in Vietnam.

equated the prevailing circumstances of 1964 with World War 2, when in the face of attack and possibly imminent invasion by Japan, conscription was broadly acceptable to the Australian public. The proper comparison should have been with World War 1, when the issue of conscription to fight a distant enemy divided society, split parties, felled governments and led to turmoil and social disenchantment.

The so-called World War 2 “baby-boomer” generation included those who turned 19 or 20 in 1964 and subsequent years. Conscription for Vietnam provoked large demonstrations in Melbourne, Sydney and other Australian capitals. Much of a whole Australian generation came to doubt the wisdom not only of laws about compulsory military service, but about many other laws. The right to free speech became a major political issue, when thousands of protestors came into contact with police attempting to enforce then current laws about public assembly. The use of the National Service Act to compel enlistment caused much anguish among those called up. Quite a number deliberately resisted and were fined. The strength of protests against conscription and the war succeeded in bringing about the withdrawal of troops from Vietnam, and after the election of the Whitlam government in December 1972 the remaining conscientious objectors in custody were released and conscription was abandoned.

The mood of the younger generation who had been engaged with this turmoil during much of the previous decade was by no means disenchantment with themselves. This was not the post war generation of George Johnson’s “My Brother Jack” which after 1918 suffered epidemic influenza, mass unemployment and social dislocation. Rather, it was a generation of confident people who had won a mass political campaign by political action, and who had seen the arguments of their opponents crumble as events in Vietnam unfolded inconsistently with the Menzies conscription decision of 1964. This generation had been told that if we did not fight in Vietnam, the Chinese would pour down through the funnel of Indochina, gravity fed, thence to arrive in Darwin, Darlinghurst and the Adelaide Hills. This generation had come to learn that the Vietnamese and the Chinese had long-standing enmities and were not going to embark on a joint invasion of northern Australia. They realised that American foreign policy was unhealthily dependent on what Eisenhower had called

the “military-industrial complex”. They came to believe that Australian policy about the Vietnam war was misguided and politically out of touch.

These perceptions became generalised. If the powers-that-be could be so grossly misguided on foreign policy and conscription, then (the mood was) the status quo in Australian health policy, industrial relations, education and other key political areas might be equally flawed.

I believe this was part of the mindset that young men like Walker and Duncan brought to politics in the early 70s. The errors of the Vietnam conscription policy had been exposed, but most importantly they had been corrected by political action converted into laws. This was the great lesson of the Whitlam political victory in late 1972 – that democratically elected lawmakers could sometimes change important things.

I detail this background because it contributes to explanation of the important law reforms of Labor governments in the 1970’s. By the time Walker and Duncan were active in the student politics which brought hundreds of thousands of mainly younger Australians onto the streets, they already had well-developed views about the need for social justice in a society which denied it to many. Their education in law at Sydney and Adelaide Universities respectively was a tool employed by each in their political efforts to change society.

I had an insider’s view of a few of the significant law reforms during the Wran years, and some of the Dunstan years. In the early 1970’s I had been lecturing in law at Sydney University Law School. In 1976 through Jim Staples I was approached by Peter Duncan, then Attorney-General of South Australia, to come to Adelaide as a ministerial adviser and establish there an equivalent of the NSW Bureau of Crime Statistics and Research.[2]

I took the appointment and worked with Peter Duncan during 1977 and from time to time thereafter. In 1979, after I had returned to Sydney, I worked for Frank Walker as

[2] The Liberal Attorney-General John Maddison deserves mention in relation to BOCSAR. Although Maddison finally came to political grief over the prisons issue, he was an admirable Attorney-General, who contended within his own party for liberal and humane policies. His establishment and support for the Bureau of Crime Statistics and Research enabled proper systems for the non-partisan collection of crime statistics, a fundamental requirement for good criminal justice policy. The BOCSAR has continued independent to the present, under the respected leadership of Dr Donald Weatherburn. The South Australian Office of Crime Statistics which I helped Duncan to create in 1977 was based on the BOCSAR model. It was led initially by Dr Peter Grabosky who went on later to head the Australian Institute of Criminology.

Director of the Criminal Law Review Division in his department. This involvement continued right through his period as Attorney-General.

The volume of law reform generated by Duncan and Walker is so extensive that I could not do justice to it in a brief paper. It was tumultuous. I will focus here on a few of the iconic campaigns and statutes.

