On February 25 2004 a seminar was held at NSW Parliament House jointly organised by the Law Faculty, UNSW and the Centre for Health Research in Criminal Justice. The seminar was held to revisit the achievements and reflect on the legacy of the Nagle Royal Commission into NSW Prisons which was established in 1976 and which reported in 1978. The seminar was chaired by the Hon Meredith Burgmann M.L.C, President of the NSW Legislative Council, and opened by the NSW Attorney General, Bob Debus. Speakers were, in order, The Honourable John Nagle (the Royal Commissioner); Professor Tony Vinson (Commissioner of Corrective Services following the release of the Nagle Report); Associate Professor Chris Cunneen (Law Faculty, Sydney University); Dr Eileen Baldry (School of Social Work, UNSW); Dr Richard Matthews (CEO of the NSW Corrections Health Service); Mr Brett Collins (Justice Action); and Professor David Brown (Law Faculty, UNSW). The following report is an edited version of the presentations.

Justice Nagle, the Royal Commissioner introduced proceedings by noting that he was pleased the Report was being revisited. He did not wish to comment on the current situation but said that he still felt that two of the most profound statements on prisons are those by Gustave de Beaumont and Winston Churchill with which he prefaced the introductory 'Overview' of the Report. They were:

> When 'society' inflicts a punishment on those who have offended against its laws, society is obliged to avoid subjecting them to a corrupting system in the place where they are held captive, not to increase their misfortune by increasing their vices. Society has the right to punish, but not to corrupt those punished. It is granted the awful power of killing the guilty; no one recognizes its rights to deprave them (Gustave de Beaumont 1843).

> The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country (Winston Churchill, House of Commons 1910).

Professor Tony Vinson : Implementing the key principles of the Nagle Commission

This evening we celebrate a milestone inquiry in the history of NSW penology. Most of the reforms that were initiated in the late 1970s and early 1980s were made possible, directly or indirectly, by the work of the Royal Commission and the recommendations that issued from it. I want to trace some of the influences of the Royal Commission on the administration that followed immediately in its wake, for that is the period with which I am intimately acquainted. I am sure there are other important connections with later periods but I will leave that part of the story to others.

One can hold an Inquiry in the highest regard, as I do the Nagle Royal Commission, and still ask questions of it. So I want to take advantage of this occasion to ask whether there are lessons to be learned about ways in which society can maximise the gains from inquiries like the Prisons Royal Commission. In doing so I will have in mind the differences between the writing of a script and its actual enactment before an audience with diverse and passionately held views about the issues at hand.

The first success of the Nagle Royal Commission was that it revealed the barbaric 'throw back' nature of the NSW prison system with such force that public opinion was temporarily wooed away from the punitive mood that is its more usual disposition. However, a tension exists in the minds of many Australians between the desire to inflict pain upon those loosely categorised as 'criminals,' and other sentiments and values respectful of the humanness of people who are incarcerated. When the state acts in ways that can be interpreted as sympathetic to that humanness, punitive counter-inclinations are rapidly triggered. Even before the ink was dry on the Royal Commission report some sections of the Sydney media were cautioning against going soft on prisoners. Of course the graphic accounts of systematic cruelty, soul-crushing unfairness and official disregard for the law engaged the interest of people of conscience who wished to see the system reformed. Add to these inclinations the continuing militancy of the prison officers union and the understandable expectation among those who had been abused by the system that changes would quickly materialise and you have some of the key interest groups lying in wait for the implementation of the Royal Commission recommendations.

The reform prospects of the Royal Commission Report were enhanced by a number of its features. First was the status and distinguished background of its executive author, Mr Justice Nagle. The unpalatable truths that the report presented could not be dismissed as being the fantasies of left-leaning malcontents, as had earlier been the political reaction to courageous critics of the system. Second was the evidence gathered in legal fashion over a protracted period and publicised in the media. The Royal Commissioner himself appeared to give some, perhaps considerable weight, to the dramatic effects of the Inquiry process. He said in the report in relation to the brutality at Grafton:

> The Commission considers it inherently unlikely that a regime which has now been revealed in all its horror and brutality, and which has been almost universally condemned, would be likely to re-emerge ... It does not propose to recommend action against the officers who served at Grafton during the relevant time. The names of these officers would be available to the appropriate authorities, and, as previously, the Commission leaves to them any consideration on their future (148).

The revelations were, of course, helpful to reform but the deferment of action entailed difficulties for the new administration that I will come to later.

A third source of authority for the Royal Commission Report was that it carried the imprimatur of the state and the gravity of its contents was symbolised by the recall of State Parliament to consider its recommendations. It was a report grounded in the concrete realities of the system and the blatant malpractices and maladministration that characterised it. This anchorage in events and the presumed potency of their exposure in correcting malpractices, were both the major achievement and limitation of the Royal Commission Report.

Let me first deal with the overwhelming strengths of the report. Immediately upon my appointment to chair the five-person Prisons Commission it was apparent to me that the best prospect of achieving progress in prison reform was to constantly invoke the authority of the Royal Commission. I thought of it as a shield behind which to advance and, as I hope to demonstrate, a great many reforms were achieved that would not have been possible in its absence. From the point of view of collectively learning from that experience, it is as much a mistake to overlook the positive outcomes achieved as it is to delude ourselves about any fundamental transformation of the penal system. But I must note that even before the Prisons Commission was officially installed, it was clear that it was entering an arena where the prison officers' retention of power and preservation of their unacceptable work culture were not about to yield before the findings of the Royal Commission. There were 'try-ons'

such as the officers' refusal to accept the transfer of a prisoner to a maximum-security section of Long Bay because he was 'too bad' to be admitted. I must also admit to some personal discouragement by the discovery that a book was being operated on the likely period of my tenure and that I was at short odds to last less than three months.

The immediate tensions emanated from two things: the officers' demand that no action be taken against colleagues mentioned adversely in the Royal Commission, and differences in the value positions of the Corrective Services Commission and the custodial staff. These under-currents continued for the almost three years that I chaired the Commission. From the text and recommendations of the Royal Commission Report it was possible to arrive inductively at a set of six principles that encompassed many of the improvements sought by the Royal Commissioner and implemented with varying degrees of completeness in the first three years. Time permits only the illustration rather than complete detailing of the changes.

