The Maybanke Lecture 2022

Criminal Justice: Scoring the Feminist Agenda

Virginia Bell AC SC

Maybanke Anderson was among the splendid 'first wave' of feminists in this State, a foundation vice-president of the Womanhood Suffrage League of New South Wales and two years later its President. She was also a member of the Women's Literary Society which despite the quiet gentility of the name was a hotbed for advancing the feminist agenda. A focus for the activism of these trailblazing women was the scant protection that the law afforded to women and girls. They opened battles on a number of fronts. Maybanke Anderson has been credited with securing the passage of the *Married Women's Property Act* 1879 (NSW)[1]. Her friend, Rose Scott, led a sustained campaign to raise the age of consent for girls, which at the turn of the last century was 14 years. As Scott pointed out many girls were too young to have much, if any, understanding of sexual intercourse and its consequences[2]. The campaign was met with sustained opposition from parliamentarians who were concerned about the evident dangers to men and boys. In 1903, the Crimes (Girls' Protection) Bill foundered with the Attorney General, Bernard Wise, warning his colleagues in the Legislative Council of the risk of blackmail by promiscuous young girls[3]. Among other arguments put in opposition to the Bill was the suggestion that in sub-tropical Australian conditions, girls ripened into womanhood earlier than in other climes[4].

Maybanke Anderson's primary focus was on education and early childhood development. Her views in these respects shaped her thinking on

---

[1] J. Roberts, *Maybanke Anderson Sex, suffrage and social reform*, ((1993), Hale & Iremonger) at 50 ('Roberts') citing L. Oliff, *Louisa Lawson: Henry Lawson's Crusading Mother*, ((1978), Rigby) at 85.
[2] Allen, *Rose Scott Vision and Revision in Feminism*, (1994) at 185 ('Allen').
[3] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard) 30 July 1903 at 1157.
[4] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 July 1903 at 1154-1155.

the administration of criminal justice. She bemoaned the expenditure of public monies on imprisonment, the rate of which in 1899 in New South Wales was at an all time high. She envisaged a day when an educated populace who had the benefit of having been raised in loving and supportive surrounds would have no need of prisons. To this end she was a leader of the Free Kindergarten Union[5] and the driving force behind the Parks and Playground Association[6]. Many of her fellow feminists were less optimistic about the capacity to effect change. Some despaired that attaining the franchise had not led to the economic and social reforms for which they had campaigned[7]. Australia led the world in female suffrage. Following federation women not only had the right to vote in federal elections, but they were also eligible to stand for election to the Commonwealth Parliament. It remained that many of the laws which discriminated against women such as those concerning the custody of children and employment were within the legislative power of the states. And while women attained the franchise in New South Wales in 1902, they were ineligible to stand for either house of the State Parliament or to enter the legal profession until the passing of the *Women's Legal Status Act* 1918 (NSW).

On the eve of World War II, Nerida Cohen, one of the very few women then at the New South Wales Bar, gave a paper to the Feminist Club in which she pointed out that twenty years had passed since the commencement of the Women's Legal Status Act and yet few women had established themselves in professional and public life[8]. It is fair to observe that before the radical social changes of the 60s and early 70s, among which

[5] Roberts at 186.
[6] Roberts at 120.
[7] Allen at 194-195.
[8] N. Cohen, *Women's Legal Status Act – How Far It Goes*, (1939) The Feminist Club of NSW: Silver Jubilee Souvenir 1914 -1939 at 15.

effective birth control must rank high, the forces limiting women's participation in public life were powerful.

The late 60s and early 70s saw the emergence of what is often described as the 'second wave' of feminism of which I see myself as a part. Germaine Greer's *The Female Eunuch* was published in 1970, Anne Summers' *Damned Whores and God's Police* was published in 1975 as was Susan Brownmiller's *Against Our Will: Men, Women and Rape,* which challenged conventional assumptions about rape. The previous year saw the funding of Sydney's first rape crisis centre. And the Women's Electoral Lobby ("WEL") had reform of the law governing sexual and domestic violence on its agenda. At the same time, significant reforms were occurring within the administration of criminal justice in New South Wales. In what was to prove a more seismic event, in 1976 the government appointed Justice Nagle to conduct a Royal Commission into New South Wales Prisons.

