

Contemporary Comment

THE NAGLE ROYAL COMMISSION 25 YEARS ON *Speech delivered to NSW Council for Civil Liberties, NSW Parliament House, 5 September 2003*

Introduction

It is 25 years since the release of the *Report of the Nagle Royal Commission into NSW Prisons* in 1978. The *Report* and the events leading up to it constituted a watershed in NSW and indeed Australian penal history. The *Report* came to signify a period of reform in NSW penal affairs. That period, presided over by Prof Tony Vinson as Chair of the NSW Corrective Services Commission, backed at least initially by the Wran Labor government and significant sections of public opinion scandalised by the revelations of brutality, incompetence and cover-up revealed at the Nagle Commission, was relatively short lived, but highly significant none-the-less.

The reform momentum was slowed by a combination of the industrial resistance of the prison officers union, the resignation of Tony Vinson, a hardening of media and public attitudes to prisons and prisoners, and government backtracking, and was officially laid to rest a decade later when the bellicose Michael Yabsley took over as Minister for Corrective Services in the Greiner government of 1988 and sought to be remembered as someone who had, as he expressed it, 'put the value back into punishment' (O'Neill 1990). There followed a period of upheaval and violence in the NSW prison system, undoing many of the gains made in the Nagle/Vinson reform period (Brown 1990, 1991). Following Yabsley's removal in the early 1990s we have seen a decade of cautious penal politics in which the major political imperative has been to keep prisons off the front pages and keep quiet about any reforms, against the backdrop of a rapidly increasing prison population, a massive prison building program and a volatile and punitive populist debate over law and order and the criminal justice system.

In attempting to make an evaluation of the Nagle Royal Commission it is important to see it in its context. That context was one of widespread upheaval from the late 1960s onwards as the established order and traditions were rocked by anti-institutional movements in universities, schools, psychiatric hospitals and elsewhere and by the rise of new political subjectivities such as second wave feminism, black power, land rights, green bans, environmentalism, 'alternative' subcultures, anti-colonial independence struggles internationally, and widespread and growing opposition to the VietNam war.

When in October 1970 Superintendent Pallot, Governor of Bathurst Gaol threw the first punch in leading a 'systematic flogging of a large number if not all of the prisoners in the gaol' (to use the belated admission of counsel for the Prison Officers Vocational Branch of the Public Service Association at the inquiry) little did he realise that he was setting in train a sequence of events which was to lead to the Nagle Report. The road to Nagle was cleared by prisoners at Bathurst 1970, such as Prisoners Action Group (PAG) founder Tony Green

and others, who came forward with accounts of the bashings; lawyers including many affiliated with NSW Council for Civil Liberties (CCL), in particular Jack Grahame, Tom Kelly and Jim Staples, who circulated those accounts, with the assistance of members of the ALP opposition in parliament, in particular the late George Petersen. The false denials of the Department and the Coalition government provided a delaying tactic but also one which fostered the sense of grievance and thirst for justice among the widening and coalescing band of prisoners and ex-prisoners and their families, lawyers, journalists, students, academics, politicians and others, individually and in groups such as CCL, the Penal Reform Council and PAG, which together constituted a prison movement.

The grievances unremedied and the events still denied, Bathurst gaol erupted again in 1974 in a major riot, in which a large section of the gaol was destroyed and in which many prisoners were injured, some seriously, by gunfire from the towers and in the subsequent gauntlet after the riot had been quelled. A fresh round of denials, prevarication and denigration of prisoners and their accounts of events issued forth from the Corrective Services Department and the government, but the road to Nagle had now become a highway and the drive for an accounting, a juggernaught.

A tactic of delay and obfuscation centred largely on the laying of riot charges against a number of Bathurst 1974 prisoners, only served to both highlight Departmental and government cover-ups and dishonesty and enlarge the ranks of the band of lawyers defending the rioters in their attempts to reveal the causes of the riot and the gauntlet reprisals afterwards. Established organisations like the Law Society and Bar Association weighed in and investigative journalists around the then *National Times*, published for the first time in the mainstream press prisoners' accounts of events at Bathurst in 1970 and 1974, drawing heavily on Jack Grahame's and Jim Staples's *Bathurst Batterings* document. This was followed by Anne Summers's important piece on the infamous 'reception biff' regime at Grafton, a regime which ran from 1943 to 1976 and was only halted on the eve of the Royal Commission.

It bears recalling, if sadly, the role of sections of the NSW judiciary and magistracy in backing the claims of authority over those of justice, truth and a fair trial and I refer here to decisions such as *Vezitis v McGeechan*¹ and the attempt to censure Jim Staples for walking out of one of the committal hearings.

