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The Honourable Frank Walker QC had a fresh, open face and ready smile. He was a good looking man. When I looked I was disappointed to see that there was no photograph to accompany his entry in *Wikipedia*. For those who knew him, and those who did not, a photo would convey his personality. Like all references to Beria after the death of Stalin, his photos were airbrushed away. There is no reason for us to inflict the same treatment on Frank Walker. His photo would show what he was: a strong and determined change agent. A force for good in the law.

Our hero still pops up in the law books. Early in 2020, the *Australian Law Journal* carried an obituary of the late Justice Jane Mathews AO.[1] She was the first female lawyer to be appointed a State judge in New South Wales.

[*] Based on an address to a webinar originating from Sydney, conducted on 28 October 2020 as the Frank Walker Memorial Lecture 2020.
[**] Justice of the high Court of Australia (1996-2009); President Court of Appeal of Solomon Islands (1995-6); President Court of Appeal of NSW (1984-96); Judge of Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1995-84). Patron of the Community Restorative Centre (2012-).
[1] (2020) 94 ALJ 78 at 78.

Before that, she had taken a leading role as counsel assisting Elizabeth Evatt's Royal Commission on Human Relationships. This took the late Justice Mathews into law reform concerning a motley collection of hot topics that would have gladdened Frank Walker's heart: "Contraception, abortion, sex education, domestic violence, rape and the police, the judicial treatment of rape victims, the changing roles of women in society, child care, child abuse and discrimination." Nothing controversial. By the time the Evatt Royal Commission had finished its work in 1977, Frank Walker was Attorney-General for New South Wales. He possessed the not insubstantial power of recommending judicial appointments. With the Hon. Neville Wran QC as Premier, they were a strong team supporting law reform and change.

According to the *Australian Law Journal*, when Jane Mathews was 39 years of age in 1980, she was approached by Frank Walker in a typically dignified and subdued way, suitable to the first law officer of the State to accept judicial office:[2]

> "[The offer of appointment] was a complete surprise. The call came from Frank Walker, the NSW Attorney-General. I'd been on the Bar Counsel and got to know him. He rang and said, "I want to appoint you to the District Court and if you say 'no', I'll thump you". So, of course, I didn't say "no"."

The appointment led on to many further and later challenges for Jane Matthews. It also led to similarly progressive appointments of others. Frank

[2] As told by Mathews J in an interview with *NSW Bar News* 2015.

Walker and Neville Wran were in a hurry to change what they saw as the conservative complexion of the judiciary. The power of politicians to nominate, and in Australia's case to appoint, judges is one of the most important powers belonging to the executive branch of government. This was a power not lost on President Donald Trump.[3] Not a few 'reformist' governments in Australia appear to have been unaware of, or indifferent to, this responsibility. But Neville Wran and Frank Walker were not.

Not long before this encounter with Frank Walker my own professional life intersected briefly and indirectly with his. When I commenced my legal studies, I applied to all of the best legal firms for articles of clerkship. Despite very good grades, I could not get an offer. Eventually, I applied to one of the smaller firms that worked on cases referred by Mr Bill Ritchie of the Labor Council of New South Wales in the field of workers' compensation. It was MA Simon and Co, housed at 42 Hunter Street, Sydney. My work with them gave me unrivaled experience in the dark arts of litigation, virtually from the first day. After my graduation in Law in 1962 I left the firm. Mr Simon, the irascible principal solicitor, offered me an opportunity to open a branch office of the firm in Newcastle. I turned this down and took another path. In 1965, MA Simon's business partner, Ray Burke also quit the firm and was admitted to the Bar, later to become a judge of the Workers' Compensation Commission. Michael Fawkner a clerk had also quit. Mr Simon, was incapable of running the firm on his own. Indeed, he was not obviously capable of doing much at all once his professional staff decamped. So he

[3] The reference is to the appointment of Justice Amy Coney Barrett to the Supreme Court of the United States of America following the death of Justice Ruth Bader Ginsburg on 18 September 2020, under consideration at the time of this lecture.

interviewed and appointed a very young solicitor to fill the void. That solicitor was Frank Walker.