Aboriginal Land Rights

Don Dunstan was the legislative initiator of the modern Australian movement to recognise aboriginal land rights. While Peter Duncan was still a law student and political activist at Adelaide University, Dunstan legislated to grant land rights over an extensive area of South Australia to aboriginals of the Pitjintjatjara and Maralinga tribes. This was given effect under the South Australian Aboriginal Lands Trust Act, No. 87 of 1966.

Aboriginal land rights, recognising the traditional connection between Australia's native inhabitants and their country, then came on to the commonwealth legislative agenda between 1972 and 1975 under Whitlam. The photograph of the then Prime Minister pouring dusty soil into the outstretched hand of Vincent Lingiari, transferring the legal title to Wave Hill Station to the Gurindji people, is iconic in Australian political history. Frank Hardy and several members of the Aarons family had been very active, in preceding years, in supporting the Gurindji claims. Both Walker and Duncan had been supporters of this cause.

Just as Dunstan and Whitlam had been motivated on this subject, the burning historical injustices inflicted on the indigenous of New South Wales moved the Wran government, and particularly Frank Walker in a second portfolio as Minister for Aboriginal Affairs (1981 to 1984), to legislate for aboriginal land rights.

The NSW Aboriginal Land Rights Act, No. 42 of 1983, preceded the High Court decision in Mabo v Queensland (No. 2) (1995) 175 CLR 1, and was necessarily constructed so as to avoid conflict with long recognised legal doctrines based on colonisation, dispossession and empire.

Preparing the groundwork for the bill, the government appointed a Select Committee on Aborigines, chaired by Maurice Keane, MLA for Woronora. Ian Macdonald of

Frank's office assisted Maurie in the work which produced the report which in turn produced the bill.

The South Australian statute of 1966 allowed the grant of significant land rights to the Pitjantjatjara, many of whom were still living on their native country as they had done for thousands of years, but the New South Wales statute of 1983 had to be based on a different approach. New South Wales was the oldest and the most closely settled colony, and by the 1980s, many if not most aborigines had long ago been dispossessed of and disconnected from their traditional country. They were compelled to live in settlements on mere scraps of land. Unrelated families and tribes with different language and histories were required to live unnaturally together, contributing to conflict and the loss of culture and community. These effects echo in criminal courts and prison populations to this day. By the 1980s it had become difficult or impossible for them to demonstrate continuity of connections with particular places, the concept which lay behind land rights claims in the Northern Territory. A fund was established by the NSW Aboriginal Land Rights Act 1983 to permit the repurchase of native land already alienated, or the purchase of land in substitution for it. Various Land Councils were established to assist aboriginal Australians to participate in self-government and social advancement. The Land Councils did in fact acquire a substantial amount of land and have a continuing important role.

Of course neither the 1966 South Australian statute under Dunstan nor the 1983 NSW law solved the problems of aboriginal dispossession. The history of government policies in Australia towards aborigines has generally been, since 1788, a history of failure. Sometimes policies have been based on malice, or at best ignorance, sometimes on good intentions. Mere good intentions and vague benevolence have often not been sufficient. Yet in the long history of policy failures, the statutes of 1966 and 1983, combined with Whitlam's Gurindji initiative (and what I think may not unfairly be called the Fraser-Whitlam Land Rights Act of 1976), were each of them well intentioned and significantly beneficial in practice.

Rape And Sexual Assault

I have said that the young men of the 1960s were galvanised by Menzies' conscription law. The young women of the same generation were affected differently,

but equally profoundly, by the Women's Liberation movement. The Women's Electoral Lobby was very active. Women's movement influences coincided with the advance in contraception known as "the pill". A choice between immediate and deferred parenthood became generally available for women and thus a work career or tertiary education became a more realistic possibility. Sexual relations came onto the political agenda, reflected in the Royal Commission on Human Relationships, established by Whitlam and chaired by Elizabeth Evatt, which reported in 1977.