The first principle was that *Prisons should be a measure of last resort and every effort must be made to find other more constructive forms of punishment.* Unfortunately, the authorities did not accept several concrete proposals for alternative forms of punishment including a probation/bail hostel, attendance centre and a new structure of sentencing that would mean a custodial order would be served in part under supervision in the community. It was possible to argue successfully on the basis of the Royal Commission recommendations for the instituting of community service orders and a uniform subsidy scheme for half-way houses. Courts were encouraged to use hostels where the availability of accommodation could avoid a custodial sentence. A 25% increase occurred in the staffing of the probation/parole service to support non-custodial sentencing. Perhaps as a consequence of the Royal Commission revelations supported by the community education endeavours of the Prisons Commission, there was a small reduction in the number of inmates to around 3,500. What a contrast with today. Notwithstanding the statement in the present Government's 1995 Corrections Policy that 'Prison will be the sentence of last resort for non-serious offenders' we have seen the numbers (including periodic detention) grow to around 9,000, an increase since 1995 of around 17%.

The second principle evident in the Royal Commission text is that *the loss of liberty is the essential punishment and the prisoner should retain all other rights except those necessary to maintain security and good order.* In some ways this was the most controversial of the principles for it confronted a definition of the prisoner as stripped of rights, a view that was the cornerstone of the old order. I cannot remember staff enthusiasm for implementing any of the relevant Royal Commission recommendations. Things like extended visits, contact visiting and the reduction of overnight lock-ups to 10 hours. There was little staff enthusiasm for a regular gynaecological consulting service for women prisoners as well as weekly clinics conducted by the Leichhardt Women's Health Centre, as well as the decision to make it no longer mandatory for mothers to surrender their infant children on their first birthday. We were told that implementing the recommended unlimited and uncensored correspondence (after checking for the presence of contraband) as well as supervised telephone calls were unworkable. The introduction of these measures was almost invariably accompanied by prevarication, the direct involvement of the Commissioners, and frequently by staff taking industrial action.

Three of the Royal Commission recommended changes that went right to the heart of staff and management's conflicting values were prisoners' legal representation before Visiting Justices, prisoners being allowed to buy any printed material legally available in the community, and establishing prisoner needs committees at every prison. These were initiatives that proved abhorrent to some senior officers let alone general custodial staff. One Superintendent said either he was mad or the proponents were insane. I well remember

being told at one maximum-security prison that no one had brought forward an agenda item for the needs committee for several months only to uncover a backlog of 76 items. The point is that the tradition of prisoners having absolutely no rights runs very deep in our penal tradition and is revitalised every time people in authority make careless remarks along the lines 'We've bricked them in their cells'.

The post-Royal Commission experience showed that the only way of preventing the horrors to which Nagle drew attention was to operate on the basis that those in custody are incarcerated citizens. Any deviation from this approach feeds an unwholesome streak in human nature, produces indiscipline among staff and tarnishes the fundamental morality of our society.

A third principle was that *imprisonment must be regarded as punishment rather than a means of 'rehabilitating' prisoners.* This principle and its grounding in the revelations of the Royal Commission introduced a necessary note of realism. It helps to clear away generally misplaced notions of the prison as a therapeutic institution. It changes the status of imprisonment from being a standard response to crime to one requiring justification in terms of the limited things gaol has to offer — essentially isolation and punishment.

One practical consequence of this orientation was the introduction of a court referral scheme that invited judicial officers to nominate an interim classification for young offenders so that they could be diverted from the usual (maximum-security) reception prisons. Expanding contacts between the prison community and the outside world were intended to dilute the social toxicity of the prison. If one accepts that the prison is so socially toxic, there is a corresponding obligation to at least put educational and personal development programs and opportunities at the disposal of offenders. One of the more practical developments in this regard inspired by Recommendation 227 was the development of a pre-release program that included a newspaper called *Daily Survivor*, pre-release group discussions and video and audio tapes designed to help during the early post-release stage.

A fourth principle was that *prison officers must possess the necessary training and means to contain prison disturbances effectively.* The Royal Commission's practical wisdom in this area provided a sound guide to the new administration. Amateurs running amok with chemical and other weapons are a recipe for disaster. Accordingly, riot plans were developed for each prison and officers were trained in riot control procedures.

However, this is clearly a sphere in which prevention is infinitely preferable to the use of force. Hence a fifth principle implicit in the Royal Commission Report was *that prisoners must be given the means of conveying their grievances to the authorities.* The proper operation of the committees was resisted with a 'shanghai' being the price paid by some prisoners for their nomination. Whenever possible having the Chairman or a Commissioner present at the meetings was one way of helping the committees to function in the intended fashion.

Being able to write confidential letters to the Ombudsman and have staff of that office visit the gaols fairly frequently contributed to improved standards of fairness and tension reduction. With Ombudsman staff focusing on serious issues a great deal of collaboration was possible. A serious error of judgement was made by the then Government prior to the establishment of the Prisons Commission. Nagle had recommended the appointment of a special Prison Ombudsman but the Government decided against this appointment. Given subsequent staffing problems in the Ombudsman's Office it was a mistake not to follow Nagle's recommendation. An even more grievous error was the recent decision to terminate the role of Inspector General of Prisons.

A sixth principle was that *the daily management of prisoners should be based on a system of incentives rather than physical coercion.* The fulfilment of this principle required that training and development programs for staff be improved and this was attempted in accordance with Nagle's recommendations. Custodial staff needed to develop a more professional identity, their amenities needed to be improved and their remuneration for a standard week's work (rather than endless overtime) increased. On the prisoners' side we were close to developing a realistic system of earned credits in the early post-Nagle years. However, the importance we attach elsewhere in society to positive incentives seems to have been lost in the Yabsley-inspired era of 'truth in sentencing.'