David Coleman, who was at the time an employed clerk recalls a young Frank Walker being taken around to meet the team. He recalls thinking at the time: “Who is this poor bastard?”. However, Frank Walker was already dreaming of a political career. Somehow, he got it into his head that Maurie Simon, on the list of Labor Council solicitors, might be able to help him in piranha pool of New South Wales Labor politics. This was an early instance of naivety that Frank Walker quickly discarded. Later Frank Walker, like David Coleman, was to leave MA Simons to work at Taylor and Scott, another firm of solicitors on the Labor Council list. In this instance, Frank Walker worked in the industrial section, generally considered an intellectual elevation after the endless workers’ compensation cases that kept both firms afloat. Still, the dream of politics burned brightly in Frank Walker’s breast. Within 3 years he had been elected Member for Georges River in the NSW Parliament. This was a State seat he held from 1970 to 1988. When in 1976 Neville Wran led the bruised and battered Labor Party to government, so quickly after the federal dismissal in 1975, Frank Walker was quickly appointed New South Wales Attorney-General. It was an office he held until 1983. Because he had been born in 1942, he was only 34 when he received the Attorney’s commission. He had acquired a Master of Laws Degree from University of Sydney. He had displayed strong interest in the legal problem of disadvantaged people. These were qualities that attracted him to Neville Wran’s attention. His later ministerial appointments also reflected his commitment to the disadvantaged: Aboriginal Affairs (1981-84); Youth and Community Services (1983-88); Housing (1983-88) and Minister for the Arts

– invariably a disadvantaged group in the eyes of most Australian politicians - (1986-88).

The story of Frank Walker's early political years in State politics was recounted by Judge Greg Woods QC in his inaugural lecture in this series.[4] He described how, in the two surviving citadels of ALP government in Australia, Dunstan in South Australia and Wran in New South Wales, reform minded Attorneys General of great talent emerged in the form of Peter Duncan and Frank Walker. They were "brave law reformers" because they "needed to be" if they were to shift the entrenched opposition facing them: mostly in their own Party. However, unlike some who preceded and some who followed them, Walker and Duncan did not postpone tasks of law reform because they were sensitive or might lose votes. In particular, they addressed the rights of Aboriginals and the fought for the rights of homosexuals and women because it was the right timing to do so. They also tackled "prudish censorship of art and literature". Judge Woods attributed their reformist attitudes to the energy that arose in the preceding decade created by the anti-conscription protests of the Vietnam War. It was also their education in Law at the Sydney and Adelaide Universities.[5] In the case of Aboriginals, Frank Walker secured the passage of the New South Wales *Aboriginal Land Rights Act* No. 42 of 1982. This was 12 years before the decision of the High Court in the *Mabo* case.[6] Frank Walker's Act established a fund for repurchasing native land already alienated. It also created land

[4] Judge Greg Woods QC, "A Golden Era of Law Reform", unpublished, 11 November 2014.
[5] Woods, ibid, 5.
[6] *Mabo v Queensland [No.2]* (1995) 175 CLR 1.

councils to assist First Nations Peoples to participate in self-government and to secure social advancement.[7]

From his post in Adelaide with peter Duncan, Dr Woods came to work with Frank Walker as Director of the Criminal Law Review Division of the State Attorney-General's Department in Sydney. In 1981 Walker introduced reform of the legal definition of "rape". He extended its reach to husbands who, astonishingly up to that time, enjoyed an immunity from prosecution for alleged rape of their wives. Various other changes in law and legal procedure were introduced. By this time, Frank Walker was cajoled and sometimes encouraged on the path of law reform by a young NSW Solicitor-General of great legal eminence. She was later to be my colleague on the High Court of Australia, Mary Gaudron.[8]

Homosexual law reform meandered slowly towards belated achievement in New South Wales. The journey began with the passage in 1982 of an Anti-Discrimination Act that forbade various forms of discrimination on the ground of homosexuality. This was remarkable given the continuance of crimes involving adult private consensual acts.[9] As Greg Woods explains it, the enactment of reforms abolishing criminal offences of gay sex in 1984 came only after the closest consultation with Cardinal Freeman and the Catholic Church as well as with Catholic members of the ALP Government. Inferentially, it would not have been advanced, even then, without receiving the nod from the Church. As recently as 1959 an apparently decent Labor

[7] Woods, ibid, 7.
[8] Mary Gaudron was Solicitor-General for NSW in 1981. See Woods, ibid, p.16. She was appointed a Justice of the High Court of Australia in 1987 and resigned in 2003. She was the first woman Justice.
[9] *Anti-Discrimination Act 1977* (NSW), as amended by Act No. 14 of 1982, Pt IVC.

