Key Themes in New South Wales Criminal Justice

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Abstract

New South Wales (NSW), in step with other Australian jurisdictions and with Western nations, has seen a dramatic growth in imprisonment since the early 1990s. In the past few decades, a notable trend of intense legislative activity in relation to sentencing, and criminal justice generally, is evident. The prison has been re-valorised as a frontline criminal justice strategy. This article reflects on developments in NSW penal policy and legislation since the 1970s.

Introduction

New South Wales (NSW), in step with other Australian jurisdictions and with Western nations such as the United States (US) and the United Kingdom, has seen a dramatic growth in imprisonment since the early 1990s.

Since the 1970s, a notable trend of intense legislative activity in relation to sentencing, and criminal justice generally, is evident. The intent and effect of the policies that have accompanied this legislation have been mostly punitive in nature, and overtly 'law and order' policies have gained ascendency. Overall, the prison has been re-valorised as a frontline criminal justice strategy.

This article documents this period in NSW and reflects on these developments. This documenting and analysis is part of a larger project — the Australian Prisons Project — funded by an Australian Research Council Discovery Grant. One of the project aims is to produce a comprehensive documentation, overview and analysis of changes in penal law, policy and practice nationally and in states and territories over the past 40 years. One line of inquiry towards achieving these aims is to examine the continuities and changes in legislation and policy in areas such as remand, sentencing, parole, risk-based assessment, the post-release process, and measures directed at special groups — including vulnerable populations such as women, indigenous people, people with disabilities, as well as other specifically designated groups such as terrorists.

Crisis in NSW prisons: The 1970s

Whilst the choice of a starting point for the project must inevitably be somewhat arbitrary, the 1970s represented a turning point in the penal history of Australia due to the confluence of a number of strong social currents — both within and outside prisons, and culminating in the Nagle Royal Commission in NSW (Chan 1992:28). The crisis situation in NSW jails in this period, manifested by riots, strikes and allegations of brutality,

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accompanied broader social changes outside the prison, highlighting human rights concerns and creating the opportunity to 'turn the violent circumstances of Bathurst into an inquest ... on the whole approach of prisons administration' (Finnane and Woodyatt 2002:99). The comprehensive nature of the resulting *Report of the Royal Commission into New South Wales Prisons* chaired by Justice Nagle ('the Nagle Report') and the breadth of the recommendations it contained, ensures that the Nagle Report retains relevance even to current criminal justice policy.

Within a framework that analyses events and disjunctures in penality, it is necessary to acknowledge the continuities and contradictions therein; for example, the rehabilitative focus strongly identified with the 1970s was present in the practice, if not the official discourse, of many who worked in prisons from the 1940s onwards. Brown (2003:37) points out that accounts of contemporary penality that 'accentuate rupture and change' ignore the imperfect nature of the implementation of many policy directions. Simplistic notions of social change and deterministic social explanations for the complex phenomena of penal policy and culture can emphasise the extraordinary and particular of the discontinuities in penal policy and practice at the expense of the often more relevant continuities of the nature of imprisonment.

Whether the period in which Nagle handed down the Royal Commission Report provided an unusual break in the natural punitiveness of the general public (Vinson 1999:2) or whether the ethos of 'penal welfarism' (Brown 2005:36), while poorly enunciated and unevenly applied, represents a real, continuing thread; there is no doubt that, in the Nagle Report, this period contained the most significant review of the penal system ever undertaken in NSW and, arguably, in Australia. Consequently, the 1970s provides a good starting point for an examination of influences on current prison directions in Australia.

Imprisonment rates

Rates of incarceration in NSW have risen higher in each decade since the 1970s — with the exception of a short period in 1972–3 (NSW Department of Corrective Services Annual Report 1974/75) and in the early 1980s (NSW Department of Corrective Services Annual Report 1982/83), as a result of the reforming work of Tony Vinson, the first Commissioner of the NSW Department of Corrective Services.

Substantial increases in imprisonment rates can be noted in the late 1980s due to the cessation of the Release on Licence Scheme (Grant 1992:15) However, the most dramatic increase occurred following the enactment of the *Sentencing Act 1989* (NSW) (now repealed), where rates of incarceration rose 51% in the three years prior to 1991. By 1993, 41% of Australia's prisoners were in NSW prisons. In NSW, the imprisonment rate in 2000 was 172 per 100,000 adult population, an increase of 78.6% since 1982 (Hogg 2002:5). In 2006/7 the rate of imprisonment in NSW was 187.6 per 100,000 adult population (Department of Corrective Services NSW 2008).

Narratives

Expansion of the penal estate

At the beginning of the 1970s, the NSW prison estate comprised a mixture of prisons constructed in the Victorian era, along with an ill-assorted collection of buildings acquired from other government departments converted for use as prisons. Conditions for prisoners were often primitive and harsh. While the Nagle Report led to many improvements in

prisoner conditions, it was the destruction by prisoners of Bathurst Gaol — where conditions had been especially harsh — that spurred the biggest rebuilding undertaken in the early part of the period under study. The opening of the starkly modern Katingal Prison, which relied on isolation to control troublesome inmates, provided a new focus for concern for prison activists and was quickly closed by Commissioner Vinson in 1981.

The need for a female-specific prison led to the opening of Mulawa (now Silverwater Women's Correctional Centre), in 1980, in a collection of partially renovated former Department of Health buildings. Due to the haphazard nature of the design of the prison, razor wire was highly visible everywhere. Other buildings (or sites) formerly used as other institutions include the Norma Parker Detention Centre and the John Moroney Correctional Complex (formerly Dharruk boys' home).

Improvements in physical conditions, such as those recommended in the Nagle Report, required prison building programs, and, despite Vinson's success at containing prisoner numbers, led to a growth in the penal estate. Subsequently, the 1990s saw the biggest prison expansion project in a century, following a period of serious overcrowding after the enactment of the *Sentencing Act* in 1989. Beginning with Parklea Correctional Centre in 1983 (the first new prison built in NSW in almost 100 years) and Junee Correctional Centre in 1993, new prisons have been constructed regularly in NSW ever since. What Baldry (2007:2) describes as the 'reification' of the penal estate at the expense of community services is most forcefully demonstrated by the huge expenditure on prison building. The problems created by the construction of prisons in remote country areas (for example, difficulties in recruiting professional staff) are reflected by the large number of prisoner complaints to the Ombudsman from these centres (NSW Ombudsman 2008:124).