That as much was achieved following the Royal Commission given the environment in which its implementation was undertaken was primarily due to the persuasiveness and specificity of most of the Report's recommendations. But as with all such projects, when an Inquiry is being written up its authors exercise choices about the way they will ground their analysis and present their recommendations. Having acknowledged the overwhelming strengths of the Nagle Commission I have a duty to reflect for a moment on some of the strategic choices made. I do not believe that the best way to lead a campaign of change in circumstances as war-like as the NSW prisons circa 1980 was with the divided authority of a commission. It is also difficult to completely dissociate the handling of prisoners from the social circumstances that spawn their offending. The 'Strengthening Communities' initiative of the present government, although in its early stages of development, is a move in the right direction.

But the most important of the choices made by the Royal Commission bore on the desirability of clearing up unfinished business so that a new administration could genuinely make a fresh beginning. There is also a subsidiary issue of stating the principles that inform an Inquiry's recommendations so that there can be some principled ordering of priorities. For example, recommendation 8 of the Royal Commission stated: 'The Superintendents should have primary responsibility for the order, good management and administration of their gaols. The Prisons Commission should concern itself with policy decisions only'. It seemed to me that the baseline from which to achieve the Royal Commission recommendations was the absolute cessation of brutal and unjust staff practices. This was no small challenge. The Royal Commission itself and many commentators since have been optimistic about the cleansing effects of the Inquiry process. In circumstances where I frequently had reason to be worried about the behaviour and attitudes of some senior staff, including superintendents, I found it necessary to make on-the-spot inquiries within the institutions, sometimes unheralded and well outside standard hours. To do otherwise would have been negligent. Those who resisted such 'interference', including the union and staff who personally had cause to worry, were happy to elevate what I considered a second-order Royal Commission priority — respecting the chain of command — to a primary status. If in those early post-Nagle years with which I am most familiar, there was a reduction in staff abuse of prisoners there was a simple reason. It was because officers serving throughout the length and breadth of the state could confidently expect the Prisons Commission or senior staff of the Ombudsman's Office with whom we collaborated, to 'interfere' as soon as instances of abuse came to notice. And there were many disturbing reports warranting such immediate investigation. The point had to be driven home that management would not tolerate the abuse of power.

I expressed the opinion at my appointment interview and subsequently that a clear line had to be drawn between past and future practices and that the prosecution, where warranted, of those who had behaved illegally was one important way to establish that irreversible progression. There was no enthusiasm for staff prosecutions in the higher levels

of the state's administration nor amongst some of my fellow commissioners who emphasised the necessity of making a fresh start. The advice tendered by the Crown Solicitor was that the Royal Commission had been an inquiry into a system and that the evidence gathered lacked that specificity with respect to time, place, circumstances and corroboration that would enable prosecutions to be launched. I remained convinced that alongside the positive industrial initiatives that were being attempted, there was a need to demonstrate that there were now firm boundaries to the staff conduct that would be tolerated.

The Prisons Commission saw complaints about alleged staff misconduct and harassment at Goulburn post the Royal Commission as providing another opportunity to bring home to staff and prisoners that the law would be upheld. Stipendiary Magistrate Henry was requested to conduct an Inquiry that resulted in confirmation of a good proportion of the prisoners' complaints, the formulation of a much needed clear statement of what constituted the lawful use of force and the subsequent charging of some officers.

It was indicative of what ideally would be completed by a major Inquiry before the installation of a 'new broom' administration that the Goulburn Inquiry again brought to public prominence certain officers who had been adversely mentioned in the Report of the Royal Commission. Partly from motives of self-protection but also because these officers were seen as embodying many of the traditional values of prison officers, the prison staff and their union rallied to their cause. The conflict over these issues and uncertainties about disciplinary action based on the Royal Commission findings assumed the proportions of an unending drama that impacted upon almost every initiative that was taken. Finally after eighteen months a point was reached where State Cabinet accepted the advice that grounds existed for disciplinary, as distinct from criminal action against two officers who had been mentioned adversely in the Nagle Royal Commission.

Then a private prosecution was launched that cut across long overdue but serious action by the authorities. In the interests of those who must administer in such torn circumstances let me put the following: It may not be the current practice but from the point of view of re-building a system shown by a Royal Commission to harbour illegal and unjust practices, could not these matters be resolved before the transformation begins? Couldn't an investigation unit concurrently undertake the task of gathering the type of evidence needed for a timely determination of culpability while the appraisal of the system is in train?

Every so often our society's greater understanding of itself is served by inviting a person of deep civility, acumen and compassion to conduct an inquiry into an area of functioning that is a cause for major concern. It is a sure sign that something deeper than the fulfilment of a technical task has been achieved when, no matter how briefly, we gain a glimpse of our collective soul and the society it is within our reach to be. The Nagle Inquiry was just such a civilised undertaking and a powerful influence upon those who, as its author said in our one previous meeting, 'Have the eyes to see and the ears to hear' its message. Hasten the advent of its successor for there is an urgent need to expose society's most secreted transactions to the civilising light of open scrutiny.

Chris Cunneen : Indigenous imprisonment since the Nagle Report

The issue of Aboriginal prisoners was only marginal to the Nagle Report. The Report indicated Aboriginal prisoners were 7% of the prison population. This was almost certainly an underestimation at the time because 'Aboriginality' was determined by correctional officers. Justice Nagle mentioned that there were 'no special programs' for Aboriginal prisoners. The only specific recommendation in relation to Aboriginal prisoners related to access to field officers from the Aboriginal Legal Service.

Our contemporary understanding of Aboriginal issues in prison is dominated by the Royal Commission into Aboriginal Deaths in Custody which fell mid way in the 25 years between Nagle Commission and the present. Changes which have occurred in relation to Aboriginal people in prison in New South Wales can be characterised as both positive and negative.

Positive

The impact of the Royal Commission into Aboriginal Deaths in Custody has lead to a recognition of the importance of specific programs for Aboriginal prisoners — the absence of which was recognised by Nagle. The move towards specific Aboriginal programs had started before the Royal Commission into Aboriginal Deaths in Custody however they expanded significantly afterwards. This change is reflected for example in the development of facilities primarily for Aboriginal prisoners. Two examples are Yetta Dhinnakkal which operates on a 10,000 hectare property near Brewarrina; and Warakirri which operates at Ivanhoe with up to 50 minimum security prisoners most of whom are Indigenous. There is also an increasing recognition of the importance of Indigenous-operated post release support programs, and this is reflected in funding for an Aboriginal women's post-release service at Central Mangrove.