Attorney-General of NSW, the Hon. Reg Downing MLC [later AC, QC], had established an inquiry into the "epidemic" of homosexuals in the State. He and Police Commissioner Colin Delaney determined to stamp this vice out. He persuaded his parliamentary colleagues to re-open Cooma Goal in NSW as an institution specifically to receive and detain a particular cohort of unpleasant prisoners – gay men. This was an initiative of the State labor Government. It was reputedly the first special homosexual prison in the world. Even the Nazis had not done this. So this was the ethos of many of Frank Walker's parliamentary colleagues when he entered the NSW Parliament only 13 years after the Cooma experiment. This feature of political life was intensely frustrating for Frank Walker. But he played the cards that were available in his pack.

As described by Greg Woods:[10]

> "Frank was a man with a passion for public service and the public interest. He was never a rich man; nor set out to be 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 competitor, he enjoyed a laugh and a drink and was popular with all manner of people."

After his years of political service in New South Wales, Frank Walker was elected to the Federal Parliament, holding the seat of Robertson, around Gosford, NSW, from 1990 to 1996. He was appointed to federal ministerial

[10] Woods, above n 5, 20.

office from 1993 to 1996. Following his loss of that seat in 1996, he took up judicial appointment on the Compensation Court of NSW (1997-2003) and later the District Court (2004-6) and the Dust Diseases Tribunal (2004-6).

During his public offices, Frank Walker and his family suffered the calamity of the loss of two sons to suicide. He did not disguise the mental disabilities that his sons had suffered from: schizophrenia and bipolar disorder. He turned his family's experience to public purpose and became the President of the NSW Schizophrenia Fellowship and Vice-President of the Mental Illness Fellowship Australia. In these bodies he offered support to families struggling with cases of schizophrenia, bipolar disorder and suicide. His knowledge and empathy in this area was reflected by his appointment in 2008 as Deputy President of the Mental Health Review Tribunal. He died in Sydney on 12 June 2012 aged only 69.

Frank Walker was greatly supported in his two political incarnations by his widow Pam and by a team of loyal friends and admirers. They have established and sustained this lecture series. Through his life, in the public and private spheres, he contributed to making our world a better place. We preserve his memory and challenge. These lectures aim to inspire all of us to walk, as he did, in the righteous path of law reform. It requires persistence, sometimes against the odds. And sometimes courage and dedication to causes that some regards as unpopular.

PRISONERS: DISPISED … NEGLECTED

Special disadvantage of prisoners: There are many groups and individuals who suffer serious disadvantages that deserve our attention. Thinking of the life of Frank Walker and his sense of moral obligation towards unloved targets of hostility and discrimination, I consider that one group whom he would certainly wish us to remember are those confined in prison and detention.

Jane Matthews, whom he proposed for judicial office, was a great lover of music. In Handel's Oratorio, *Messiah*, soon after the mid-point, comes a great aria: "He was despised and rejected of men". It is a meditation on the isolation of Jesus on the day of his passion. This is the story of a prisoner. He was subjected to an unjust trial; a wrongful conviction; and brutal punishment. The aria is normally sung by a mezzo soprano or counter tenor. It is designed to focus our minds on the rejection and special suffering of Jesus and all prisoners. It moves with slow grace and a quiet repetition of its themes.

Those who are familiar with *Messiah*, including those who are not religious, should invite this majestic music into their minds as I turn to the special challenges we face today affecting prisoners and detainees. Some of them are challenges peculiar to the current time of pandemic. Others are challenges particular to our society as it is. Others still are challenges because of the procedures we have adopted to respond to assertions of miscarriages of justice. In the balance of these remarks I wish to deal with each of these categories in turn.

Prisoners and COVID: Prisoners remain a much neglected minority in our society, including in the legal community. This has probably been the case from the beginning of European settlement in Australia. The basic problem is that prisoners are unpopular, despised and feared. They are commonly isolated from their fellow citizens. They generally have no way of speaking effectively to society concerning the challenges they face. They are dependent on others to give them voice. This means, they are dependent on civil society organisations that are willing to point out particular and general injustices. Otherwise they are dependent on public guardians, concerned experts or statisticians and other providers of information to society, from whom lessons for reform may be drawn.