As a newly minted young lawyer, I assisted in drafting submissions that were put to the Royal Commission on behalf of women prisoners by an advocacy group. Later, as a solicitor working at the newly opened Redfern Legal Centre, I was a member of the Sexual Assault Committee, which I believe was then under the aegis of the Women's Coordination Unit in the Premier's Department. Later still, I was a member of the Women in Prison Task Force, which was set up in 1984 by the Minister of Corrective Services to review the appropriateness and adequacy of the custodial facilities for women. Tonight, I plan to discuss the changes that I have observed over my professional life in the treatment of women and children who encounter the criminal justice system as complainants. Overall, it is a distinctly positive picture. And, on the other side of the ledger, there is the distinctly less positive picture for women who encounter the criminal justice system as offenders.

In Maybanke Anderson's day policing practices and the common law provided little protection to women and children in the case of sexual and domestic violence. The police did not see it as their function to interfere between husband and wife or father and child. In the relatively rare cases in which a complaint of rape or the sexual abuse of a child led to a prosecution, the experience of the court was arduous for the complainant. Standardly, juries were directed by the judge that rape was an easy allegation to make and hard to disprove.

When I commenced practice, little had changed. Police remained reluctant to become involved in domestic violence cases leaving it to the abused woman to secure the issue of a summons from the chamber magistrate and to prosecute the case herself before the court. The crime of rape remained as enacted in the *Crimes Act* 1900 (NSW). In rape cases, the complainant was required to give evidence at a preliminary committal hearing as well as at the trial. Cross examination at the committal hearing could be particularly brutal as defence counsel were unconcerned about creating sympathy for the complainant in the eyes of a jury. The cross examination often included intrusive and offensive questioning about the complainant's sex life, and all of this took place in open court with members of the public coming and going. At the time it was considered unethical for the Crown prosecutor to confer with the complainant before she was called to give evidence. In the result, the complainant found herself sitting outside the court waiting to be called with no understanding of the procedures and likely course of the trial. When she came into the court, she was confronted by the accused who very likely was the only person in the room whom she recognised.

By the late 1970s, the WEL was at the forefront in pressing for reform of the law and procedures concerning offences of sexual violence. It produced a draft of legislation for the abolition of the crime of rape and the provision of offences of sexual assault[9]. The draft was debated at a conference on rape

[9] J. Scutt, *Rape Law Reform*, Australian Institute of Criminology, 1980, Appendix II.

law reform sponsored by the Australian Institute of Criminology with the support of the New South Wales and federal governments and held in Hobart in 1980.

The following year the New South Wales Parliament enacted sweeping changes to the law, which were broadly in line with the WEL's proposal. The crime of rape, which was confined to proof of penile penetration of the vagina, was abolished in favour of offences of sexual assault of graduated levels of severity[10]. The new laws placed the focus on the violence inherent in sexual offending. And the law was made gender neutral. "Sexual intercourse" was broadly defined to include vaginal and anal intercourse involving penetration by any part of the body of another or by an object manipulated by another and it extended to fellatio and cunnilingus. The more serious of the new offences did not require proof of any sexual connection. The physical element of these offences required proof of the infliction of serious, or actual, bodily harm on the complainant while the mental element required proof that the violence was carried out with the intention of having sexual intercourse. Other reforms included abolition of one of the sillier of the common law's irrebuttable presumptions, namely that a male under 14 years was incapable of sexual intercourse[11]. Another unsatisfactory feature of the law, as it was understood throughout the common law world at the time of the 1981 reforms, was that a husband could not be prosecuted for the rape of his wife, she having given irrevocable consent to sexual intercourse upon marriage[12]. The law now provided that marriage was no bar to a conviction for a sexual offence committed against one's spouse[13].

As important as the reform of the substantive law were the procedural and evidential changes to the conduct of the trial. Evidence of the sexual reputation of the complainant or evidence which disclosed or implied that the

---

[10] *Crimes (Sexual Assault) Amendment* 1981 (NSW) ("1981 Amendment").
[11] 1981 Amendment, s 61A (2).
[12] See *PGA v The Queen* (2012) 245 CLR 355; [2012] HCA 21.
[13] 1981 Amendment, s 61A (4).

complainant may have had particular sexual experience or the lack of it was made inadmissible[14]. And the trial judge was no longer required to warn the jury that it is unsafe on the complainant's uncorroborated account[15]. The 1981 reforms did not go so far as to relieve the trial judge of the requirement to warn the jury that it is unsafe to convict on the uncorroborated evidence of a child[16]. We have come a long way since then in relation to the treatment of the evidence of children[17].