The refurbishment of a large section of Goulburn Correctional Centre into a 'Supermax' prison (recently gazetted as a separate prison) demonstrates the continuation of the practice of segregation of problematic inmates under especially restrictive conditions, not so different from Katingal (Zdenkowski and Brown 1982:218). In recent times, the placement of especially demonised prisoners there (such as Ivan Milat and Bilal Skaf) has arguably diminished the opportunity for mobilisation of public sentiment against such extreme measures.[1] Recently, the NSW Ombudsman found that the Department had instituted a Behaviour Management Unit at the new Wellington Correctional Centre, similar to previous programs where the Ombudsman found that inmates had been 'illegally segregated' (NSW Ombudsman 2008:125). The program was closed soon after the Ombudsman began the investigation.

Legislative changes

In the brief period of NSW Attorney-General Frank Walker's tenure (1979–83) partly coinciding with the reform period of Commissioner Vinson, progressive steps were taken in the area of bail, summary offences, repeal of many status offences and sentencing. Other positive aspects of this reform period were legislative reforms in the areas of sexual assault and domestic violence, and an increased focus on the status of women generally. A new focus on the needs of victims began in this era. However, later assessment suggests that these concerns were harnessed by politicians to 'tap the retributive nerve in popular opinion in support of tougher measures' (Hogg and Brown 1998:41), rather than to provide actual assistance to victims of crime.

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[1] Although the coronial inquiry into the death of Scott Ashley Simpson in 2001 indicates that vulnerable and mentally ill prisoners are placed there — see n 22.

Over the next decade, programs such as early release schemes, and even rehabilitation in general, were discredited by a number of complex political and socio-cultural factors and events, amplified and distorted through the popular media, including: delays in the enactment of the *Probation and Parole Act 1983* (NSW) (now repealed) (Chan 1992); the disgrace of Rex Jackson;[2] and rising media hysteria about the limited changes to conditions of imprisonment and uncertainties about sentencing. Subsequently, the trend towards a more punitive approach, although uneven, is evident in the areas of sentencing, bail and parole. At the same time, seemingly contrary threads in policy and legislation have been unevenly adopted, such as the use of restorative justice mechanisms and therapeutic jurisprudence.[3]

Throughout the 1980s, 1990s and into the 21st century, a constant political focus on criminal justice has led to a proliferation of legislation, including profound changes in the way in which certain offences and offenders are dealt. Interwoven with this frenzied legislative change has been changes in process and legal procedure, including an increasing reliance on technology both as a procedural tool (for example, audiovisual links for bail and parole) and as a tool for surveillance (for example, CCTV and anklets for parolees). While the human rights ramifications of surveillance may be obvious, the more subtle effects of the removal of the subject from the court in many criminal justice proceedings has gone largely unremarked — the practical utility of the measures outweighing concerns about rights of appearance. An increasing concern with risk and surveillance, alongside draconian legislation (relating to acts of 'terror', drug trafficking offences and sex offences) has led to the emergence of new discourses around community protection and risk — 'future crime' as McCulloch and Pickering (2009) describe it — that have, at times, come close to infringing some of the basic principles of the Anglo-Australian criminal law, such as the presumption of innocence.

The sheer number of changes to sentencing and bail legislation in NSW over the past 20 years indicates a constant political and legislative focus on these areas. This 'uncivil' politics of law and order (Hogg and Brown 1998:41), with an emphasis on more punitive approaches to crime, has become a feature of the political, legislative and policy climate in NSW. The election of the Greiner Liberal Government in the late 1980s and the ascension of the Minister for Corrective Services Michael Yabsley, while representing an extreme manifestation of law and order politics, set the tone for subsequent political and legislative discourse around crime up to the present. Throughout the 1990s and continuing to the present, the number of statutory amendments, for example to bail legislation, gives credence to the view that short-term measures and reactions to individual cases and popular sentiment, rather than a more considered route of law reform, has been the norm in NSW (Brown 2003:64). A notable trend, which has persisted to the present in NSW, is the way in which government responds to media attention to particular cases by creating new offences or increasing penalties (Loughnan 2010:21). This raises concerns about the damage to the integrity of political processes done by hasty legislation passed without proper political process (Bronitt 2008:76). Loughnan (2010:19) points to features of recent offence creation that evidence a politically-driven, over-particularised approach. Another consequence of the rash of legislation in NSW has been a significant expansion in police powers.

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2 Jackson, then the Minister for Corrective Services, was later convicted of corrupt conduct in relation to the Release on Licence Program.

3 Often, these programs have begun as pilot projects externally to the legislative process and later legitimised in legislation.

(a) Sentencing

Much of the law and order focus since the 1980s has been on sentencing. Increased sentences and the creation of new offences arising from perceptions of public dissatisfaction have been ongoing features of criminal justice legislation since the mid-1980s. As sentencing is the most public and easily accessible face of the criminal justice system, heightened political recognition of the importance of congruence between the decisions of the judiciary and magistracy and public attitudes towards crime is demonstrated through the constant policy and legislative focus of the last 40 years. The NSW Sentencing Council, established in 2000, demonstrates a strong focus on community awareness and the recognition of the importance of ascertaining community attitudes towards sentencing — a development at odds with the traditional legal attitude to sentencing as a purely technical legal task.

Along with a loss of confidence in administratively-determined release programs following the Jackson debacle (see n 2), significant public discourse centred on the need for certainty, indeterminate sentencing and a complex mathematically-determined remissions system highlighting problems in the way sentences were administered in NSW. The radical changes brought by the *Sentencing Act* in 1989 manifested in a burgeoning of prisoner numbers and tipped the balance towards punishment over rehabilitation and reintegration. Remissions were abolished and sentences increased. While dubbed 'truth in sentencing', the legislation only dealt with imprisonment, other penalties remaining in numerous small pieces of legislation (Brown 1992).

For the first time, community supervision was tied to the length of time spent in custody. The judiciary were compelled to adopt 'bottom up sentencing', and responded to the inflexibility of the rule that the parole period must be one-third of the time spent in custody by broadly defining the special circumstances required by the *Sentencing Act 1989* to vary the ratio of a sentence (Campbell 1992:300) to include people in need of rehabilitative services beyond their release, for example young people and people with drug and alcohol problems (Ford 1992:304). In 1992, 'special circumstances' were found in 47% of sentences passed in the higher courts (MacKinnell, Spears and Takach 1993:3). By 2007, 'special circumstances' were found in 87.3% of standard non-parole period cases (Poletti 2010:23).