In his inaugural Frank Walker Lecture, Judge Woods referred to the important innovation of the New South Wales Bureau of Crime Statistics and research created by Frank Walker's predecessor Ken McCaw. It was designed to provide objective, politically neutral but persuasive statistical and like data on the predicament faced by prisoners and other offenders, stated in a cold, unadorned terms. The unexpected catastrophe of COVID-19 that has struck our society, and that has special implications for prisoners today, has required this clinical approach so as to found the response upon sound empirical data. This was an approach Frank Walker followed. The COVID-19 pandemic first appeared in reports out of Wuhan, China in November and December 2019. It was notified by China to the World Health Organisation on the last day 2019. Its impact on the world, and on Australia, in 2020 has been profound. That impact has included a special impact on people housed in custodial institutions, including on remand or in immigration detention. Because COVID-19 is a disease, especially prone to cause death and

disability in older persons who become infected, strategies involving social distancing, isolation and reduction of contact have been recommended. The close proximity into which people are forced when in custodial detention has resulted in a heightened risk of infection amongst prisoners and detainees.

In recognition of this fact, lawmakers in all parts of Australia (and overseas) have taken initiatives to address custodial overcrowding, as well as the scarce facilities for housing and accommodating people after release from detention. As Dr Ruth McCausland and Dr Mindy Sotiri have explained,[11] while crime rates have been decreasing over many years in NSW, the prison population has increased. Overwhelmingly, those incarcerated frequently come from disadvantaged backgrounds and have mental health and addiction issues. Many have been diagnosed with a cognitive impairment such as intellectual disability or acquired brain injury. First Nations men make up a quarter of the male prison population and First Nations women, a third of all incarcerated women. That is, sadly, in 2020 not a statement that will shock this audience.

Most people in NSW prisons are imprisoned for minor offences, including breach of bail conditions. A third of people in NSW prisons are held on remand, meaning that they have not been convicted of the crime they have been charged with. The majority will be back in the community within 12 months. To address many of these issues and the neglect of custodial institutions a new initiative has been created of which I am a member. It is the Justice Reform Initiative. Its members were co-signatories to a recent

[11] McCausland and Sotiri, https://www.theguardian.com/australia-news/commentisfree/2020/apr/15/vicious-cycle-for-inmates-who-are-homeless-on-release-needs-urgent-action.

appeal calling on Australian governments to release people from prison, detained on short sentence and on remand, in order to avoid a COVID-19 crisis in our prisons.

The NSW Government have responded with positive steps towards this objective. However, a major hurdle is a lack of accommodation for people leaving prison. This is not a new problem: NSW has a chronic lack of beds for people [in] existing prisons, both short and long-term. Even without the potential for extra people to be released as a response to COVID-19, data in the State from 2019 indicates that, over the following 3 months, approximately 5,000 prisoners will be discharged from custody.

> "At least a quarter of these people will be released into homelessness or housing instability. Where will they go? If they cannot return to live with family and there is no accessible housing, what will happen to them? Of all the complexities facing people leaving prison, it is these questions that remain the most difficult to find answers to. Yet without a doubt they are, the most urgent… [This crisis] is highlighting the fact that prisons are the stuff of public health nightmares. People with already poor physical and mental health and complex support needs living in stressful, unsanitary, overcrowded conditions are a challenge growing to a crisis. And despite the high walls, prisons populations are not quarantined from the rest of society. Those who are incarcerated and working in prisons come and go and live amongst us."[12]

[12] McCausland and Sotiri, *ibid.*

Because this analysis is plainly addressed to the issues of mental disability and cognitive impairment amongst people in custody, I have placed this first on the catalogue of issues I wish to address. I must acknowledge a special interest in this respect. For nearly a decade I have been patron of the Community Restorative Centre (CRC). This is an organisation that works with politicians of all persuasions. It seeks to button hole them, capture their ears and minds and speak to their intelligence as well as to their hearts. The CRC supports people leaving prison when they need to reintegrate into society. This involves discussion prior to release; assistance to find somewhere to stay once released; and meeting on the day of discharge if they do not have a family or others who can immediately support them. The CRC also supports people after release to meet their parole conditions. It attends to housing and welfare appointments. All of this is obviously in the interests of the rest of us in society. Unless these highly practical and increasingly urgent tasks can be addressed, laws for the release for short-term prisoners alone may all too quickly spin the revolving door that sends the prisoners into society. However, it is then waiting, all too soon, to bring them back into the familiar, but now increasingly risky, environment of prison, custody, control, supervision and incarceration in the age of COVID-19.