There has also been an increasing importance of Aboriginal people in research, policy development and program delivery both inside and outside corrections. We can see this change inside the criminal justice system through the development of Aboriginal Policy Units in all relevant Departments like police, corrections, juvenile justice and so forth.

The major developments outside the criminal justice system have been through organisations such as watch committees (like the Indigenous Social Justice Association) and particularly the Aboriginal Justice Advisory Council (AJAC). The expanding and important role of AJAC can be seen in research such as Rowena Lawrie's excellent work on Aboriginal women prisoners, and in policy negotiation and development in the development of an Aboriginal Justice Plan.

Negative

The major negative development has been the dramatic long term growth of Aboriginal imprisonment — which has outstripped the growth of the general prison population. The increase has been particularly acute for Aboriginal women prisoners. In 2000/2001, New South Wales had the second highest rate of Indigenous imprisonment in Australia (after Western Australia) (SCRCSSP 2002, Vol 1:519). According to the Department of Corrective Services (2002:15):

- Indigenous prisoners comprise 16% of the total inmate population.
- Indigenous women comprise 26% of the female inmate population.
- The number of Indigenous prisoners has increased by 30% over six years compared to a 17% increase for the non-Indigenous prison population.

We might compare this to community corrections. In 2000/2001, New South Wales had the fifth highest rate of Indigenous people on community corrections in Australia (after the ACT, South Australia, Queensland and Western Australia) (SCRCSSP 2002, Vol 1:521). According to the Department of Corrective Services, Indigenous inmates comprise 10% of the community-based offender population. The figures speak for themselves: 16% of the prison population, 10% of community corrections. Aboriginal people are over-represented among both groups, but more so among those who have lost their liberty.

We might compare the New South Wales situation with what is occurring in Western Australia. The Australian Bureau of Statistics (ABS) notes that between 2001 and 2002, Western Australia recorded a 12% decrease in the number of prisoners. The ABS attributes this decrease to a number of factors including an increase in the acquittal and dismissal rates in courts, greater use by the courts of suspended imprisonment and community orders as penalties and a decrease in the breach rate for early release orders (ABS 2003).

This general reduction in the use of imprisonment in Western Australia has been felt powerfully among Indigenous offenders. Indeed, whilst the aforementioned factors have resulted in a 9% decrease in the prison population for non-Indigenous Western Australians, it has effected a reduction of 20% in the prison population for Indigenous Western Australians (ABS 2003). At present New South Wales and Western Australia are moving in opposite directions in relation to Aboriginal imprisonment and, on current trends, it is highly likely that New South Wales will become the highest imprisoning jurisdiction of Indigenous people.

Conclusion: Where to?

Perhaps ironically by the time of the Royal Commission into Aboriginal Deaths in Custody the impetus for reform in the post Nagle era had already passed. While the Royal Commission into Aboriginal Deaths in Custody analysed the reasons for Aboriginal over-representation and provided a framework for reform in a way inconceivable at the time of Nagle, the political momentum was already very clearly moving in the opposite direction. By the early 1990s the idea of lessening our reliance on the use of imprisonment was simply not on the political horizon.

To the extent that there has been reform in the prison system in relation to Aboriginal people it is around what might be called administrative and programmatic reform rather than structural change. What might some changes that lead to a structural shift look like?

Firstly I would support the abolition of six month sentences of imprisonment as a way of opening a gap for greater control of the sentencing punishment processes by Aboriginal people. If Aboriginal people given sentences of six months or less were given non-custodial sanctions instead, then the number of Aboriginal people sentenced to prison would be reduced by 54% over a twelve month period (Baker 2001:8).

Another step is to promote Indigenous-controlled residential alternatives to prison for longer term inmates — places where Aboriginal people can serve their sentences in an Indigenous environment with Indigenous programs and staff. This involves a more fundamental shift in relocating power away from Correctional authorities to (Aboriginal) community-based organisations.

Thirdly it is important to promote Indigenous control in the sentencing process. At the moment the most exciting things are happening outside prison in the sentencing area around initiatives like circle sentencing and the development of Community Justice Groups. These initiatives need to be strengthened, resourced and respected, and most importantly, given greater decision-making functions.

The opening of a punishment or sentencing 'space' could have a hugely positive impact for Aboriginal people and be filled with the development of Aboriginal community-based sentencing options. These can potentially cover the following areas:

- Community based sanctioning (such as circle sentencing, community justice groups).

- •Community based and controlled residential corrections (the establishment of healing centres).
- •Diversion programs (such as Aboriginal conferencing, Aboriginal community supervision orders).

There are both pragmatic and principled reasons for advocating the development of an Indigenous space for sanctioning and healing. The pragmatic reason is that the literature suggests that programs delivered in the community have a greater success than the same programs delivered in a custodial setting (Maguire 1996). In addition there is a substantial literature on the effectiveness of Indigenous community-based sanctions (Cunneen 2001).

The principled reason is that the 'space' provides an avenue for exploring greater Indigenous control in the criminal justice system in a spirit which respects self-determination, and at the same time is more likely to be effective as a crime control mechanism (Cunneen 2001).

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Dr Eileen Baldry : Women in Prison – 25 years after Nagle

The Nagle Royal Commission Report recommendations fall into 2 categories: the 'fundamental principles' group and the practical 'what-to-do-on-the-ground' group. Both are essential to reform but, without adherence to the principles of prison as the last resort, imprisonment not being used to lock away people with social problems society can not handle and the principle of constant external vigilance, the practical reforms, important though they are, will not resolve the serious matters Nagle identified.

The most outstanding developments regarding women in NSW prisons over the past 25 years have been the trebling of their rate and proportion in prison, the increase in drug and mental illness problems and the iniquitous and almost unbelievable rise in the rate of Aboriginal women in prison.

In 1976 the Royal Commission estimated there were 102 women in prison in NSW — a rate of around 5.5 per 100,000; 8% was on remand (Nagle 1978:378). It is not clear how many Koori women there were. It was assumed by Nagle that there would be little increase in the number of women over the following decade (Nagle 1978:25, 378).