Throughout the 1990s, amendment to NSW sentencing legislation was frequent — there were approximately 49 pieces of criminal justice related legislation from 1995–98, compared to 23 in Victoria (Simpson and Griffith 1999:5–15, 28–35). The periodic detention regime, for example, was changed significantly three times. Numerous new offences were created, with prostitution the only area that saw a move away from prohibition towards regulation. In 1996, mandatory life sentences were prescribed for murder and supply of a commercial quantity of heroin or cocaine where culpability was 'extreme'.[4] Differing attitudes to culpability are demonstrated in reforms to the concepts of intoxication in 1996[5] and diminished responsibility (now substantial impairment) in 1997.[6]

In the context of increasing punitiveness and public concerns about judicial discretion, in 1998 the NSW Court of Criminal Appeal, in an innovative move dubbed 'a masterstroke in public relations' (Warner 2003:20) gave the first of several guideline judgments in the case of *R v Jurisic.* In an attempt to head off the more extreme versions of legislative control over sentencing, such as grid or mandatory sentencing, the Court handed down a series of

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4 *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW).
5 *Criminal Legislation Amendment Act 1996* (NSW).
6 *Crimes Amendment (Diminished Responsibility) Act 1997* (NSW).

judgments setting 'indicative' guidelines (Spigelman CJ in *Jurisic* at 216) for various serious offences.[7] Characterised as 'guerilla tactics' on the part of the judiciary (Freiberg 2000), the impact of guideline judgments has been generally assessed as positive in reducing disparity between sentences, but in the cases of *Jurisic* and *Henry,* guidelines may have contributed to increased sentence lengths (Barnes, Poletti and Potas 2002). There was also a 'dramatic increase in the number of sentence appeals' between 1996 and 2000 (Poletti and Barnes 2002).

In 1999, a package of amendments that consolidated sentencing law into three statutes was passed,[8] leaving much of the substance of sentencing law unchanged (Johns 2002:5). Again, in 2002, in the lead-up to the State Election, further changes were proposed, leading to the inclusion in legislation of many of the common law principles of sentencing and the listing of aggravating and mitigating features to be applied in sentencing. Problems with this codification include the prevalence of 'double counting' of aggravating features by the sentencing court where these features are already elements of the offence (Stratton 2005).

A series of standard non-parole periods, which represented 'significant increases' in sentence lengths, were introduced in 2002 (Brown 2002:71). Whether this codification has led to increased clarification of the law or simply to complications resulting from the need, for example, to define such concepts as 'the mid range of seriousness' is arguable (Brown 2002:65).[9] What it has achieved, however, are significant increases in the length of sentences in matters now subject to the regime (Poletti 2010).

(b) Bail

The development of bail legislation over the past 30 years can only be seen as a retreat from the proposition that the presumption of innocence is the overriding consideration — as expressed in 1979 by the then Attorney-General in enacting the original *Bail Act 1978* (NSW) (Walker in Simpson 1997:8).[10] Beginning with a raft of amendments removing the presumption in favour of bail during the late 1980s — stemming mainly from concerns for protection of alleged victims in sexual assault and domestic violence matters — the Act has been amended many times to remove the presumption in favour of bail for many offences. For the first time, in 1988, a presumption against bail was introduced in relation to drug offences involving large (commercial) quantities of drugs.

Not only has the ambit of offences where there is no entitlement to bail increased, but a continuing focus on repeat offenders, hand in hand with an increased focus on the prediction of risk, has further limited the availability of bail. Amendments in 2002 removed the presumption for those on parole or community-based orders or those who had previously been convicted of an indictable offence.[11]

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7 *R v Jurisic (1998) 45 NSWLR 209*, concerning dangerous driving, was followed by: *R v Henry* [1999] NSWCCA 111 (armed robbery); *R v Ponfield* (1999) 48 NSWLR 327 (break and enter); *R v Wong* (1999) 48 NSWLR 340 (drug importation); *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; *Re Application by Attorney-General (NSW) (No 3 of 2002)* (2004) 61 NSWLR 305 (drink driving).

8 *Crimes (Sentencing Procedure) Act 1999* (NSW); *Crimes (Administration of Sentences) Act 1999* (NSW); *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).

9 The case of *R v Way* (2004) 60 NSWLR 168 provided guidance as to the application of standard non-parole periods and confirmed the correctness of the 'instinctive synthesis' approach to sentencing and the individualised nature of the sentencing task.

10 The only original exception to the presumption, armed robbery, occurred in response to public concern over a high profile case.

11 *Bail Amendment (Repeat Offenders) Act 2002* (NSW).

Recent procedural limitations on the making of bail applications have further restricted access to bail.[12] As the *Bail Act* applies equally to juveniles, one impact has been burgeoning numbers of young people in custody. As in other criminal justice areas 'many amendments have been a result of political imperatives or moral outrage over a particularly abhorrent high profile case, rather than responses to detailed empirical research or evidence' (Brignell 2002). Steel (2009:24) notes the significance of political involvement in bail legislation, with NSW amending bail legislation 23 times from 1992 to 2009 — compared to 6 times in Victoria, 4 in South Australia, 7 in Western Australia and the Northern Territory and 9 in the Australian Capital Territory. In both adult and juvenile jurisdictions in NSW, restrictive bail legislation and policy has increased the proportion of people in custody on remand, leading to a change in the whole experience of incarceration. Unable to participate in programs or work, kept in maximum security, remand prisoners are often merely warehoused.

(c) Parole

The history of parole in NSW since the 1970s has reflected the limitations on discretion and increasing punitiveness seen elsewhere in the criminal justice process. Parole was initially conceived as part of an individualised sentencing process whereby parole was seen as incentive (Chan 1990:405) and part of a welfarist, rehabilitative framework.[13] However, it has arguably been reconceptualised as a process of risk management and prevention, involving monitoring and the application of rigid management frameworks depending on risk assessment. The Nagle Report recognised parole as an important tool for the reintegration of prisoners. Recommendation 39 states that the relevant issue should be whether there any reasons why the prisoner should not be able to adapt to normal community life (Zdenkowski and Brown 1982:89). In a reversal of this test, the modern NSW State Parole Authority must now positively determine that there is sufficient reason to believe that the offender would be able to adapt to normal community life (State Parole Authority NSW 2008:5).

Since the demise of the Release on Licence Scheme in 1983 (Chan 1992), administratively-determined early release programs — long a feature of the correctional landscape as a successful method of controlling prisoner numbers — have not reappeared at all. Parole has remained the only method of conditional release (appeals for mercy being theoretically still available) and has reflected developments elsewhere in the criminal justice system, becoming less a period of support and reintegration than a monitoring of risk and an increasing way back in to prison by way of revocations.

The *Sentencing Act 1989,* which abolished remissions, provided a further block to the control of prisoner numbers by the Department of Corrective Services, and provided significant challenges in the management of increasing numbers of prisoners (Chan 1992:416). The presumption in favour of parole was removed for many prisoners and the introduction of the 75% rule fixed and increased the time spent in custody (Simpson 1999:14).

In the same way that media reports of individual sentences have led to dramatic legislative changes in sentencing and bail, a similar process has applied in the area of parole

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12 *Bail Act 1978* (NSW) s 22A, enacted in 2007, prohibits the court from hearing repeat applications other than in exceptional circumstances.