The Nagle Royal Commission began in 1976 and its Report was handed down in March 1978. The Commission essentially verified prisoners accounts of events at Bathurst in 1970 and 1974, laid out the horror of the 33 year Grafton regime, recommended the closure of the state's newest prison, Katingal, and made a large number of mainly reformist recommendations for improvement in prison conditions and amenities.

Let us now jump from 1978 to 2003 and attempt to provide a sketchy overview of a few of the key issues arising in and around the Nagle Report; noting before doing so, the vastly different political context to that of the late 1970s. A context marked by widespread insecurity; a 'volatile and contradictory' penalty; the decline of what Garland calls the 'penal welfare complex', and an increasing tendency to a politics of exclusion and 'othering'. In short a context not particularly conducive to arguments in favour of prisoners rights.

1 (1974) 1 NSWLR 718.

The specific issues I will touch on are:

- prison numbers;
- settling accounts and doing justice;
- ending the bash: culture change;
- concentration: from Grafton to Katingal to Goulburn;
- the status of prisoners: the persistence of notions of forfeit and civil death; and
- the issue of alternatives.

Prison numbers

In the introductory 'Overview' section Nagle called for 'a building plan to be drawn up until the year 2000', the aim of which 'should be to replace old gaols which cannot immediately be satisfactorily altered by new facilities' (1978:25). He added:

Any replaced gaol should be handed over for other public use or destroyed. The plan should be flexible, as it can legitimately be hoped that the prison population will not necessarily continue to increase proportionately to any population increase because of, inter alia, the adoption of alternative modes of punishment and improvements in the organisation of society.

In fact imprisonment rates, which take account of population increases have doubled in the 25 years since Nagle. When the Commission was sitting in 1977 the NSW prison population was 3,687 (1978:450) and the total Australian prison population was 8,700 at a rate of 63 per 100,000 population (Mukherjee et al 1990:50). In March 2003 the NSW prison population was 7,920 at a rate of 154.2 per *adult* population, with a national figure of 22,114 and national rate per 100,000 adults of 147. (ABS 2003:7–8). There were 254 Indigenous prisoners in NSW prisons in 1976, a proportion of 7%. In 2003 there were 1,427 Indigenous prisoners in NSW at a rate of 2,066 per 100,000 Indigenous population (ABS 2003:20–21) and a proportion of 20%.

These increases have led both to levels of significant overcrowding and a massive prison building program giving rise to arguments about a prison-industrial complex as rural communities in particular vie to be the site of the next prison as a source of jobs, revenue and services.

Settling accounts and doing justice

While making findings of fact in relation to the bashings at Bathurst and Grafton Nagle avoided recommending any criminal prosecutions and left the matter to governmental action. No criminal prosecutions were laid. This is still something that rankles with ex-prisoners, especially those who were charged and convicted and served extra terms relating to the Bathurst riot. (Interestingly juries acquitted all those charged of riot, convicting some of damaging the prison). It is still a source of illegitimacy that particular officers named as bashers in the Nagle Report were not only not prosecuted but have risen through the ranks and are now in senior positions within the Department without adequate acknowledgment or accounting for their actions. On the other hand I feel a little uncomfortable when a movement which generally preaches the virtues of forgiveness and redemption ties individuals quite so tightly to their actions and personas of the distant past.

Ending the bash: culture change

The Nagle argument was that once the brutality had been revealed for all to see it was unlikely to reappear. George Zdenkowski and I in our *The Prison Struggle* (1982) were sceptical about this, but it may have turned out to be largely true. Shortly after the release of the Nagle Report a group of old guard officers, some formerly from Grafton, engaged in a range of violent behaviour at Goulburn but an inquiry was quickly called by Commissioner Vinson and some *Public Service Act* charges laid. Since this time little evidence has emerged or complaint been made about systematic bashing. There are the more muted forms of violence in the increasingly prevalent lock-downs and in the regime at the High Risk Management Unit (HRMU) at Goulburn. But it seems that by and large a significant cultural change away from systematic physical violence and brutality by prison officers was brought about in the Nagle period and has largely persisted. A worrying development is the increasing grouping of prisoners along racial and ethnic lines and consequent violence between such groups. On official figures it might appear that prisoner to prisoner assaults are increasing but whether this is an artefact of the recording practices and shifting sensibilities is difficult to determine given the very low rate of reporting of assault and sexual assault within an overall culture of prison hyper-masculinity.