The 1981 reforms gave the court power to order that the court be closed during the hearing of any part of sexual assault proceedings[18]. It was necessary to confer a specific power in this respect because the common law places a premium open justice. The circumstances in which a court can be closed to the public or in which the court can order the non-publication of evidence or the identity of witnesses appearing before it are closely confined[19]. Contrary to the ABC's report of the "let her speak" campaign[20], the Tasmanian law which prevented publication of Grace Tame's identity as the complainant in a sexual offence prosecution, was not "archaic", it was a reform which had the support of feminists who were concerned to protect the privacy of complainants. Well intentioned law reform on occasions produces unintended consequences.

In this case, the particular provision, s 194K of the *Evidence Act* 2001 (Tas), had been reviewed by the Law Reform Institute of Tasmania not long before the "let her speak" campaign[21]. The review was prompted not by any concern that s 194K stifled complainants but rather that it afforded insufficient protection to them. It came about as the result of a case in which a mother

---

[14] 1981 Amendment, s 409B.
[15] 1981 Amendment, s 405C (2).
[16] 1981 Amendment, s 405C(3)(c).
[17] *Criminal Procedure Act* 1986 (NSW) Part 6 ("CPA"); *Evidence Act* 1995 (NSW), s 165A.
[18] 1981 Amendment, s 77A.
[19] *Russell v Russell* (1976) 134 CLR 495; *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465.
[20] ABC News, *Finally, she can speak*, published 12 August 2019.
[21] Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No 19, November 2013. ("Law Institute Report")

and her friend had been convicted of prostituting the mother's 12-year-old daughter. While neither the mother nor the child was directly identified in the media, the friend's name was reported, and this enabled people with some knowledge of the matter to identify the child[22].

In its Report, the Tasmanian Law Institute identified the rationale of s 194K as being to shield complainants from the stigma that attaches to victims of sexual assault. The Report acknowledged a compelling public interest in overcoming this stigma and it recognised that it would assist to do so were victims of sexual abuse to identify themselves and tell their stories. But it went on to reason that encouraging complainants to self-identify might be to subvert their individual interests in pursuit of the social good. And it expressed concern that complainants might be pressured by the media to self-identify at a time when they were emotionally vulnerable and ill-equipped to weigh up the consequences of publicity[23]. Plainly, the authors of the Report did not envisage the circumstances in which Grace Tame found herself. On his release from custody, the man who had abused her boasted of his offending on Facebook, and s 194K operated to effectively deny Grace Tame the capacity to correct the record. What her case illustrates is that the Law Institute was right to see the willingness of the victims of sexual abuse to come forward and tell their stories has had the effect of overcoming any misplaced stigma.

There have been numerous further amendments to the substantive law of sexual assault since the 1981 reforms. Many have been concerned with the sexual abuse of children. Among them is the creation of an offence of maintaining an unlawful sexual relationship with a child[24]. It is not that the law in the past permitted the maintenance of sexual relationships with children. This offence has been crafted to address the practical difficulties of prosecuting sexual offences against children, particularly small children. A

[22] Law Institute Report at 1 [1.1.1].
[23] Law Institute Report at 22-23 [3.4.2] – [3.4.4].
[24] *Crimes Act* 1900 (NSW), s 66EA.

child who has been subject to repeated abuse may have difficulty recounting the detail of any single episode of abuse. Ironically, the more frequently a young child was abused the more difficult it could be to prove the commission of a single identified offence. An unlawful sexual relationship with a child is defined as a relationship in which an adult engages in two or more unlawful sexual acts with a child over any period. The prosecution does not have to provide particulars of the sexual acts that it would be required to provide if the act were charged as a discrete offence. The current form of the offence follows recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse[25]. Again, reflecting recommendations of the Royal Commission, we now have laws which criminalise grooming a child for unlawful sexual activity[26].

There have been striking reforms to the rules of procedure governing the conduct of sexual assault trials, which have made the experience a great deal less daunting for complainants while at the same time seeking to preserve a fair trial for the accused. It is stating the obvious to observe that women have the same interest that men have in a system of justice that ensures that the trial of allegation of criminal offending is a fair one. If an accused denies a complainant's allegation, he or she must have the opportunity of challenging it. It may be accepted that the requirement to answer questions in a formal setting about an unwanted, often humiliating, sexual experience is likely to be distressing for most complainants. But it is not the horror show that I recall from my early days in practice.