13 *Power v The Queen* (1974) 131 CLR 623: 'to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom where appropriate' (at 629).

(Simpson 1999:1).[14] The current practice of tying parole to the risk-assessment process, which leads to a simplistic tendency to link parole to program completion, privileges inmates who can negotiate the system and disadvantages those who cannot.

Major inquiries[15]

The *Report of the Royal Commission into New South Wales Prisons* was the watershed criminal justice event of the last 40 years. The Nagle Report provided a vindication of prisoners' complaints of brutality, while at the same time disappointing many by the subsequent absence of legal action against the perpetrators of the brutality. In the 252 recommendations, the Nagle Report undertook an examination of the principles of imprisonment, as well as providing practical prescriptions for action. Imprisonment was to be used as a last resort and Justice Nagle's words — 'the punishment is the loss of liberty but he or she should lose no further rights than result from that loss of liberty' (Royal Commission into NSW Prisons 1978:677) — have guided prison reformers ever since. While failing to predict the dramatic subsequent increases in incarceration (Brown 2005:27), the Nagle Report provided a blueprint for reform that was used by Vinson (1982) as a 'shield' in his subsequent battles with the prison officers' union and the conservative media, to improve prisoner conditions. The most immediate positive change was the virtual end of institutionalised violence by prison officers (Brown 2005:35). Improvements in the area of prisoners' rights make it difficult to overstate the radical changes that the conception of 'prisoner as citizen' brought to the treatment of prisoners. Access to legal representation, written material, improved access to visits, along with gradual improvements to physical conditions, changed the face of imprisonment in NSW.

However, the practical consequences of the adoption of that philosophy (that prisoners retained all rights except those necessary for good order and security) led to an almost immediate backlash against these improvements by sections of the media, fed by the vehement opposition of the prison officers union. As Zdenkowski and Brown (1982:268) point out: 'within a day of the release ... [of the report] the Daily Telegraph was rewriting the record ... excusing and legitimating massive acts of state violence'. Chan (1992:28) argues that the significance of the Nagle Report was to legitimise the rhetoric of reform, not only for the implementation of the recommendations, but also for subsequent policy initiatives.

The most significant inquiry in the immediate post-Nagle period was the NSW Women in Prison Task Force (1985). The Nagle Report devoted just one chapter to women, with recommendations 29 to 35 relating specifically to women and reflecting the poor medical care and tendency to use psychotropic medication that characterised female incarceration in NSW. This focus also reflects the dominant view of women. In a climate of political action by women in the early 1980s, assisted by sympathetic bureaucrats, the concerns of the numerically small, but vastly disadvantaged, women's prison population were canvassed thoroughly in the Women in Prison Task Force Report and then largely ignored for almost a decade. The Task Force found that most women within prison are not violent offenders and,

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[14] Wide publicity given to the case of John Lewthwaite led to further restrictions. In 1999 Lewthwaite was released on parole after serving 20 years for the killing of a child.

[15] Other important inquiries on matters ancillary but relevant to the prison system were: the Woodward Royal Commission into Drug Trafficking (1979), making limited inroads into police corruption; the Wood Royal Commission into the NSW Police Service (1997), which finally uncovered some of the deep systemic corruption within the NSW police alleged by prisoners since the Nagle Report; and the Independent Commission Against Corruption (ICAC) (1993) inquiry into the use of informers.

therefore, pose a lower risk to the community. There was an abnormally high proportion of women on remand (NSW Women in Prison Task Force 1985:42) and the Task Force recommended that the number of women inmates should be kept below 100 (Baldry 2004).

The rate of female incarceration in NSW increased dramatically between July 1994 and June 1999 — reflected in both the remand and sentenced population — rising from a daily average of 291 to 412 between January 1995 and January 2000, an increase of 41.6% (Select Committee on the Increase in Prisoner Population 2001:10). The recent expansion of the women's prison estate, although vigorously opposed, has led to the conversion of Emu Plains Correctional Centre to a women's prison and the construction of Dillwynia Correctional Centre, which may or may not be the prison referred to by Pat Carlen in her recent analysis of 'imaginary penality' (Carlen 2008). A long overdue refurbishment of Silverwater Women's Correctional Centre (formerly Mulawa) has improved conditions there to some extent.

The implementation of the Richmond Report (Department of Health NSW 1983) recommendations — for the deinstitutionalisation of people with a mental illness, the closure of the large psychiatric institutions and the management for the mentally ill in the community — has had far reaching effects on the criminal justice system (although the process of deinstitutionalisation had begun prior to Richmond). The lack of long-term secure care and support for the most disadvantaged of this group saw many homeless people committing low level offences. Coupled with decreased tolerance for this type of offence (evidenced by the reintroduction of summary offence type legislation in the late 1980s and increases in police powers), the only place for many was prison. The somewhat perverse alliance of advocates of deinstitutionalisation of the mentally ill and economic rationalists in government throughout the past three decades has contributed to the over-representation of mentally ill people in prison. Baldry (2004:105) points to the high proportion of women with mental illness in prison: 15% with a serious psychotic illness, 90% having received psychiatric treatment in the previous year, and almost all with coexisting problems of drug dependence and homelessness. The prevalence of intellectual disability among prisoners has also increased, often with coexisting problems of drug use and mental distress, if not mental illness in the legal sense.

A recent review of Chapter 5 the *Mental Health Act 1990* (NSW) and related matters under the *Mental Health (Criminal Procedure) Act 1990* (NSW) has led to the Mental Health Review Tribunal being granted increased power to authorise release (James 2007). However, some of more draconian provisions impacting on those with mental illness remain — most notably the lack of any provision for the setting of a non-parole period for those found unfit to plead and given a limiting term under s23(1) after a special hearing under s19(2) of the *Mental Health (Criminal Procedure) Act 1990* (see *R v Mailes* (2004) 62 NSWLR 181 at [22] [43]). Within the correctional system, recent improvements to conditions in some areas — the new Justice Health facility at Long Bay in particular — must be balanced against evidence in individual cases of the effects of Supermax conditions on inmates with a mental illness.[16]

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC), established in 1987 and reporting in 1991 (RCIADIC 1991), was a national inquiry into the reason for the high numbers of deaths in custody of indigenous people. By default, it became an inquiry

[16] For example, the Human Rights and Equal Opportunity Commission (HREOC) submission to the coronial inquest into the death of Scott Ashley Simpson in 2004: <http://www.hreoc.gov.au/legal/submissions_court/intervention/simpson.html>.

into the imprisonment of indigenous people generally and highlighted systemic problems. The Commission found that, while Aboriginal people were not dying in custody at a rate any greater that non-Aboriginal people, their over-representation in custody was a result of disadvantage and inequality (Cunneen 1997:4). While an accurate view of the numbers of indigenous people in prison is not really available until the late 1980s, the figure of 7% in the Nagle Report was probably an underestimation, as prison officers made the determination of Aboriginality (Cunneen 2004). The Nagle Report recognised the dearth of specific programs for indigenous people, but it was not until the national RCIADIC that the imprisonment of Aboriginal people was placed under the spotlight.