Concentration: From Grafton to Katingal to Goulburn

In a bold move Nagle recommended that Katingal be abandoned, its cost being 'too high in human terms'. He added: 'it was ill-conceived in the first place, was surrounded by secrecy and defensiveness at a time when public discussion should have been encouraged. Its inmates are now suffering the consequences' (1978:165). The exact rationale for Katingal is obscure given the secrecy surrounding its planning, but in part at least it was a replacement for the bash regime at Grafton, replacing the physical brutality to troublesome prisoners with sensory deprivation. Its closure was a victory for the prison movement and a testimony to Foucault's argument that prison revolts were :

Revolts against an entire state of physical misery that is over a century old,: against cold, suffocation and overcrowding, against decrepit walls, hunger, physical maltreatment. But they were also revolts against model prisons, tranquillisers, isolation, the medical, the educational services ... In fact they were revolts, at the level of the body, against the very body of the prison. What was at issue was not whether the prison environment was too harsh or too aseptic, too primitive or too efficient, but its very materiality as an instrument and vector of power: (1978:30).

Nagle favoured a policy of dispersal rather than concentration but the discussion was ill-developed. I have not personally seen the Goulburn High Risk Management Unit but its function seems to be to replace Katingal for a mixture of high-profile-horror-crime offenders, high escape risk, potentially violent or simply troublesome. The same complaints about a lack of natural light and air, isolation, deprivation of association, lack of access to law books, limited and enclosed exercise, self mutilation and generally harsh environment and regime, similar to complaints at Katingal, have recently been made and usefully publicised by *Justice Action* in their Voices from the Hole campaign. It has been alleged that the unit and its inhabitants have been subject to strategic media access at crucial junctures to suit 'tough on crime' party electoral politics.

Status of Prisoners: the persistence of forfeiture and civil death

Nagle made a number of recommendations which were aimed at the status of prisoners in an attempt to remove elements of forfeiture and restrictions on legal subjectivity. For example he recommended the abolition of all restrictions on prisoner's right to vote and prisoners right to sue; full access to courts; and entitlement to serve on juries. Arguably none of these recommendations have come to fruition and in relation to some of them, prisoners rights to legal and political subjectivity are being eroded. Prisoners in NSW serving more than 12 month sentences are not entitled to vote and at a Commonwealth level where prisoners serving less than 5 years retain the franchise the Howard government attempted in 1998 to remove it altogether, thankfully unsuccessfully. While the effects of the *Dugan*² decision retaining the antiquated notion of civil death of capital felons was partly remedied by legislation recent developments at a state level such as prohibiting prisoners claiming criminal injuries compensation for injuries sustained in prison illustrates that the notions of forfeiture are alive and well.

The issue of alternatives

As highlighted earlier, Nagle predicted that the prison population would not increase, in part because 'alternatives to imprisonment should be used as extensively as possible, and prisons should be used only as a last resort' (Rec 249). As we saw, the prison population as a rate has more than doubled. We have seen an expansion in available alternatives since 1978, but this has not stemmed the flow. For a whole range of reasons an institution under significant challenge in the 1960s and 1970s, regarded by some as deeply obsolete and likely to be consigned to a marginal status or even abolished, has undergone a revival across a number of jurisdictions internationally, particularly in the US where respected criminologists now talk of 'mass imprisonment' (Garland 2001:5-6).

Rather than seeing such trends are inevitable and irresistible it is important to try to reconstitute the conditions, the forces and the discourse of penal reform represented in part in the era of the Nagle Report, albeit now in very different circumstances. In searching for inspiration we might look no further than two other, more recent reports, indeed Reports of this very parliament. I refer to the NSW Legislative Council Select Committee on the Increase in Prisoner Population, (July 2000) *Interim Report: Issues Relating to Women*, and *Final Report*, (November 2001) (for a brief review see Brown 2002).

In this exercise members of the NSW Legislative Council from nearly all major political constituencies engaged in an open-minded process of inquiry over two years and agreed on a method of approach to the issues which included a focus on 'what works' rather than an acceptance of established views based largely on retributivism; an examination of the differentiated nature of the prison population and the differential experiences of particular disadvantaged groups; a preparedness to envisage a more plural, experimental, diverse approach to corrections, what might be called a 'mixed penal economy', rather than accept the inevitability of the traditional centralised state command model; and a recommendation that NSW seriously look at the suspension of short term prison sentences, following events in Western Australia.

2 *Dugan v Mirror Newspapers Limited* (1979) 142 CLR 583.

I commend the Reports to you as an example of what can be achieved and argued for politically, across the party political divide, even in a climate of law and order populism. These Reports deserve to be promoted and debated, in the interests both of good government and good sense and as a way of rekindling the spirit of Nagle in these insecure and uncertain times.

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