Through two Acts of 1976[3] introduced by Peter Duncan, South Australia addressed one of the iconic concerns of the burgeoning women's movement – the law which barred the prosecution of a husband for the rape of his wife. This old common law rule was based on a conception of the relationship between husbands and wives more akin to master and servant (or trainer and greyhound) than to a relationship between equals. The common law rule was a potent symbol of patriarchy, and it fed into the problem of domestic violence. Surely, if a husband could command his wife's body so as to require sexual intercourse at whim and regardless of consent, he must be entitled to discipline her with slaps or worse? In the 1970s such reasoning affected many marriages and conditioned the attitude of police to complaints of domestic violence. The bill which was introduced into the South Australian parliament to restrict the common law immunity of the husband for rape was the first such provision in Australia. It did not by itself liberate women from domestic suppression, but it was a very important step. [4]

The second of Duncan's connected South Australian bills of 1976 was aimed at the problem of rape victims being cross examined about their prior sexual experiences or their "sexual morality".[5] The new provision excluded such questions, "except by leave of the judge", which was to be only granted where the question was "directly relevant" and "in all the circumstances of the case, justified". It was a groundbreaking provision. Reforms such as these were and are not easy. Misogyny is not absent in contemporary Australia. It was stronger in the 1970s. It required political courage and skill to overcome resistance to change.

[3] *Criminal Law Consolidation Act* (SA), No.83 of 1976; *Evidence Act Amendment Act* (SA) No. 84 of 1976.
[4] Act No.83 of 1976 did not absolutely abolish the common law presumption that a husband could not be convicted of rape of his wife. It did so conditionally: a husband could thereafter be prosecuted of raping his wife if additional factors as set out in section 73(5) were satisfied – that the act was preceded or accompanied by or associated with assault occasioning actual bodily harm, gross indecency or humiliation, or threats. These things would commonly be associated with domestic rape.
[5] S.A. Act No. 84 of 1976, section 3.

It was to be six years before these South Australian developments were followed in NSW, during which time the political pressure being applied by various women's groups had increased significantly. Frank knew that I had been working in South Australia with Duncan in 1977 and he wanted someone to coordinate similar and other reforms in New South Wales. This is how I came to be appointed in 1979 as Director of the Criminal Law Review Division in the Department of Attorney-general and Justice. Neville Wran's Women's Advisory Council, chaired by Kay Loder and the Women's Coordination Unit (headed by Helen L'Orange) were highly effective in marshalling the disparate voices of the women's movement into a coherent force. The Premier and the Attorney-General listened closely. The law which Frank Walker introduced in 1981 (the NSW Crimes (Sexual Assault) Amendment Act) followed the lead of the SA law but bluntly abolished the common law immunity of husbands. Further, it removed the terminology "rape" and substituted the expression "sexual assault", reflecting a view that rape is more an offence of violence than of sexuality.

Among numerous changes it made to the law, the most significant part of Walker's 1981 NSW bill was the heavy restrictions placed on the cross-examination of victims of sexual assault - more restrictive than under the South Australian law of 1976. In many rape or sexual assault cases, the key issue is whether there was consent or not. Commonly the defence will claim that the female consented, so the accused cannot be guilty. For decades, indeed centuries past, it was common practice for courts to permit the cross-examination of the victim as to her sexual behaviour other than on the occasion in question. The assumption was that if a young woman had voluntarily slept with X or Y, that would make it more likely that she would voluntarily have slept with Z, the accused.

In the year 2014, merely to state this proposition is to expose its absurdity. Many women might happily agree to a one night stand with some attractive man they meet on holiday, but might be repelled by the idea of sex with their boorish next door neighbour. Yet until the 1980's it was accepted that a trial of the boorish next door neighbour for rape would permit his barrister to grill the victim not only about the time when, visiting the USA, she had a "one night stand" with a tall, dark, handsome stranger, and possibly also about any other episodes of consenting sex in her life.

In the course of preparing the 1981 NSW sexual assault amendments there were long and intense discussions with FJ Walker about just how restrictive the new bar on cross-examination of victims should be. One view was that, as under the SA law, a residual discretion should be left with the trial judge to permit evidence about other sexual episodes where "the interests of justice" justified it. The contending view, pressed by the women's groups, was that there should be no residual discretion – there should just be a list of defined situations, spelled out specifically, where evidence about prior sexual behaviour, genuinely relevant to the case before the court, should be permitted. It was argued that although the SA law of 1976 reflected progress in women's rights, in practice the trial judges were exercising their discretion to allow questions about prior sexual experience too liberally, undercutting the intention behind the reform.