The Commission found a culture of racism and neglect of basic human rights in the treatment of indigenous people by police and custodial authorities. One important outcome of the inquiry, which had ramifications for the entire prison population, were the findings regarding breach of duty of care on the part of correctional authorities and police (Cunneen 1997:4). In many instances, deaths were preventable and, in NSW, Commissioner Wootten recommended that of the 18 deaths investigated, seven should be further investigated by prosecutory and disciplinary authorities (Cunneen 1997:5). While no charges were laid, some clarity was achieved over the responsibility of police and other relevant organisations to ensure that their duty of care is fulfilled. However, Cunneen (2004:100) argues that any impetus for reform as discernible in the immediate post-Nagle period was long gone by the time the Commission handed down its report and he assesses most of the reforms resulting from the RCIADIC to be 'programmatic and administrative'.

Despite the exhaustive efforts of the RCIADIC, the numbers and rates of indigenous imprisonment throughout Australia continue to climb upwards. The most alarming increase has been among young indigenous women; from 21% of all women prisoners in 1996 to 30% in 2006 (Australian Bureau of Statistics in Baldry 2009:20). In NSW courts, a distancing from legal doctrines (known as the *Fernando* principles),[17] which came some way to recognising this structural disadvantage, has been evident (Anthony 2008:14).

The Legislative Council inquiry into the reasons for the increases in the prison population was the first post-Nagle general inquiry into the State's prisons. The Interim Report looked specifically at the effectiveness of incarceration as a response to women's criminality and other similar issues (Select Committee on the Increase in Prisoner Population 2000). Further evidence of the highly disadvantaged backgrounds of female prisoners and the advantages of developing alternatives to incarceration led to the Select Committee recommending a moratorium on the building of a new women's prison until a serious exploration of ways to reduce the number of women being sent to prison had been completed (Baldry 2004).

The Final Report found that 65% of inmates in NSW prisons were serving sentences of six months or less, recommending that these be abolished completely (Select Committee on the Increase in Prisoner Population 2001), and the Sentencing Council of NSW (2004) later echoed these recommendations. Factors responsible for the growth of the NSW prison population were found to be the increased use of remand, longer sentences and increased police activity (Roth 2007:22). As for the political response to this 'rational, democratic and well researched' report — it was 'immediately repudiated by both the government and opposition in a bipartisan response which showed clearly the very real political limits to claims of "non-ideological", "evidence-led" policy formation in the law and order area' (Brown and Wilkie 2002:xxi).

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[17] *R v Fernando* (1992) 76 A Crim R 58.

Major policy changes

At the beginning of the 1970s, while failing to address problems of institutionalised brutality, the newly named Department of Corrections was beginning to expand the Probation and Parole Service and implement weekend detention. The official record, in the form of the Department's Annual Reports, shows no recurrence of the philosophical musings of the retiring Commissioner Ken Moroney in the 1965 report, in which he urges care in utilising imprisonment as a frontline criminal justice strategy, pointing out its recent adoption and untested nature (NSW Department of Prisons Annual Report 1965). The extraordinary nature of this prescient and thoughtful statement is reinforced by its novelty; nothing like it appears in any other Annual Report.

The explosive reaction by prison officers to the reform process under Commissioner Vinson characterises the correctional landscape of the late 1970s and early 1980s. Complex political developments deprived Vinson of the political support he needed to carry out the massive task of reform (Grant 1992:86; Vinson 1982:195–203). Despite this, Vinson's reform agenda succeeded in implementing a large number of the Nagle Report's recommendations (Zdenkowski and Brown 1982:215) and resulted in many positive gains for prisoners.

The paradoxical situation of good intentions in prisoner management and a humane approach to containment resulting in an expansion of the prison estate through prison construction is evident in NSW in the post-Nagle period. The scrupulously documented attempt at the newly reopened Bathurst Gaol to adopt case management in the 1980s (Gorta 1982), among other innovations, is evidence of a desire within the Department to continue the reform process. However, the outcome for Bathurst was badly affected by a lack of resourcing and eventually by the sheer numbers of prisoners coming in to the system (Crouch et al 1987). Innovative programs like the Special Care Unit, which sparked worldwide interest, were poorly documented and evaluated. By the mid-1980s, a more managerial approach was developing in the Department, in keeping with broader trends throughout the NSW public service.

On one view, the Department, permanently scarred by the Nagle Report and with a difficult relationship with its own past, constantly seeks to redefine itself by virtue of what it is not (Sotiri 2003:249). In the process, lacking a vision of what it is, managerial and security based concerns have filled the void. A truly 'volatile and contradictory' approach (O'Malley 1999) prevailed as the rise of punitive populist sentiments throughout the 1980s led to an increased political sensitivity about crime, with simultaneous implementation of some of the reforms recommended by the Nagle Report. Damage to public confidence in criminal justice generally in NSW, already affected by the Jackson affair (see n 2) was clearly accelerated and magnified during this period.

The election of the Greiner Government in the late 1980s and the ascendance of Michael Yabsley as the Minister for Corrective Services was undoubtedly an important 'tipping point' in the penal culture of NSW, although there had been a noticeable hardening in the policies of Wran Labor Government. Radical reforms to every aspect of sentencing and criminal justice administration led to an immediate increase in prisoner numbers. Changes in focus from remissions to defined sentences changed the way prisoners were managed in the system. Work was privileged over other forms of activity as the most effective rehabilitative mechanism, just as some of the early programs, such as the Special Care Unit and the new management regime at Bathurst, were starting to develop. The effect on the prison system

was to 'decisively reverse the reforms introduced following the Nagle Royal Commission' (Brown 1992:28).

Following the enactment of the *Sentencing Act 1989*, the influx of prisoners caused yet another near crisis for the Department, as staff were simply overwhelmed by the numbers of prisoners. The 1990 review of the impact of the *Sentencing Act 1989* by the Department's Research Division showed that, in less than a year, while the average aggregate sentence was lower, the average time to be spent in custody had increased, less prisoners were receiving periods of community supervision and those periods were shorter (Gorta and Eyland 1990:2).