I fully understand that society does not want to spend, and cannot easily afford in hard economic times, to pay the added cash amounts for long-term housing and supportive environments for highly dependent people in our community. However, COVID-19 has presented a new, different, special and increased risk factor. As Drs McCausland and Sotiri also point out:

> "This health crisis is escalating and exacerbating existing inequalities… of race, disability, gender, income. … It is showing us that prisons compound health and social problems rather than fixing them, and that de-carceration is possible… How we treat people inside and as they leave NSW prisons should be everybody's concern."

What they say in the context of NSW, applies throughout the Commonwealth.

Indigenous imprisonment: Another long-term institutional feature of the criminal justice system in Australia is the seriously disproportionate number of First Nations (Indigenous) people who enter our State, Territory and other institutional facilities. This problem is well known. It has been repeatedly revealed and examined over the past four decades. In December 2017, the Australian Law Reform Commission (ALRC) delivered a report to the Federal Attorney-General: *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.[13] It highlighted the disproportionate incarceration rate in these terms:

> "Although Aboriginal and Torres Strait Islander adults make up around 2% of the national population, they constitute 27% of the national prison population. In 2016 around 20 in every 1000 Aboriginal and Torres Strait Islander people were incarcerated. Over-representation is both a persistent and growing problem – Aboriginal and Torres Strait Islander people incarceration rates increased 41% between 2006 and

[13] ALRC 133 (December 2015) Executive Summary, 20-21.

> 2016, and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over the decade widened. … The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found [in 1991] that the Aboriginal population was grossly over-represented in custody. It noted that 'Aboriginal people are in grossly disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody. … [Indicators] of disadvantage… contributed to this disproportionate representation, including that 'Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation… While the statistics concerning the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples are alarming, it is important to bear in mind that the majority of Aboriginal and Torres Strait Islander people never commit a criminal offence."

The ALRC recommended many proposals for reform of this serious and seemingly intractable challenge. These included reinvestment in justice and reconnection of the criminal justice system with local communities; reform of the law of bail; reform of sentencing and Aboriginality; consideration of community-based sentencing; removal or reduction of mandatory sentencing; attention to prison programs and parole; improvement in access to justice; particular attention to women's incarceration, attention to problems of alcohol addiction; attention to the special problems of loss of driver's licenses and to the need for better community consultation.

Although there is much goodwill across the political landscape in Australia for dealing with these problems, new energy must be addressed to them, and their fundamental causes. More funding has to be found to address the solutions as a matter of urgency.

In September 2020 it was announced that the Australian Government will be called before the Human Rights Council of the United Nations in 2021, on a rescheduled date, to explain why it has failed to meet important commitments to protect the rights of Indigenous peoples (as well as refugees and asylum seekers). Perhaps symbolically, the Australian report under its Universal Periodic Review (UPR) obligations will now reportedly commence before the Human Rights Council on 25 January 2021. This is a day before the anniversary differently described as "Australia Day" or "Invasion Day" by some Indigenous Australians. Human Rights Watch Australia has commented that:

> "Indigenous Australians remain significantly over-represented in the criminal justice system, often for minor offences like unpaid fines. Death in custody of Aboriginal and Torres Strait Islander prisoners remains a pervasive problem despite the government's commitment at the 2015 UPR to address mortality rates in prison."[14]

This aspect of our criminal justice system remains unsolved. Attention to the ALRC report is urgent. It would not be saying too much to suggest that, especially in the context of the added dangers of COVID-19 in custodial

[14] Human Rights Watch, "Australia to appear before Human Rights Council in January 2021" https://www.hrw.org/news/2020/09/17/australia-appear-un-rights-council-january.

institutions, we have reached a crisis point in relation to Indigenous custody. Words are not enough in tackling this crisis.

In July 2020, the Australian Bar Association (ABA) joined in expressions of disappointment at what it described as the "low justice targets" set by the Commonwealth for the reduction of the incarceration of First Nations people across Australia. The President of the ABA (Matthew Howard SC) announced that ABA was supporting the calls by the Law Council of Australia and the New South Wales Bar Association for "more ambitious justice targets". Specifically, he said, "Reducing the incarceration rate of Indigenous Australians by only 15% by 2031 [the present goal] is a profoundly disappointing effort. Three "well thought out and detailed measures" were urged:

- Implementation of the *Voice* to Parliament, contained in the *Uluru Statement from the Heart,* agreed by First Nations leaders from around Australia meeting at the heart of our country;
- Raising the minimum age of criminal responsibility from 10 to 14 years of age; and
- Implementation of the recommendations of the ALRC report.