Nonetheless, the insensitivity to which complainants in sexual cases were subject years ago has left its mark in the popular consciousness. Women, including young women, still may believe, wrongly, that complainants are cross-examined about their sex lives. The prohibition on cross examination on sexual reputation has been complemented by a provision of

[25] *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (NSW).
[26] *Crimes Act* 1900 (NSW), s 66EB.

the *Evidence Act* 1995 (NSW) which requires the trial judge to disallow any question that among other things is harassing, intimidating, offensive, or humiliating or which is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate[27]. While this may seem no more than common sense, enactment of the provision was needed to overcome judges' inclination not to reject a question unless it is the subject of an objection by the other party. An overly interventionist judge may cause a trial to miscarry. Compliance with the statutory obligation that the Evidence Act now imposes does not carry that risk. Importantly, at the trial of a sexual offence in which the accused is unrepresented the court may appoint a person to ask the complainant questions, but the law no longer allows the accused to question the complaint directly[28].

The days of committal hearings at which the complainant was required to give evidence are long gone[29]. And if a verdict is overturned on appeal, or a trial is aborted, or the jury is unable to agree and there is a second trial, the complainant is no longer required to give evidence again. The complainant's evidence at the first trial will have been recorded and the recording serves as the complainant's evidence at the second trial[30]. Any part of any proceedings in which the complainant gives evidence or in which a recording of the complainant's evidence is played are to be held in camera unless the court otherwise directs[31]. The complainant may give evidence by closed circuit television and may choose to have a support person present and within sight while giving evidence[32]. There are similar protections for complainants giving evidence in domestic violence cases[33]. Special provisions govern the evidence of children including that the interview between the child and the

[27] *Evidence Act* 1995 (NSW), s 41(1).
[28] CPA, s 294A.
[29] CPA, s 84.
[30] CPA, ss 306B, 306I
[31] CPA, s 291.
[32] CPA, s 294C
[33] CPA, s 289VA.

investigating police is received at the trial as the child's evidence in chief[34]. In child abuse cases this has the advantage that the jury see the child as she or he was shortly after the assault.

The old warnings given to the jury by the judge based on myths about how a victim reacts to sexual assault have been abolished and in their place judges are empowered to inform the jury that experience shows that people may not remember all the details of a sexual offence or describe a sexual offence in the same way each time; that trauma affects people differently including in how they recall events and that both truthful and untruthful accounts of a sexual offence may contain differences[35]. Judges must not warn a jury or make any suggestion to a jury that complainants as a class are unreliable witnesses[36].

And the days of the complainant being left in the dark about the conduct of the trial are over. Prosecutors are required to keep complainants informed of the progress of the case, and to consult the complainant about important decisions such as whether to allow the accused to plead guilty to a lesser charge[37]. There is a Witness Assistance Service to provide support to the complainant throughout the criminal trial process.

Most recently we have seen significant changes to the law of consent in sexual cases. Commonly, in cases in which the complainant is an adult, consent is the principal issue. The offence of sexual intercourse without consent requires the prosecution to prove not only that the complainant was not consenting but that the accused either knew that the complainant was not consenting or was reckless in this regard. Recklessness was colourfully described by Lord Hailsham in *DPP v Morgan* as the intention of having intercourse "willy-nilly not caring whether the victim consents or not"[38].

---

[34] CPA, ss 306S, 306T, 306U.
[35] CPA, s293A.
[36] CPA, s 294AA.
[37] Office of the Director of Public Prosecutions NSW, *Prosecution Guidelines*, Ch 5 [5.3]- [5.7].
[38] *Director of Public Prosecutions v Morgan* [1976] AC 182.

In *Morgan* the House of Lords held that the accused's honest, albeit it objectively unreasonable, belief that the other person was consenting to intercourse, relieved him of criminal liability. The decision generated a deal of controversy. It must be said that in terms of the principles of criminal responsibility it was unremarkable. Guilt of serious offences requires not merely that the accused engaged in the proscribed conduct but that he or she did so with requisite mental state, generally either intention or recklessness. If a person honestly believes that he or she is engaging in consensual intercourse, even though the belief is mistaken, it is not offensive under our principles of criminal responsibility that the conduct is not criminal. I should add, as a practical matter, in my experience, juries are unlikely to entertain a doubt in an accused's favour where his or her claimed belief in the complainant's consent is an objectively unreasonable one.

Perhaps of greater concern, is the common law's acceptance that consent given reluctantly and after a deal of persuasion is nonetheless consent[39]. For this reason, by the beginning of this century there was growing pressure to legislatively define consent to give the concept an appropriate contextual and contemporary meaning[40]. In New South Wales, a Task Force[41] and the specialised Criminal Law Review Division in the Attorney General's Department urged the adoption of a definition that would make clear what does and does not amount to consent in the context of sexual relations[42].