Frank Walker and the NSW government accepted the narrow approach, and it was my job to draft instructions for parliamentary counsel as to those specific situations. These instructions were indeed defined very narrowly, and were followed by the draftsman. Despite considerable criticism by defence barristers and a few judges, those provisions have stood the test of time. They are unaltered since 1981 and are still the law in NSW.[6] Sexual assault trials remain an ordeal for all involved, but the provisions of 1981 have contributed to a remarkable change in the way such trials are conducted, removing at least one of the many barriers which deter victims of sexual assault from reporting the crimes.

Homosexual Law Reform

This was another area where South Australia moved before New South Wales did. Don Dunstan had a particular interest in homosexual law reform. Despite his two successful marriages, he himself ended up openly linking with a male partner, Steven Cheng. The complexities of Dunstan's personal life and its bearing on his political achievements have been admirably revealed and examined in a recent biography by Dino Hodge.[7] During his first period of cabinet office as Attorney-General (1965-68) Dunstan had the opportunity to appoint a new Chief Justice, John Bray QC. Dr Bray was a distinguished jurist, scholar and poet who was also well

[6] Legislated originally as section 409B of the Crimes Act 1900, the provisions have been transposed as section 293 of the Criminal Procedure Act 1986.
[7] Hodge, Dino, *Don Dunstan: Intimacy and Liberty*, Wakefield Press, 2014.

known in gay circles. This was not flaunted but it could not be entirely hidden, particularly from members of the Vice Squad of the S.A. Police. The fact that active homosexuality remained criminal was a problem and Bray's reputation excited antagonism from police and certain conservative judges. It became more of a problem, and the need of law reform clearer, when on the 10th of May 1972 a gay university law lecturer Dr George Duncan was assaulted by gay-haters and drowned in the River Torrens. In due course, members of the vice-squad were charged with manslaughter but acquitted. The result of the Dr. Duncan case was a distinct change of attitude by many people who may not previously have been aware of the established practice of victimising homosexual men. On the 1st of July 1972 the usually conservative Adelaide Advertiser published an editorial headed *"Legalise Homosexuality"*.

Peter Duncan (no relation of the unfortunate Dr Duncan) was then the endorsed ALP candidate for his first seat. He and Dunstan saw in the tragic death of the murdered university academic the opportunity for homosexual law reform to be undertaken with public support. However in the first instance it was not they but a Liberal Country League Legislative Councillor called Murray Hill who moved a private member's bill on the subject. This was passed after exhaustive debate and unsuccessful amendments by Dunstan to make it stronger. It altered the law to allow as a defence to an "unnatural act" allegation that it was done between consenting adults in private.[8] This was a limited step only, a reform in accord with the famous sentiment of Mrs Patrick Campbell that homosexuals should be accepted provided they "don't do it in the street and frighten the horses." Of course Dunstan voted for the reform, but regarded it as highly unsatisfactory. It did not remove the stigma of criminality from the basic physical activity of gay men.

In 1973 Dunstan won another election, and his new backbencher Peter Duncan introduced a private member's bill for legalisation in 1974. This was derailed by publicity about the Gay Activists Alliance advocating sexual education for youths, so there was a temporary tactical retreat. Peter Duncan introduced his bill again in 1975, this time successfully, following arm-twisting of the more conservative ALP members.

[8] Criminal Law Consolidation Amendment Act, 1972, section 68a.

The new law abolished the criminal offence of buggery[9] and set the age for consent to homosexual sex at 17 by "gender-neutralising" rape and related sexual offences. The effect of this legislation was to lift from the shoulders of gay men in South Australia a great burden of embarrassment, fear and social isolation.

At that date, late 1975, the offence of buggery remained on the statute books of NSW and the other Australian jurisdictions. Nationally, the closet door was only partly open. It was not until 1997 when the law reforms effected first in South Australia was finally followed in Tasmania, the last Australian jurisdiction where homosexuality was legalised.

From its beginning in 1976 the NSW Wran government was lobbied hard by advocates of homosexual law reform. Lex Watson and Dennis Altman, both Sydney University academics, were among the most effective advocates of reform. However the Wran government regarded itself as constrained by criticisms for "moving too fast", criticisms of the kind which had been launched at the Whitlam government. Whitlam's political demise in 1975 made Wran cautious. When elected in 1976 he appointed as head of the premiers department Gerald Gleeson, a brilliant administrator with close connections to the Catholic Church, and a brief to keep a lid on proposals for reform which might be politically counterproductive or – as NK Wran pungently put it – "lead in the saddlebags".