It is generally thought that the Nagle report gave little attention to women. That is true to some extent but there is a chapter — Chapter 27 — titled Women Prisoners (Nagle 1978:378–385). Justice Nagle stated that most of his recommendations applied equally to women as to men, and then he spent the bulk of that chapter addressing the abysmal medical, psychiatric and dental care afforded women. Claims by the Department that comprehensive care was given were viewed with the gravest of doubts. The report questioned the placing of women with a mental illness and women guilty of social offences such as drunkenness and drug offences in prison. It recommended women with a psychiatric illness be sent to a hospital not to prison, that women be afforded meaningful work and be included in work release and periodic detention programs, that regular gynaecological, psychiatric and general practitioner visits be instituted for women and that babies not be summarily removed from their mothers at 12 months. It also recommended that women be given incentives to attend educational classes. The food and some of the accommodation at Mulawa were noted as being appalling.

During the Vinson era, 1979–1981, consultations by gynaecologists and general practitioners as well as visits by the Women's Health Centre were arranged; works release and periodic detention schemes were introduced; a mothers' and children committee was established to assist women to keep their children beyond 12 months with them and the dormitory style accommodation at Mulawa so criticised by Nagle was begun to be replaced with single cells. Numbers remained fairly stable (Vinson 1982).

In the 1981 Annual Report of the Department of Corrective Services, in keeping with the Nagle principle of last resort, it was argued that a significant number entering prison could be effectively supervised in community programs (cited in NSW Women in Prison Task Force 1985:39). This applied particularly to women. But already this approach was falling out of favour with the government, the courts and Corrective Services.

But by 1983 the numbers of women had increased considerably. There were 182 women prisoners, a rate of 10.1 per 100,000. The rate of women on remand had increased massively to 18%. In 1984 7% of sentenced women prisoners were Aboriginal women — no remand figure was available.

In 1984 The Women in Prison Task Force was set up to investigate in detail the situation of women in prison and to in a way continue the Nagle inquiry. It reported in 1985 that most women in prison at that time were not a danger to the community and that everyone would benefit if some of them were supervised and supported in the community. It recommended that the number of women in prison be reduced to under 100. The lack of women-specific policies and procedures and of drug and alcohol rehabilitation services and the overuse of remand were to be remedied (NSW Women in Prison Task Force 1985).

The many recommendations of the Task Force were filed away until the 1992 1st Women's Action Plan of the Department that did pick up many of the recommendations and reiterated the last resort principle (NSW Department of Corrective Services 1992). Positive and successful advances out of the Plan (and subsequent plans) have been the establishment of a different classification system for women, the Parramatta Transitional Centre and a second Transitional Centre for women with drug and alcohol issues, Aboriginal women's cultural and healing camps, more employment and educational opportunities, women-specific programs, officer training for working with women, some significantly improved accommodation and improved medical care.

But the fundamental principles enunciated by Nagle were ever being eroded especially as applied to women. The increased use of prison to deal with social and health problems — poverty, mental illness, drug abuse and homelessness — was increasing significantly the number of Aboriginal women and those with serious mental health problems in prison.

The Inquiry into the increase in prison population in its 2000 Interim report on women recommended a moratorium on the building of a new women's prison until serious exploration of ways to reduce the number of women being sent to prison had been completed (NSW Legislative Council Select Committee on the Increase in Prisoner Population 2000:xix). Every submission to that Inquiry except that by the Department of Corrective Services, upheld the Nagle last resort principle and argued that non-prison alternatives, law and sentencing reform and post-release support be initiated instead of building more women's prisons (NSW Legislative Council Select Committee on the Increase in Prisoner Population 2000:151). But the moratorium on building a new women's prison was rejected by the government, with another 300 prison spaces for women being built in the past 2 years.

In 2004 there are now about 600 women fulltime prisoners (NSW Department of Corrective Services 2004). This is a rate of 23 (Australian Bureau of Statistics 2004), compared with 10 in 1983 (NSW Women in Prison Task Force 1985:40). There are around 175 women on remand equalling 30% of the women in prison (NSW Department of Corrective Services 2004) compared to 17% in 1984 (NSW Women in Prison Task Force 1985:57). There are around 175 Aboriginal women equalling 30% of the women in prison (NSW Department of Corrective Services 2004), compared to 7% in 1984 (NSW Women in Prison Task Force 1985:51).

In a sample of women in prison surveyed a few years ago, 42% had experienced physical violence and 33% sexual assault as a child, 52% violence and 29% sexual violence as an adult (NSW Legislative Council Select Committee on the Increase in Prisoner Population 2000:25). It is unsurprising that in 2001 an estimated 90% of women prisoners had had psychiatric treatment in the previous year with an equal percentage having some form of drug problem (Butler & Allnutt 2003).

Being held on remand in prison is no small matter. It is as much time in prison as being on sentence is and in many respects worse. There has been a 205% increase in the women's remand population since 1996 and this growth accounts in large part for the increase in the full-time women's inmate population. Are women on remand because they are a real threat to the community? Of course most are not. And this is known by interrogating the census data. A submission Vinson and Baldry made to the Inquiry into the Increase in Prisoner Population in 2000 showed, using conservative criteria, that one third of the women on remand at the previous census date need not be there on any security grounds (Vinson & Baldry 2000). An analysis of the Department's 1999 research on remand (Thompson 1999) showed only 29% of women remandees were given a custodial sentence at their final court hearing, and 71% were discharged without a custodial sentence begging the question of why they needed to be in prison on remand in the first place. The problem is, once that prison threshold has been crossed, whether on remand or sentence, recidivism figures indicate a return to prison is likely. Radical reform of the remand system for women is required.

That women, with psychiatric illnesses and disturbances, are turning up in prison time and again and in increasing numbers indicates that Nagle's observation that prison is the wrong place for women with a mental illness was correct. Mental Health professionals working in the women's prisons state publicly that it is a destructive situation especially for

the 15% of women (many on remand), who have a serious psychotic illness (Greenberg 2003). The senior managers of corrective services have made similar statements (NSW Legislative Council Select Committee on the Increase in Prisoner Population 2000:51). So why are so many with mental illness in prison? As has been increasingly evident since the mid 1980s much of the fault lies in the woefully inadequate mental health care and support available to women with multiple problems such as mental illness, drug use and homelessness. Mental health professionals working in the prison system suggest many of these women have been refused admission to hospital or have been discharged too early due to lack of space before being remanding in custody.