The continuing absence of a strong, consistent philosophical rationale for the work of the Department (Sotiri 2003:394) — which was also identified by the Nagle Report as a problem (Dawes 2002:118) — along with the politicisation of criminal justice and the ensuing political pressure on senior management, has resulted in a defensive, closed culture, with an aversion to publicity engendered by escapes, unrest and industrial action.

Privatisation is again on the agenda with the taking over of Parklea Correctional Centre by GEO in 2008 — the second privately run prison since Junee Correctional Centre opened in 1994. As the Assistant Director of Learning and Staff Development at the NSW Department of Corrective Services points out: 'In NSW, the Department has used the spectre of privatisation to trial a series of operational reforms in its newly constructed prisons at Kempsey and Windsor' (Griffith and Edwards 2009:4).

Programs and services

A pragmatic appraisal of the capacity of prison to rehabilitate is reflected in the Nagle Report's insistence that prison be seen as punishment and not an opportunity to reprogram people (Royal Commission into NSW Prisons 1978:52). However, the Nagle Report's criticism of the use of rates of recidivism as a 'measure of success' for correctional authorities (Royal Commission into NSW Prisons 1978:52) could not be further from the political reality for the current Department of Corrective Services.[18]

The Department appears to take a peculiarly ahistorical stance in relation to the delivery of programs and services for prisoners. The ongoing failure to properly document and evaluate programs, along with the effect of the 'nothing works' philosophy, and a tendency to constantly reinvent itself (Sotiri 2003:249) has arguably negatively affected the capacity of the Department to deliver programs and services. The paradoxical situation of empty programs and full waiting lists was observed by the Audit Office of NSW in a review of the rehabilitative services offered by the Department (Audit Office of NSW 2006).

Recently, the demonisation of particular types of offenders has led to program development linked to risk assessment (most notably sex offenders), and program completion as a precondition to parole. The relationship between risk and rehabilitation has arguably changed the focus of program development from the provision of opportunities to rehabilitate through undertaking voluntary short courses (with questionable utility) to mandatory or coercive offence-specific programs with often slight evidence of a beneficial effect in terms of the evaluative paradigm of reoffending (Sotiri 2003:259).

The absence of a clear rationale and effective evaluation process led the Audit Office to recommend that 'it would be useful if the Department [of Corrective Services] clearly

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[18] 'Corrective Services NSW delivers professional correctional services to reduce re-offending and enhance community safety': NSW Department of Corrective Services Statement of Purposes and Values 2009.

defined what it wants to achieve in rehabilitating prisoners' (Audit Office of NSW 2006:1). The NSW Ombudsman has expressed concern that, despite the direct linkage between parole and the completion of programs particularly for sex offenders, there were long waiting lists and low numbers of inmates completing the sex offender treatment program (NSW Ombudsman 2008:127).

The Compulsory Drug Treatment Correctional Centre at Parklea,[19] somewhat of an anomaly in the correctional system, is attempting to integrate notions of therapeutic jurisprudence into correctional practice with a small group of carefully selected offenders. It remains to be seen whether a broader change in approach will be discernible throughout the rest of the prison system. However, the low numbers of inmates entering and completing programs indicate that the majority of offenders receive no program intervention at all.

Themes

The preceding discussion of changes in legislation and policy in NSW criminal justice since the 1970s uncovers a number of themes that permeate the events outlined above.

While prisoner activism has almost disappeared and prison officer activism has been transformed by changes in industrial relations and the threat of privatisation, these factors have salience in explaining certain features of NSW's current system. Popular sensibilities — including the media (the importance of which is not reflected by the brief reference in this article); the development of a discourse of 'risk'; the transmission and extension of penal relations into the community by the development of so-called 'alternatives' to incarceration; and the normalisation and reproduction of criminalisation in various population groups — provide useful thematic structures to consider the impact of the foregoing survey of criminal justice and penal changes.

Prisoner activism vs prison officer activism

The significance of prisoner action — in the resulting Nagle Royal Commission, and in the many themes and concerns that coalesce around prisoner rights to the present — must be acknowledged. The systematic bashing of prisoners at Bathurst in 1970, the subsequent riot leading to the destruction of Bathurst in 1974 and the ongoing brutality of the regime at Grafton all had to be communicated by prisoners to the outside world. Vinson (1982:94) sees the period as a time when the public was 'temporarily wooed away from the punitive mood that was their usual disposition'. By the 1970s, the prison estate was in a sorry state and prisoner agitation over conditions was now supported by activists on the outside. Prisoner activism has not been a significant part of the correctional landscape since this time. Scrutiny by external bodies has also been reduced, the most notable example being the abolition of the Office of the Inspectorate in 2003. It may be that NSW, consequently, will be unable to comply with the obligations imposed by the United Nations' *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brown 2008).

The significance of industrial action by prison officers in shaping the way prisons are run in NSW today is also difficult to overstate — from the concerted campaign in the 1980s to halt the process of reform under Vinson, to the latest moves towards privatisation by the

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[19] Established in 2006 following amendments to the *Drug Court Act 1998* (NSW), the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW).

Department of Corrective Services, which hold the added benefit of reducing the power of the union. Both of these extremes represent the central role of those working in the system in the maintenance and reproduction of penality in NSW. The ability of prison officers to hold the system to ransom by industrial action has resulted in such 'rigid staffing formulae as the "sight and sound rule" designed to protect prison officers from allegations of assault by inmates' (Dawes 2002:123).

The limited penetration of case management and throughcare, despite official rhetoric, has left a vacuum filled by more militaristic and security based concerns. The dominance of security concerns, which characterises the current regime, owes its genesis and maintenance, in part, to a recognition of the undesirable political consequences of losing control over prisoners and prison officers.

Popular sensibilities and penal politics

The intensification of the climate of popular punitiveness in the mid-1980s as a 'backlash against the reform period' (Brown and Wilkie 2002:xix) was preceded by a mixed period of limited reform and increasing watering down of political will to temper the rising tide of popular punitiveness. A growing focus on victims addressed strong community concerns about the treatment of, in particular, vulnerable victims such as children and female victims of male violence. Other currents of popular discourse were driven by concerns about escapes; and a focus on particularly violent and abhorrent crimes such as the murders of Janine Balding and Anita Cobby, increased calls for longer sentences and harsher conditions. The confluence of these currents of concern with more populist, punitive attitudes has accompanied the increased use of imprisonment in NSW.