While Dunstan and his supporters such as Peter Duncan had led the way on gay law reform, moving in advance of public opinion, Wran was more careful, and therefore Walker necessarily so. Nonetheless as one of the leaders of the more liberal or progressive branch of the government party, Walker was in constant touch with people who were complaining of the law's discrimination against homosexuals.

If Dunstan had a particular personal interest in homosexual law reform, as he did, and if the position of John Bray as a gay Chief Justice had been remarkable, Frank Walker was equally aware of talented and highly placed people in NSW who suffered the embarrassments of an outdated law. Michael Kirby, later a High Court judge, had not yet "come out". Frank's departmental head, Trevor Haines, a distinguished public servant who was Frank's principal adviser and protector, was similarly placed. It was

[9] Criminal Law (Sexual Offences) Amendment Act, 1975. A new section 68a abolished common law or statutory sodomy.

obvious to decent people that the legal stigma which the law imposed upon homosexuality was grievously unfair and ought to be removed. The politics of all this were difficult for Wran and Walker because of the religious beliefs of a number of ALP MPs and party members.

Various private member's bills for homosexual law reform were initiated during the early years of the Wran government, several proposed by activist and humanitarian George Petersen, MLA for the Illawarra. These were not successful. However in 1982 a "half way house" possibility arose.

Homosexuality and Discrimination

One of the major social laws passed during the Wran era was the Anti-Discrimination Act 1977. This was handled by the Premier's Department and was proposed by the premier himself, but as Attorney-General Frank Walker had a close input into the policy.

Although by 1982 Wran still regarded it as politically impossible to muster the votes for the full legalisation of homosexuality, an amendment made in 1982 to the Anti-Discrimination Act of 1977 was a strong step in the direction of reform. By Act No. 14 of 1982, a new Part IV C of the principal Act set out an array of prohibitions against discrimination on the ground of homosexuality. The political art of the legislation lay in extending the anti-discrimination prohibition beyond mere homosexuality to the situation of a person being "thought to be" a homosexual person, whether he was in fact homosexual or not.

After this law of 1982, it was illegal in New South Wales to discriminate against homosexuals in employment, work, accommodation and other areas.

The extraordinary position was thus that for the next several years the *perception* of being homosexual was protected by the Anti-Discrimination Act regime, while the *reality* of active homosexual life continued to be punishable by imprisonment. The possibility of social disgrace and Reading Gaol remained ever present.

This contradiction was intolerable and was finally recognised as so by the NSW Parliament.

The 1984 bill

The substantial legalisation of homosexuality in New South Wales did not occur until 1984, when Wran himself took the course of proposing a private member's bill. It was done by way of a "conscience" vote because the Catholic Church's position against homosexuality was thought to create a crisis of conscience for Catholic members of the government party. Discreet approaches were made to the incoming Cardinal Clancy who told Wran, presumably through his departmental head Gerry Gleeson, that the church would regard an act of parliament as a matter for the civil authorities, not a matter for the church.[10] I remember a significant day when Barry Unsworth, highly influential with the Trades and Labor Council and the moderate wing of the ALP, came to the Attorney-General's office for discussions. His support for homosexual law reform was very influential. Wran himself moved the legalisation bill, and with the support of "small L" or progressive Liberals such as John Dowd, the criminal penalties against homosexual acts were removed as from 1984.

The age at which males might consent was highly contentious. In Wran's political judgment, the coalition of forces which might lead to the passage of this reformist measure would have jibbed at making the age of gay consent for males the same as for females (16 years, as it had been in NSW since 1910). It was set by the 1984 NSW Act at 18 for males and it stayed at that age until 2003 when continuing pressure for equality of treatment finally permitted it to be set at 16.[11]

Domestic Violence

Frank Walker presided over major changes in NSW law relating to domestic violence, closely related to the issues of rape in marriage and sexual assault law reform. The Crimes (Domestic Violence) Amendment Act (Number 116 of 1982) distinctly changed the landscape relating to domestic violence. It was the product of close collaboration between officers of the Department of Attorney-General and Justice, the Premier's Department, Health and Police. The Womens Coordination Unit of the Premier's Department under Helen L'Orange arranged many meetings with womens groups. Sergeant Keith Mercer of the NSW police undertook the sensitive exercise of convincing NSW police (long accustomed to a culture of "hands off" relating to domestic violence) that in future the protection of battered women by