Research on post-release integration found that women were significantly more likely than men to be homeless and be returned to prison (Baldry et al. 2003). The recognition by Nagle that bail and post-release housing were important has been given lip service but, apart from some support for Guthrie House with space for 10 women and a little community housing negotiated by CRC, has in effect been ignored by governments for 25 years. This has had the easily predicted result that many women releasees have no suitable housing and are quickly reincarcerated.

Aboriginal women in that post-release study were significantly more likely than other women to be homeless and they returned to prison much faster than any other group (Baldry et al. 2003). Aboriginal women, at one third (estimate by prison mental health professionals), are greatly over-represented amongst women in prison with a serious mental illness. The over-representation of Aboriginal women in NSW prisons has risen faster than any other group and now, at 25.8 is the highest over-representation rate of any State or Territory in Australia (Aboriginal and Torres Strait Islander Social Justice Commissioner 2002) and as far as can be ascertained, of Indigenous women prisoners in comparable countries. This is discriminatory and abusive.

Perhaps the dreadful truth is that successive governments since the Nagle Inquiry **have** been using prison as the last resort — but as the last resort for groups of women with serious mental health and/or social problems that enmesh them in the criminal justice system — a use warned against by Justice Nagle.

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Brett Collins, Justice Action : Prisoners and their organisations must be part of the dialogue

Let me start by grounding what I have to say in my personal experience. I was in Grafton Jail when Justice Nagle visited with David Hunt back in 1976. I was serving 17 years, was in segregation and had served five of the almost ten I eventually did. The prison movement outside had made the Royal Commission aware of the plight I was in as one of the prisoner organisers. That attention meant I was safer from that time on. Although two years later I was returned to Grafton with the classification of intractable.

Since 1971 I have been involved with prisoners and have lived and worked with the prison community. The humanity of those in there and the lies and unfairness we had to deal with had such an impact that I recognised it as my life work. Early in my sentence I learnt some law to help myself and then those around me. We formed the Prisoners Legal Cooperative with a shared library and adopted the phrase 'Prisoners are people'. That assertion is just as relevant today.

For those of you who do not have the experience, let me say briefly that prison generates a very powerful culture with some enviable values. It is mutually supporting, plain speaking, egalitarian, and with clearly stated basic principles of loyalty and sharing. Many of those who lived with me then are still my best friends — still looking after each other. Many are here tonight. Last weekend I was invited to farewell a dear friend. He is weeks away from dying of cancer. His name is Gary Nye, previously known as Gary Van Heythuysen. He was one of the warriors of the Bathurst riot in February 1974 that led to the Royal Commission. Gary got another 2 years for it. He exemplifies the spirit of the prisoner community today — our commitment to resist degradation and dehumanisation — to work with people of goodwill for a better community.

Prison authorities have responded to prisoner solidarity by intensifying their efforts to divide prisoners from each other, and their friends and supporters outside. NSW has adopted wing-segregation by race, a practice long known from US experience to increase violence both in the prisons and outside. Visitors are harassed and treated as criminals by the current prison administration. Prisoners are prevented from receiving magazines like *Framed* or visits from community supporters. Prisoners are denied the right to speak to journalists and activists about their experience even as their right to privacy is abolished and they are treated as pawns by the government's PR machine. Prisoners have even had the

right to seek compensation for injuries suffered due to abuse and neglect by prison authorities taken away from them by this government. Although it may appear that the worst of the abuses identified by Nagle have now almost disappeared, in many ways they have just been updated and NSW prisoners have never been more vilified, abused and isolated than they are now.

I want to make five basic points today as we revisit the lessons of the Nagle Royal Commission.

The first is that we, the prisoners and ex-prisoners, are and must be part of the dialogue. This is something we insist on because if the people who are directly affected by the prison system are not part of the solution as we seek reform then I suggest we don't have a solution. We acknowledge the work of many of you who have stood behind us, beside us and sometimes in front of us. You have helped us gain access to the general community to counter some of the stereotypes. You have supported our projects and campaigns over the years, sharing information and access to power. Your trust and expectations ensure the success of our movement. You know who you are. We thank you.

My second point is that prison reform is an important part of the struggle for a better, fairer society. Let us not minimise the importance of the job. Crime degrades community life. Prisoners are a touchstone to what is happening out there in the general community. To give up on prisoners condemns us all to a dangerous future.

The prison movement has links into the disenfranchised in all communities. In Sydney we have reason to be concerned about what is happening for Aboriginal people in Redfern or Muslims in Lakemba. On a global scale we are concerned about the frustrations and anger that lead to the community fear aroused by the Washington snipers and the nightclub bombings in Bali. People who live in Australian cities are vulnerable to individuals and groups who feel rejected, whose human rights and human feelings are denied. Confronting grieving relatives with lines of armed police, and refusing permission for a father to be at a son's funeral are practical symbols of the inhumanity that feeds this anger and are likely to provoke a similar or worse response.

My third point is that what we are doing isn't working, in fact is making the situation worse. The justice system and prisons in particular absorb enormous amounts of money. The community has a right to expect that they serve its long term interests and add to the protection of the community. They don't; the evidence now shows clearly that more imprisonment leads to an increased likelihood of further offending. Each jail term further weakens the base of community support, housing, jobs, family ties, relationships, links to the community that give people a stake in that community. Further, the whole system sytematically brutalises people, takes away dignity, self-respect and the opportunities to take responsibility that are the basis for humanity.

And mostly we fail to provide the opportunities of the 'time-out' in jail away from the wider community — for people to learn, to study, to rethink, to overcome the disadvantages that led to them being there and to make contributions to society. Try living in an environment seemingly designed to breed fear and uncertainty 24 hours a day, seven days a week and you will understand how far we fall short of any real rehabilitation of prisoners through the current jail system.

It is our duty to help people understand that they protect themselves by understanding, being kind, treating prisoners and those in the community at risk of becoming prisoners, as human. Instead of the being manipulated into resentment and vengeance we need a genuine program of reform. 'Law and order' and the 'lock up and throw away the key' attitudes are no solution to the community concerns about safety.