It would be difficult to examine the development of penality in NSW over the past 40 years without reference to the popular media, which developed a crucial role in reflecting and shaping political reactions and actions in criminal justice policy, practice and legislation. From the lurid reporting of escapes and concentration on defiant individuals such as Darcy Dugan and Ray Denning in the early part of the 1970s to the intensification of critical reporting about minor improvements in prison conditions in the early 1980s the media has concerned itself in a highly selective way with the deficiencies of criminal justice. In the 'hysteria provoking tone' (Lumby 2003:110) of reporting on the release of high-profile especially hated categories of prisoners in the latter part of the period, the media has, at many points in the last 40 years, provided a focal point for the expression of deeper fears. Recently, the significance of media involvement in spurring on politicians to engage in the kind of hurried and ill thought out legislation is exemplified by the so-called 'bikie legislation'[20] (Loughnan 2010:18).

The culmination of this intensification of popular sentiment about crime and punishment came with the election of the Greiner Government, heralding the unprecedented dominance of the Minister for Corrective Services, Michael Yabsley, in a radical, ideologically-based change of the criminal justice system and sentencing in particular. His 'Truth in Sentencing' regime (a misnomer according to Brown (1992) and others), led to widespread restrictions throughout the prison system (for example, on property and visits). The abolition of remissions caused huge management problems and the consequent longer sentences caused critical overcrowding problems.

This was not a unitary process, however, as those techniques of control (such as probation supervision) began to be seen as ways in which the reach of the prison could be

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[20] *Crimes (Criminal Organisations Control) Act 2009* (NSW).

extended. Developing discourses around so-called 'sentencing alternatives' — such as probation, community service, treatment and rehabilitation — are evident throughout the 1970s and 1980s. A concomitant movement toward longer sentences, concentration on repeat offenders and restrictions on bail complete the 'volatile and contradictory' (O'Malley 1999:175) picture, and has led to a huge expansion in the use of prison, even as other sentencing options have been developed.

Risk-related developments

While prison escapes have often fuelled populist cries for stricter security, increasingly, the fear of political fallout from such events has become so acute that escapes from custody are much less frequent. Since 1980 the rate of escapes has dropped 95%, but the rate of escapes from maximum security has remained steady between 1979 and 2004 (Clark et al 2006). As these figures demonstrate, the majority of escapes have always been from medium or minimum security prisons. However, despite this, the use of escape numbers as a performance assessment tool has led to increased attention to security by correctional administration.

In the 1990s, there was a discernible trend towards the post-sentence detention of those offenders considered especially risky. The case of *Kable v Director of Public Prosecutions (NSW)* (1996) illustrated the first, if somewhat unsophisticated, move towards a change in the balance between the rights of individuals and the right of the State. The High Court overturned the Kable legislation, which was specifically directed towards Mr Kable and provided for his detention after the expiry of his sentence. However, as is often a feature of the development of the criminal law in Australia, developments in other jurisdictions (in this case Queensland) provided a template for subsequent legislation in NSW (Brown 2004:1) — namely, the *Crimes (Serious Sex Offenders) Act 2006* (NSW). On 7 July 2009, NSW Attorney-General John Hatzistergos said that 24 orders under this Act had been imposed in respect of 18 sex offenders (Hatzistergos 2009). The reliance on psychological risk assessment instruments to determine the legitimacy of post-sentence detention raises questions as to their efficacy, as does the reliance on mandatory or coercive cognitive behavioural programs to reduce 'risk'. Brown (2004:12) points out the 'fundamentally punitive nature' of the post-sentence detention measures and the danger of privileging community fears and anxieties over the liberty rights of individuals.[21]

Concomitant with this focus, after the 11 September 2001 terrorist attacks in the US, new security categories relating to 'terrorist' prisoners reflect an increasing willingness to suspend individual rights for those considered especially risky (McSherry 2005).[22] The rhetoric of 'balancing' security concerns with concerns about personal liberty often result in the dominance of security concerns and the perpetuation of a type of zero-sum game in which individual rights are seen as always in conflict with the need for security (Bronitt 2008:68). A similar discourse can be detected in relation to recent concern relating to victims rights.

Transmission/extension of penal relations

It would be possible to construct quite disparate dichotomies of intent throughout the past 20 years — a concern with rehabilitation and treatment in the latter part of the 1970s or

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[21] The decision of the Human Rights Committee of the United Nations (2010) in the matter of Tillman confirms this view.

[22] In NSW, Category AA prisoners are said to pose a 'special risk to national security': *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 22 (now repealed).

earlier according to Chan (1992), alongside more punitive currents developing in the 1980s leading to longer sentences and more bail refusals; an awareness of the need for a human rights based perspective when dealing with imprisoned populations, alongside a reduction in the actual avenues of action open to prisoners to challenge the conditions of their imprisonment. The situation is much more complex than this and the development of so-called 'alternatives to imprisonment' (such as probation and community service), while a dominant thread of discourse, was, in practice, often an instrumental adoption by correctional administration in NSW of the ideology of prison as a last resort: 'when this ideology was translated in to a policy of reducing the prison population it was beneficial to the political and economic interests of the corrective services' (Chan 1992:43).

The increasing permeability and blurring of the boundaries of the penal in NSW is evidenced by the recent extension of penal relations into the community. The types of recent initiatives promulgated by the NSW Government in this area — for example, Community Offender Support Schemes (COSPS) — represent an extension of penal control into areas hitherto serviced by poorly-funded prisoner welfare organisations in the community (Weelands 2009). The creation of oppressive 'regimes' for 'pariah' offenders, such as sex offenders, subverts the need for post-release housing into opportunities for increased control (Weelands 2009). These strict regimes set up increased possibilities for breach and return to prison — 'offenders who are released "into the community" are subject to much tighter control than previously, and frequently find themselves returned to custody for failure to comply with the conditions that continue to restrict their freedom' (Garland 2002:176). A feedback effect from conditional release programs may exist, with imprisonment for technical breaches of orders (rather than reoffending) leading to reincarceration in 'many cases' (Jones et al 2006:2).[23] Wacquant's (2001:97) 'carceral continuum' is, thus, maintained and extended.

The experience of many prisoners is accurately conveyed by the notion of a 'third space' within which prisoners are trapped, shifting between prison and the community and — although constrained by the exercise of surveillance and control 'disguised by notions of reintegration and settlement' (Peacock 2008) — never again an included member of the community. Official discourse often conceptualises the sentence and release process in a linear fashion, whereas, as Peacock (2008) points out, it is more of a 'net' — a useful concept that reflects the disjunction of the prisoner from their former life and the difficulties of exiting their former status as prisoner. As Baldry (2009:21) puts it, 'prisoners are cycling around in a liminal, marginalised and fluid community-criminal justice space'. The concept of 'iterative homelessness' describes the plight of many prisoners (Baldry et al 2006:20).

This is not to place undue importance on the control aspects of so-called alternatives to imprisonment, as this belies the actuality of the lack of the most basic support services for most prisoners (Brown 2004:38). When considered in the context of post-sentence detention, such intrusions of the penal into the community have been part of a broader trend of a risk-orientated '"future crime" discourse' (McCulloch and Pickering 2009:628), privileging the ostensible prevention of crime by the identification of risky individuals, over the preservation of basic principles of criminal law such as the presumption of innocence.