[10] Source: Charles Bowers, policy adviser during this period to Deputy Premier Jack Ferguson.
[11] Crimes Amendment (Sexual Offences) Act (NSW), No. 9 of 2003.

prosecution should be a police matter, rather than an added responsibility placed on the victim's shoulders. The Bureau Of Crime Statistics And Research under the late Dr Sandra Egger provided extensive statistical evidence relating to the occurrence of domestic violence across all classes – in all electorates, so to speak.

The NSW Crimes (Domestic Violence) Amendment Act 1982[12] did three important things. First, it withdrew the ancient legal rule that a wife could not be compelled to give evidence against her husband. Second, it allowed police stronger powers to enter a home where there had been domestic violence or it was threatened. Third, it established a regime of "Apprehended Domestic Violence Orders" which magistrates could issue. These were rather like the old common law bond to "keep the peace", but specially adapted for domestic violence situations. An important innovation was the telephone warrant, based on having J.P.'s available at night on a roster system, so that police could make an urgent call and obtain an entry warrant at the time when a victim of domestic threats might be most in need of protection. Keith Mercer worked diplomatically with Justice Department officials and women's groups to ensure that this new system could work.

These were revolutionary changes. I remember in the early 1960s seeing the Monday morning parade at Glebe Court of Petty Sessions when drunken wife bashers from Friday or Saturday would face charges of assault. Almost always the now penitent and hung-over defendant would escape partly because the wife had the legal choice of whether or not to give evidence against the violent husband. She usually could not bear this responsibility and would decline to give evidence. She could not be legally compelled to do so. There were at that time no women's refuges, nor any supporting parents pensions. These were not available until after their introduction under Whitlam in 1973. Police dealing with family violence in the 1960s were frustrated by the legal processes and, partly for that reason, reluctant to intervene in "domestics".

The women's movement came to recognise that the right of a wife not to give evidence against her spouse was not a benefit but a burden. From 1982, the new section 407AA of the Crimes Act meant that the moral pressure of choice was removed from the victim. She could afterwards say "I didn't want to dob my husband

in but the magistrate forced me to." This turned out to be correct psychology. It converted many failed prosecutions into effective intervention into a domestic violence situation. The new law was not completely rigid, and permitted the magistrate not to compel the wife to give the evidence if the case could be proved by other evidence or was very minor.

Some Appointments

Walker had the opportunity to appoint or recommend the appointment of numerous people to senior positions. The most important of these was the appointment in 1981 of a new Solicitor-General, Mary Gaudron. She continued as the principal independent NSW Crown law officer until 1986 when she was appointed as a Justice of the High Court.

On legal matters generally, and particularly on the kinds of law reform issues about which I have been speaking, Walker paid more attention to Gaudron than to anyone else. He had been conditioned to do this at Law School where she came top in most of the exams and won the University Medal. As Solicitor-General she gave the words "frank and fearless advice" real meaning, often pointing out an objection or an impossibility from within a cloud of smoke, accompanied by stabbing motions of her favoured cigar. None of Frank's major reforms after her appointment went through without advice from M. Gaudron. Apart from the particular reforms I have mentioned, Mary initiated significant humane amendments to the law of infanticide, and these were enacted. She felt particularly well qualified on this matter, being the only Solicitor-General of NSW who had ever given birth to a child.

I won't refer to all the numerous judicial or magisterial appointments made or recommended by Frank while Attorney-General, but I will mention that he nominated Judge John O'Meally to the Workers Compensation Commission in 1979. O'Meally, in a long judicial career, became President of the Dust Diseases Tribunal, established to deal with pulmonary problems affecting workers, especially the dreadful affliction of asbestosis. O'Meally presided successfully over the humane policy of providing urgent bedside courts to deal with claims which would have been defeated by a combination of a fatal disease and normal court delays. In fact the last position of public service which Walker fulfilled was, after his work in the

[12] NSW Act No. 116 of 1982, date of assent 7 December 1982.

Commonwealth Parliament, as a judge of the District Court and of the Dust Diseases Tribunal working with O'Meally.