My fourth point is that this struggle needs effective prisoners organizations, organisations run by and for prisoners and ex-prisoners. We at Justice Action are one of these. We don't pretend to be the only one. For all of us in this work, our offering is a bridge. Our organisations have decades of service to prisoners and contact with the outside communities. We identify with prisoners and have represented their interests over the years.

If open and honest dialogue with prisoners is an essential part of the solution to the issues of jail reform and community safety then the government of New South Wales is going in the wrong direction. Until 1997 we had meetings every six weeks with the Commissioner and every two months with the minister. We had special prison visiting passes and organised community group visits. Suddenly they closed it down. They said we had tried to embarrass the Department. It turned out that the objection was to our involvement in public protests about the use of imprisonment. Is the price of dialogue to be the silencing of the democratic right to protest?

Since that time the response from the prison authorities has been extremely defensive, blocking us at all levels they control. Our magazine, *Framed*, now in its 45th edition, goes into every jail in Australia except Jails in the NSW (and the NT). It is said that this is because of the 42nd edition where we published details of the Commissioner's history. The edition is on our website. In line with standard journalistic practice, we gave him the chance to correct any inaccuracies. He declined. Instead his response was to ban its distribution. We are expecting shortly that the Human Rights and Equal Opportunities Commission will find that the ban is a breach of human rights. But the question remains: is the price of dialogue to be the silencing of the right to publish on matters of public interest ?

A more immediate concern is the situation that directly relates to this symposium. In order to bring to this forum the up to date position on issues that concern prisoners today we wrote to Inmate Development Committees asking for prisoners' feedback so that these could be shared with you tonight. We got support for this from numerous people including Dr Meredith Burgmann, Clover Moore MP, Lee Rhiannon MLC and John Ryan MLC. The Commissioner's office gave a directive to all governors and commanders that 'This letter is not to be distributed under any circumstances'. Minister Hatzistergos said: 'I am not prepared to waste departmental time and resources for an ad hoc and self-serving anthology of potentially inaccurate, prejudiced and highly relativistic prisoners' perspectives'.

Is there to be any channel for prisoners to share their legitimate concerns with the public? Or are we going to continue to silence these voices, increase the repressive controls and denial of human rights and in the process increase the risks that the wider community will face as a result? We (and the community) need to remember that, however much we brutalise and dehumanise those in prison, most if not all will eventually be released into the community. And there are far too few resources to deal with the problems we have created.

And we are all responsible. Government responses are made in our name. We can't hide as non-combatants or innocent victims. Only by reaching out and offering goodwill and reconciliation can we avoid damaging ourselves.

This leads me to my final point. If we are to tackle the problems we have created by our current culture of repressive justice and imprisonment then we are going to need resources in the community to do this. It is pointless for Corrective Services to be talking about a 'Through Care' system where prisoners are to be supported to make the transition back into the community unless the agencies in the community are given the resources to play their part in such a partnership.

Justice Action is one of these agencies. Just one but a significant one in that we have a long and (we think) honourable history of involving ex-prisoners, prisoners and their families in both advocacy and action for the human rights of those caught up in the justice system. We have a core of activists working on the various campaigns, producing the magazine, *FRAMED*, developing the mentoring program, and the day to day work of providing a point of contact and assistance for people in and coming out of jail.

Professor David Brown : Evaluating Nagle 25 years on

26 years after the release of the *Report of the Royal Commission into NSW Prisons* it is important to briefly recall that the origins of the Commission lay in the systematic bashing of all prisoners at Bathurst prison in 1970, the subsequent Bathurst riot in 1974 and attempts at Departmental and political denial and cover-up. In its Report the Commission verified prisoners' accounts of events at Bathurst, laid out the horror of the 33 year Grafton 'reception biff', 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.

How might we evaluate the Report 25 years on, in a political context characterised by a popular punitiveness? In my comments I will offer very brief assessments across a number of issues, grouping them under five heads: Violence; Numbers and Cost; Legality; Conditions and Drugs.

Firstly in terms of violence, the practice and culture of systematic bashings of prisoners in NSW seems to have ended with Nagle, an overdue but significant achievement. The rate of assaults by prisoners on other prisoners and prison officers was only recently introduced as a performance measure so comparison with the Nagle period is not possible. In 2002–03 NSW had the highest recorded rate of assaults by prisoners on other prisoners per 100 prisoners of any Australian jurisdiction at 16.86 (cf 'serious assaults' which includes sexual assaults, of 0.63 for prisoner on prisoner and 0 for prisoners on officers). But such figures must be interpreted carefully given the very low rate of reporting of assault and sexual assault within an overall culture of prison hyper-masculinity.

Older prisoners talk in terms of 'blue on green' being replaced by 'green on green'. They mean that officer on prisoner violence has been replaced by prisoner on prisoner violence, exacerbated in prisons such as Goulburn by racial and ethnic grouping. The level of riots and major disturbances common in prisons across Australia and in the UK and USA in the 1960s and 1970s has diminished significantly, although in NSW there have been recent incidents of violence (e.g. at Goulburn and Lithgow in 2002) which received little publicity.

Secondly on the issues of numbers and cost, Nagle predicted that 'the prison population will not necessarily continue to increase proportionately to any population increase because of ... 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, and trebled for women prisoners. The proportion of Indigenous prisoners has trebled from 7% in 1976 to 20% in 2003 and for Indigenous women increased seven-fold. The number of prisoners on remand has blown out to 2,000 and is now over 20% of the prison population. These increases have lead both to levels of significant overcrowding and a massive prison building program, giving rise to arguments about a prison-industrial complex as rural communities vie to be the site of the next prison as a source of jobs, revenue and services.

The operating expenditure of the NSW Department of Corrective Services for 1975–76 was $30 million and for 2001–2002, $560 million. The average daily cost per prisoner in 1975–76 was $28.12 compared with $221 in 2002–03.

Thirdly in terms of legality, it bears recalling that Justice Nagle left the issues of criminal prosecutions of prison officers found to have taken part in bashings at Bathurst in 1970 and 1974 and at Grafton over its 33 year reception biff regime to the political process. No state criminal prosecutions were ever launched.