Bail is another area where the extension of the penal into the community is evidenced. From a baseline position that was possibly the most liberal in Australia, NSW, as the first jurisdiction in Australia to codify and extend common law principles of bail, has restricted

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[23] In 2008, the number of parole revocations for reoffending or outstanding charges was 763, while an almost equal number (723) were revoked for breach of conditions (NSW State Parole Authority 2008:24).

and reshaped the ideology of bail so as to result in an almost total presumption against bail for all but the least 'risky'.

Brown's (2004:36) argument — that ' a battered and reconfigured penal welfarism' has survived in NSW and that any critique of the extension of the prison must consider the limited extent to which any kind of proper support has been evident in the community — has some cogency still, although 'battered' is an understatement. However, the development of forms of coercion and control that act to reproduce and multiply the effects of disadvantage by adding a further way to prison, necessitate the recognition of the role of such initiatives in extending, transmitting and normalising the prison.

Normalisation and reproduction

Throughout the last 30 years certain sectors of the population have emerged as the proper subjects for the criminal justice system. The effects of colonisation — dispossession, genocide and cultural dislocation — have arguably been a continuous process for indigenous people in NSW. Others, such as the mentally ill, have increasingly become enmeshed in the institutions of the criminal justice system. The constant cycling through the correctional system of the homeless and mentally ill links high rates of instability in accommodation with a high chance of re-imprisonment (Baldry et al 2006:30). Prisons have been 'remade as multi-mode therapeutic agencies to house, control and "treat" marginalised and criminalized persons' (Baldry 2009:27).

Even if one accepts Garland's (2002) thesis of rupture between post-war welfarist policies and modern penality, it is necessary to develop a particular analysis for Aboriginal people who, as Blagg (2008) points out, were never really included in the benefits of the welfare State. Blagg's (2008:43) conception of the prison as an 'Aboriginal domain' illustrates the continuous nature of the process of colonisation for indigenous people. While decarceration and alternatives to imprisonment have been a feature of white criminal justice, indigenous people have not benefited from these programs: 'punishment had a different trajectory for aboriginal people' (Blagg 2008:21). Blagg (2008:28) also demonstrates that notions of risk have always attached to indigenous people — the form may be different now, but the intent has been the same throughout the process of colonisation.

Conclusion

To attempt a synthesis of the various legislative, policy and penal narratives of the past 40 years leads invariably to the risk of overemphasising the extraordinary over the more mundane and ordinary continuities. Criminal justice, and penal policy in particular, is inextricably woven with the particular social, economic and cultural circumstances in which these practices are embedded (Lacey 2008:45). By summarising and de-contextualising these events they may lose some of their more subtle nuances.

While seeking to avoid the type of 'dystopian vision' counselled against by Zedner (2002) and Brown (2005), this analysis of the various strands of policy, legislation and practice in criminal justice in NSW over the past 40 years leads to the conclusion that, with the exception of the immediate post-Nagle period, legislative and policy development have all moved toward the creation of a large and constantly growing prison estate in NSW. The significance of this fact reflects the way in which imprisonment has become embedded in the criminal justice and penal culture of NSW as the predominant model from which all other sanctions are conceived as 'alternatives'.

Brown (2005:39) cautions against adopting a simplistic account of 'rupture and change', pointing to the 'continuities of penal welfarism' present in NSW criminal justice. For Brown (2005:41), evidence of continuity rather than rupture, and of the persistence of penal welfarism, is provided by post-Nagle improvements to physical conditions for prisoners, a stronger 'social welfare' role for prison officers, and the persistence of notions of due process among the minions of the criminal justice system. The importance of emphasising 'contestation' in criminal justice policy (Brown 2005:42), rather than implying any kind of smooth, cohesive inevitable transformation lies in detailing the actual developments as they occur and the context in which they occurred. As Pratt (2008:274) points out 'there is no inevitability about this', and so the development of currents of populist punitiveness in NSW, as elsewhere, must be traced through the specific currents of legislation, policy and practice and their socio-cultural context.

Pratt (2008:269) describes five main causes of 'penal populism' all of which have arguably been present in the recent socio-political context of punishment in NSW. In particular, the 'decline of deference', and an associated decline in the trust of the community in political processes, can be detected — for example, the many legislative attempts to constrain judicial discretion in sentencing. However, Freiberg's (2000) 'guerrilla judges' epitomise the kind of complexity of response and resistance that belies direct categorisation and supports a more nuanced view. The existence of a level of 'ontological insecurity' — due to structural changes in society, the role of the media and the impact of the widespread availability of information technology (Pratt 2008:271) — have been evident in NSW through the perpetuation of a particular type of populist media reporting about crime. The responsiveness of the legislature to such reporting has, at times, led to ill considered, hurried legislation (Loughnan 2010:19. What Pratt (2008:274) calls 'democratisation' — where the authenticity of lived experience, especially of victimisation, is validated as an authentic and influential part of criminal justice discourse — has undoubtedly had an impact on criminal justice discourse in NSW. Whether the 'non discursive' (Brown 2005:29) evidences any real change for victims, through the development of a kind of 'zero sum' game between the rights of victims and offenders, is another question.

As O'Malley (2008:64) points out, while there has been a discernible shift from 'welfare–social policies' towards a more 'neoliberalist political rationality' these currents have a complexity in their aetiology and maintenance. The 'volatile and contradictory picture' painted by O'Malley is exemplified in NSW by, for example, the coexistence of punitive trends such as longer sentences and restrictions on bail, with initiatives relying on conceptions of therapeutic jurisprudence, such as the Drug Court. Notions of decarceration may be subsumed by the development of risk discourse and technologies in which the same programs became less about keeping people out of prison than, in their effect, part of a 'carceral continuum' that feeds people back through prison. In addition, the effect of legislation in related areas (such as anti-terrorism laws and preventive detention legislation for sex offenders), while constituting a very small part of the operation of the criminal justice system, may, in retrospect, be seen as an integral part of an overall move to restrictions on the liberty of individuals falling into specified categories. Terrorist legislation, for example, has allowed for the resuscitation of status offences (McSherry 2005:283) and a significant broadening of the scope of inchoate offences.

This brief overview of some of the developments in criminal justice and the penal system in NSW since 1970 has attempted to provide a basis for further theorising about the causes and consequences of these phenomena. Attention to the local, to the specific details of the manifestations of criminal justice policy is essential to avoid an overly determined, 'sweeping and generalised' account (Brown 2005:28) and to reflect the presence of both change and continuity in philosophy and practice.

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