The United Nations Committee on the Rights of the Child has indicated that, following ratification of the *Convention of the Rights of the Child*, more than 40 State parties have raised the minimum age for criminal responsibility levels. The Committee states that "the most common minimum age of criminal responsibility internationally is now 14". A similar law reform has been proposed in Australia by the Justice Reform Initiative. That body

includes the former High Court Justice, Sir William Deane and Dame Quentin Bryce, both past Governors-General, as Patrons in Chief as well as Elizabeth Evatt, Mary Gaudron, Professor Patrick McGorry, myself and others as Patrons. All have urged attention to this issue. Staying still will mean that: we will drown in our own inaction. It is not an option.

Complaints of Unfair Convictions: The third initiative that is necessary in Australia is eminently achievable, relatively inexpensive and straight-forward. It has already been secured, in part, in some Australian jurisdictions. Yet others, including Frank Walker's NSW, appears to be "dragging the chain". Dragging the chain is something that prisoners and detainees experienced in convict days. Here again, reform is needed.

In virtually every country and jurisdiction where provision is made for criminal trials, it is usual to provide for appeals to be available for those who complain that they have been unlawfully, falsely or unjustly convicted of the crimes with which they were charged. Indeed, nowadays the facility of appeal in such an instance (or at least "the right to [have] his conviction and sentence … reviewed by a higher tribunal according to law") is now part of international human rights law.[15] Australia is a party to that obligation. We are duty bound to provide this facility as a right – not as a possible privilege that might be granted, or refunded, by prosecutors or other public officials at their discretion.

[15] *International Covenant on Civil and Political Rights*, Article 14.5.

In 1907, for the first time, an English statute was enacted providing a right of appeal against a criminal conviction and sentence.[16] This Imperial statute was quickly copied in many jurisdictions of the British Empire, including throughout Australia. The relevant provision in NSW was the *Criminal Appeal Act 1912* (NSW). Such appeals include a power and duty of a Court of Criminal Appeal to determine whether a conviction was "unsafe". Such appeals are normally heard and determined before a court comprising three senior judges. A percentage of appeals are upheld. However, against all the appeals brought, that percentage is comparatively small. The process is partly dependent upon the talent, experience, time and dedication of the participants.

Securing top advocates to represent an appellant, especially if they are already in prison with limited resources, depends upon availability of funds or of dedicated supporters for the prisoner, usually persons convinced that he or she is actually innocent. Sometimes, such appeals require a second hearing in the courts.[17] Sometimes they additionally need securing special leave to appeal to the ultimate court, the High Court of Australia.[18] Not many prisoners have the funds and appropriate legal support to secure top counsel and especially if they must proceed beyond the first appellate level.

In the recent widely reported decision of the High Court of Australia in *Pell v The Queen,*[19] the first level appeal was rejected (by a majority) in the Court

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[16] *Criminal Appeal Act 1907* (GB).
[17] *Mallard v The Queen* (2005) 224 CLR 225; 157 ACrimR 121; [2005] HCA 68. A problem has been held to arise in the bringing of a further appeal under the *Criminal Appeal Act* 1912 where the orders in the first appeal have been perfected. See *Postiglione v The Queen* (1997) 189 CLR 295 per Kirby J or 333, 343-4.
[18] As in *Mallard*, above n. 16, also in *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.
[19] *Pell* (2020) 94 ALJR 394 at 413 [127]; [2020] HCA 12 at [127].

of Appeal of Victoria. The Chief Justice and President of that Court concluded that the complainant was believable and that the testimony of the victim supported the conviction that followed the unanimous verdicts of the jury. However, in the High Court of Australia the judicial conclusion was reached that "acting rationally on the whole of the evidence [the jury] ought to have entertained a doubt as to the [prisoner's] guilt in respect to each of the offences for which he was convicted." That conclusion was reached unanimously by the Justices of that Court.

Whilst the procedures of the Court of Criminal Appeal constitute an undoubted protection against miscarriages of justice, it has several relevant defects. These include the limited time typically available for argument and consideration of the case; the heavy load of case lists faced by the judges; the necessary sharing of responsibility for the writing of decisions; the lack of experienced and adequate expert scrutiny of facts and law essential for the decision; and the opinionative character of the outcome, resting, as it does, on assessments of unsafety and injustice in the trial outcome. Appeals are scarcely a failsafe protection against wrongful convictions. This had led to, in several jurisdictions, consideration of further protections that should support, or change, the current system.