During his period in state cabinet Frank set out as a matter of policy to redress the serious gender imbalance of the judiciary. This deliberate exercise was one of the more admirable consequences of an arrangement where politicians appoint judges. For many decades there had been highly qualified female candidates who had not been appointed as partners in law firms, or as departmental heads, or as magistrates or judges. Choosing high quality people, Walker and the cabinet of which he was part attacked gender prejudice. One most notable such appointment was Jane Matthews, appointed in 1980 to the District Court. She was the first ever female judge in NSW and in 1987 was appointed to the NSW Supreme Court, where she is still in fact sitting from time to time as an Acting Justice.

The Dark Side

No "Golden Age" is without blemish. During the golden age of the Roman Empire the emperor Augustus who found Rome brick but left it marble, brought imperial peace to the empire, and fostered marvellous poetry, art and engineering, also butchered his enemies brutally and employed an extensive network of spies and informers to control the populace.

As Attorneys-General, neither FJ Walker nor P Duncan (to my knowledge) butchered enemies or employed informers. However the governments of which they were part were inevitably imperfect. No doubt you will have your own list, but two failures of broad legal policy stand out in my mind. Most notably none of their collective efforts towards aboriginal land rights diminished the excessive proportion of aborigines in their state's prison systems. This remains a major problem to the present. It was a failure then and it is a failure now.

Secondly (although it did not become widely apparent until much later) both of the governments I am discussing failed to remedy the problem of the sexual exploitation of children on an industrial scale by institutions, particularly the churches. This was a major policy failure of the period, although it is true that those at the coalface had glimmerings about the issue. In 1985, when TW Sheahan was Attorney-General but Frank was still in Cabinet, the Wran government introduced a package of bills

dealing specifically with child sexual assault.[13] These were important provisions, and Terry Sheahan was able to call on the same committed advocates for children's and women's rights who had assisted Walker in the 1981 and 1982 amendments.

On the dark side also there were of course personal attacks on leaders of both governments. Don Dunstan did live a double private life, and his enemies attacked him for it, although it should have been none of their business. His private morals were attacked in a pumped-up farrago of half-truths entitled "It's Grossly Improper". The attacks wounded Dunstan and no doubt contributed to his early retirement from the premiership. Courage has its costs. Wran was attacked for (among other things) his friendship with Lionel Murphy, and was fined by the Supreme Court for contempt of court in saying (in response to a question at a press conference) that he believed Murphy to be not guilty of a charge he was facing.[14]

These and similar attacks were in a sense responsive to and a measure of the effectiveness of both Dunstan and Wran in their political programs.

LK Murphy QC, a prodigious reformer of the law, was in close contact with Wran, Walker and Duncan during their most productive law reforming periods. It is ironic that the charge which brought Murphy to trial and ultimate acquittal related to his alleged interference with the independence of the magistracy. Since the establishment of responsible government in NSW in 1855, police magistrates and stipendiary magistrates in NSW had been government officers, subject to official discipline and control. For just one example in 1924, a magistrate called Butler was suspended and disciplined by the Public Service Board for comments adverse to the government.[15] The political character of this procedure was criticised in Parliament but because the arrangements suited officialdom, magistrates remained subordinate, and continued to lack independence, for another 60 years. This situation persisted until 1985. The statute which the Wran government passed finally bringing legislative independence for NSW magistrates had long been a policy aim of Wran, Walker and Murphy. Wran and Murphy had advocated this specific policy in meetings of the ALP Legal and Constitutional Committee in the 1950s and 1960s. It was a policy view strongly held by Walker also.

[13] Crimes (Child Assault) Act.
[14] *DPP* v *Wran* (1987) 7 NSWLR 616.
[15] SMH 30 July 1924, p.13; *Newcastle Morning Herald*, 14 August 1924, p.7.