Nagle hastened the end of the Visiting Justice 'kangaroo courts', already dealt a fatal blow in the *Fraser* decision in 1977 which established a right of appeal from VJ courts to the District Court. Nagle angrily rejected the call from the Public Service Association to recommend legislation to overturn *Fraser*. Later legislative changes shifted internal disciplinary charges largely from magistrates to prison governors, from whom there is no right of appeal, so that the post Nagle 'legalisation' of internal disciplinary charges has become primarily administrative. The main work of the Prisoners Legal Service is now representing prisoners at parole hearings.

Recommendations aimed at improving the legal status of prisoners have not all been implemented e.g. no movement on the right to vote, the exclusion of prisoners from access to criminal injuries compensation for injuries sustained from assaults in prison. Prison litigation is rare, courts tend to defer to the expertise of correctional administrators and international human rights law relevant to prisoners has had little direct effect in Australia. The role of prison watchdogs has been curtailed: the Inspector General of Prisons has been recently abolished and the Ombudsman increasingly muzzled and overworked.

Fourthly, in terms of prison conditions, Nagle recommended that Katingal, the high security 'electronic zoo' introduced to replace the Grafton regime for 'intractable' prisoners be abandoned, its cost being 'too high in human terms'. The Goulburn High Risk Management Unit opened in June 2001, appears to be the replacement for Katingal, for 'high-profile-crime' offenders. 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 a generally harsh environment and regime, similar to complaints at Katingal, have recently been made. It has been alleged in NSW parliament that the unit and its inhabitants have been subject to strategic media access at crucial junctures to suit 'tough on crime' political electioneering.

Nagle was critical of the Department of Corrective Services for not introducing more time out of cells. He noted that time confined to cells varied and in secured institutions was up to 15 hours per day (i.e. 9 hours out of cells) and recommended that prisoners should not be locked in their cells overnight for longer than ten hours. In 2002–03 the average time out of cell hours were 10.6 total; 12.3 in open prisons and 9.2 in secure institutions, indicating little movement since Nagle. Lock downs of whole complexes, criticised by Nagle, have become more common.

Prison programs have expanded dramatically although availability is often limited both in numbers and location and their effectiveness remains unclear or unevaluated. Recidivism levels (conviction within two years of release) in NSW are over 40%. Individual case management was introduced in the early 1990s and despite some criticism has promoted a shift in the roles of prison officers involved away from the purely custodial to more positive engagement. Health services have improved but face massive problems dealing with the extent of mental illness and drug use. The rate of escapes is currently at its lowest level since 1980, with none from secure custody in 2002–3.

There are only 6 entries on drugs in the index of the *Nagle Report.* A NSW Legislative Council Report in 2001 put the figure of prisoners with a history of drug use at 60% of males and 70% of females. Drug use, dealing and attempts at regulation have significantly affected prison life and culture in all sorts of ways, including in the violent enforcement of drug debts incurred in prison, informing, in breaking down solidarities and oppositional cultures and in unsafe administration. Drugs are now the major official justification for a battery of new technological identification and surveillance devices, urine testing, dog squads, strip searching, cell ramps, lock downs, harassment of visitors, and increases in powers of search outside the confines of the prison.

The sheer extent of this security activity can be seen from an informative letter from Commissioner of Corrective Services Ron Woodham to the *Sydney Morning Herald* late last year (3 Nov 2003). Commissioner Woodham reported that:

> in the first six months this year there were 164,143 cell searches, 231 searches of the entire centre, 19,000 visitor searches and 150 vehicles were searched. As a result, 294 inmates were found with drugs or contraband resulting in visit restrictions and police charges.

What struck me about these figures was the massive resources poured into drug detection and the extraordinarily low rate of detections to searches (taking just the individual cell searches that is a success rate of 0.17% or approximately 1 in every 600 searches).

The report card is thus a mixed one. The key differences over 25 years are:

- the commendable ending of the institutionalised bash;
- the unforseen significant increase in the prison population and the expansion in the number and cost of prisons;
- the tripling over this period in the proportion of Indigenous prisoners and women and the near tripling in the proportion of remands;
- and the influence of drug use and criminalisation on the operation, culture and security of prisons and the health of prisoners.

It is important to acknowledge that many of these developments lie largely outside the direct control of the Department of Corrective Services, in the broader social, political, cultural and economic life of the community and more particularly in cycles of deprivation, unemployment, child abuse and neglect, ill health and poverty, often highly concentrated in specific marginalised communities.

It is also important to face up to a changed political landscape since 1978, a few features of which are:

- the rising popular and political concern about victims of crime and the potential for this important and legitimate concern to be diverted away from concrete forms of victim support and reparation into simplistic demands for heavier punishment and diminution of civil liberties and long standing legal protections;
- the increasing power of the media and in particular sections of talk back radio to foment a vengeful popular punitiveness to which politicians respond with ever more extreme measures:
  - measures which damage our rule of law traditions;
  - measures which raise public expectations which cannot be met and the inevitable failure of which give rise to demands for even more extreme measures;

- •measures which increase the cycle of violence;
- •measures which create an increasingly uncivil politics of law and order.

- •the hollowing out of the social democratic welfare state under the impetus of neo-liberalism, fostering marginalisation and the breakdown of social solidarity in ways that are clearly criminogenic;
- •the rising interest in a range of restorative justice programs, from juvenile and family group conferencing to circle sentencing;

Despite, or perhaps because of, these generally but not exclusively unfavourable conditions, the time is ripe for a rekindling of the reformist spirit of the Nagle era. There are pointers as to how this might be done in official reports such as that of the NSW Legislative Council Select Committee into the Increase in the NSW Prison Population, which brought together members of all major political parties, albeit that one of its key recommendations, a trial moratorium on the building of a new women's prison while resources are diverted into non-custodial alternatives, was immediately repudiated by the major political parties.

The Nagle Royal Commission came about because systematic official violence and illegality was denied and because the voices of prisoners thirsting for an accounting, could not be quenched. In attempting to rekindle the forces and discourses of penal reform in a very different context it is important that today's prisoners are accorded the ability and means to engage in democratic discussion and communication over how and why that might be done and to what effect.