One such protection has been introduced in the statute law of South Australia, Tasmania and Victoria. A similar proposed law is presently before the Parliament of Western Australia. This new protection involves providing a prisoner who complains, but who has not prevailed in the first appeal to the intermediate court in defined circumstances. This right may be granted by the intermediate court on the basis that "fresh and compelling evidence of a

wrongful conviction" has been shown.[20] Until now, the vicissitudes of a petition to the Governor has been necessary to gain a second right to judicial scrutiny. In practice, the new legislation has not occasioned a flood of cases. It has resulted in occasional corrections of error. Such a limited reform should not, one would think, unduly delay a modern Australian legislature, given the demonstration of the risks of error in the 1907 template.

Australian jurisdictions that have delayed amendment to that template are dragging the chain. They should reform the statutes in the remaining jurisdictions without further delay. It is remarkable that 7 years after the South Australian amendments were enacted we are still waiting for the same reform in New South Wales, and other jurisdictions, despite the comparatively swift example from the one state of Australia that never had convicts.

A more substantial reform, that has been adopted in the United Kingdom builds on the demonstrated weaknesses of the *Criminal Appeal Acts,* from an institutional point of view. This is the creation of a Criminal Cases Review Commission (CCRC). Such a body was established in the United Kingdom following concerns over wrongful convictions, initially in the so-called "Irish cases" in the 1980s and 1990s. [21] The utility of the CCRC has been demonstrated by the fact, that since its creation, 440 cases have been referred to the courts by decisions of the CCRC. This has resulted in

[20] *Statutes Amendment Appeals Act* 2013 (SA), inserting s353A into the *Criminal Law Consolidation Act 1935* (SA). See now *Criminal Procedure Act 1921* (SA), s159.

[21] Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?*, Palgrave Macmillan, 2009, London,; David Hamer and Gary Edmond, *Wrongful Convictions and Adversarial Process*, (2019) 38 UQldLJ 185; David Hamer, *Wrongful Convictions, Appeals, the Finality Principle: The Need for a Criminal Cases Review Commission*, (2014 37 *UNSWLJ* 270 at 292-4.

convictions being overturned in all cases so referred. These cases have included over 100 murder convictions. They extend to convictions of 4 prisoners reviewed by the UK CCRC even after the prisoner had been hanged, based on the jury verdict, set aside *post-mortem* on grounds that it was unsafe or unreliable.

In New Zealand a CCRC has been established and personnel have been recruited. In December 2019, in Canada, Prime Minister Justin Trudeau announced the intention of his re-elected government to establish a CCRC for Canada. Although action on the Canadian promise has been delayed, a recent report from Canada indicated that establishment of a CCRC is still part of the policy of the Government.[22] Yet despite recommendations and urging, not a single jurisdiction in Australia has established a CCRC. Inferentially, the levels of miscarriage would be similar to those found in the United Kingdom, New Zealand and Canada. What is there about the Australian legislative process of reform in criminal matters and matters involving prisoners that makes us so perfect? Or, alternatively, so complacent and unreflective about the institutional weaknesses that we persist with against the evidence?[23]

CONCLUSIONS

[22] https://www.thestar.com/politics/federal/2020/11/08/ron-dalton-knows-what-its-like-to-be-wrongfully-convicted-of-murder-he-doesnt-know-why-ottawa-isnt-moving-faster-to-help-people-like-him.html?fbclid=IwAR0YIWi37vdNvbCaFo3BRtBJHX_cfIRlFx1KSV4mgpImgmvkOqA-hY30B4Y

[23] M.D. Kirby, "A Right of Appeal as a Response to Wrongful Convictions: Is It Enough?" (2019) 43 *Criminal Law Journal* 299 at 305.

Frank Walker's sharp intellect and strong sense of justice and his particular concern for the disadvantaged for Indigenous Australians, for people with mental disabilities and for those who complain about "the system" would cause him to raise his voice on issues such as these. We, who survive him, can heed his example. We should raise our voices. Injustice, inequality, discrimination and bad fortune can affect the innocent. The struggle for justice continues. The need for law reform remains. Lawyers who care, across the political spectrum, continue. We should all give voice to the call for change until there is action from the political leaders of today.