After nearly 30 years I remain puzzled at how LK Murphy – although finally acquitted - came to be charged and tried for alleged conduct totally at odds with legislation he had himself urged for many years and helped to guide into the statute book. The case against him was based on disputed words spoken in a particular context. I believe there must have been misinterpretation or misunderstanding. LK Murphy was a vigorous rationalist and secularist, highly critical of religious influence throughout human history, although himself keenly committed to religious tolerance. Chief Magistrate Briese, the supposed object of an improper approach by Murphy to influence a case pending in the magistrates courts, was highly regarded as a good magistrate and as a man of probity committed to the independence of the magistracy. That was how I knew him. In recent years he has become known as a mediator between warring factions of fundamentalist creationism in Australia and America.[16] Looking back after nearly 30 years, I surmise that the unhappy prosecution of Lionel Murphy in 1985 and 1986 may well have come about due to misinterpretation or misunderstanding of the 1983 "Australian Humanist of the Year", LK Murphy, by the future creationist mediator, Clarence Briese.

In any event, the fire and passion for law reform radiated by the brilliant polymath LK Murphy certainly influenced Walker and Duncan. In 1973 Murphy when Commonwealth Attorney-General had empowered the first national Law Reform Commission and it was highly productive under Justice Michael Kirby.

I recall numerous social meetings during the Walker and Duncan Attorney-Generalships where each called on Murphy for advice and guidance on law reform, advice which he enthusiastically and tirelessly provided, not unlike Whitlam on sewerage of the outer suburbs or the primacy of the Commonwealth within the federation.

Finale

The Walker-Duncan period of law reform is best judged from a distance. In the following decades the capacity of Labor Attorney-Generals to legislate major legal changes may have been hindered by a more conservative mood. To a certain extent, great political achievements involve "catching the historical wave". In Dunstan, Duncan had a leader with a passionate mind to change things. In Wran, influenced

[16] See inter alia Michael McKenna's piece in *The Australian*, 4 June 2007: *"Biblical Battle Of Creation Groups"*.

by Murphy, Walker had a similar leader in similar times. But even if law reform achievement is advanced by catching an historical wave, it does not happen without courageous law reformers prepared to do the work and fight the battles. Both Duncan and Walker were courageous reformers and had to contend stubbornly and skilfully against serious opposition.

As a sitting judge I will not venture any comment closer than the last Premier but four. Overall, despite the “lead in the saddlebags” which the Wran administration had to carry through (among other things) the unhelpful activities of Rex Jackson and Murray Farquhar, the Walker Attorney-Generalship was indeed a golden age of law reform. In the end, substantial policy achievement, bringing real benefits to many people, trumps anything else. I have described a few of those achievements, particularly where I was myself involved, but there were many others including major reform of the laws of bail, the introduction of legal protections for tenants and significant protections for the mentally disordered facing criminal trial. Walker’s reform enthusiasm encompassed child welfare and children’s courts, an area in which very substantial legislation was enacted, Frank relying to a large degree on the valuable policy input of his long standing adviser Hans Heilpern. Likewise in relation to environmental issues, I recall Frank involving himself in the so-called “Battle of Terania Creek” in 1979, one of the early contests over clear felling of native forests by the Forestry Commission. Frank sent his media adviser Laurie Patton north to report on the situation, and accepted Laurie’s advice that the trees were worth saving. The internal battle within the government was fought and won. The trees were saved, and so was the seat in the 1981 election.

Time forbids a full exposition here of all the matters I have mentioned. A book would be required. Fortunately, you will be gratified to learn, I am writing one.

I conclude by saying a few personal words about FJ Walker. He was in my older brother’s year at Fairfield Primary School in the 1950s, but I did not get to know him until Law School in the 1960s. In late primary school, Frank’s family went to New Guinea for a few years. The fire in his belly which inspired Frank’s work on aboriginal land rights was sparked, I believe, by his time as a youth in New Guinea mixing with local children as an equal. It gave him an abiding objection to racism in all its forms.

Frank's law school days were a highly political period. The cohort which had its final year in 1965 included on the one side people like Frank, Mary Gaudron, myself and Trevor Haines, and on the other hand various budding Liberal Party politicos including Philip Ruddock, former Immigration Minister in the Howard administration. Bronwyn Bishop – then Bronwyn Setright – was part of the Sydney law school cohort around the same time.

Frank was a man with a passion for public service and the public interest. He was never a rich man nor set out to become one. He had prodigious political skills based on an instinctive sympathy for people, and an understanding of what motivated them for good or ill. A stern political combatant, he enjoyed a laugh and a drink, and was popular with all manner of people, most particularly with his widow Pam who is here tonight. She was his right hand during his ministerial years in Canberra and his wife, confidante and sustaining helpmeet in the several difficult years of his final illness.

Vale Frank.