In response to these recommendations, in 2007 amendments were introduced into the Crimes Act providing that a person consents to sexual intercourse if the person freely and voluntarily agrees to it[43]. The amendments did away with the 'defence' of honest but mistaken belief in consent. The law

---

[39] *R v Holman* [1970] WAR 2 at 6.
[40] *The Law of Consent and Sexual Assault*, Criminal Law Review Division, NSW Attorney General's Department, 2007 at 8 ("CLD Report 2007").
[41] Responding to sexual assault: the way forward: http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpcrld_publications/lpclrd_reports.html#criminal
[42] CLD Report 2007 at 10.
[43] *Crimes Amendment (Consent – Sexual Assault Offences) Act* 2007 (NSW), Sch 1 (1) inserting s 61HA ("2007 Amendment").

now deemed a person who had sexual intercourse with another without that other's consent to know the other was not consenting in the absence of reasonable grounds for belief in consent. The jury was required to have regard to any steps taken by the accused to ascertain if the other person was consenting in determining whether there were reasonable grounds for the belief[44].

And there matters stood until another courageous young woman, Saxon Mullins, came forward and gave her account on *Four Corners* of having been sexually assaulted in an alley behind a nightclub in Kings Cross[45]. She was an 18-year-old virgin who was having a night out with a girlfriend, and both had had a deal to drink. The young man did not dispute that they had anal intercourse in the alley, but he maintained it had been consensual. Ultimately, he was acquitted following a trial by a judge sitting without a jury. The judge found that while Saxon Mullins had not consented to intercourse, the prosecution had failed to establish that the young man had not formed a genuine belief on reasonable grounds that she was consenting. The latter finding took into account that Saxon did not say "stop" or take any physical action to move away from the intercourse or attempted intercourse"[46]. Saxon Mullins explained that she "froze" during the intercourse.

The NSW Law Reform Commission was asked to review the law on consent and knowledge of consent in relation to sexual offences. Justice Carolyn Simpson, New South Wales' most experienced judge in criminal cases was appointed to chair the review. The Commission reported in September 2020[47]recommending that the law be re-worked, starting with a legislative statement of principles, namely that:

a) Every person has a right to choose whether to participate in sexual activity;

---

[44] 2007 Amendment, Sch 11.
[45] Four Corners, ABC, *I am that girl*, 7 May 2018.
[46] *R v Lazarus* NSWDC, 4 May 2017.
[47] NSWLRC, *Consent in Relation to Sexual Offences*, Report 148, September 2020 ("NSWLRC Consent Report").

b) Consent to sexual activity is not to be presumed; and
c) Consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

Legislation implementing the Commission's recommendations was passed at the end of last year[48]. The amendments are expected to commence shortly. They adopt the concept of affirmative consent. The law will now provide that a person does not consent to a sexual activity where the person does not say or do anything to communicate consent[49]. The Commission acknowledged that at a trial in which non-consent is the issue it is inevitable that there will be scrutiny on what the complainant said or did at the time of the encounter. Under the new legislation, the focus of the trial will be whether the complainant said or did anything to communicate consent, and not whether the complainant resisted or otherwise demonstrated an absence of consent[50]. On any view the law has come a long way from the days when juries were directed that tearful and grudging consent was nonetheless consent.

Reform of policing and prosecution practice in sexual and domestic violence cases reflects a new focus on the needs of the victims of crime. This focus has been criticised by criminologists on the ground that it "tap[s] the retributive nerve in popular opinion in support of tougher measures" rather than providing actual support to victims[51]. It is the case that over my professional life there has been a notable shift from an emphasis on rehabilitation to an emphasis on the punitive or denunciatory function of criminal justice. At the same time, we have had a significant increase in the prosecution of offences of sexual assault and domestic violence[52], which

[48] *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 (NSW) ("2021 Amendment").
[49] 2021 Amendment, Sch 1 (9) inserting s 61HJ.
[50] NSWLRC Consent Report, at 88 [6.49].
[51] M.Hall, *Key Themes in New South Wales Criminal Justice*, July 2010, Current Issues in Criminal Justice, Vol 22(1) 19 at 21 ("Hall") citing R. Hogg and D. Brown, *Rethinking Criminal Justice*, ((1998, Pluto Press, Aust); Productivity Commission, *Australia's Prison Dilemma*, October 2021 at 11 ("Productivity Commission Report").
[52] Productivity Commission Report at 3.

notoriously were under reported in the past. The sentences imposed for these offences have increased markedly[53]. It is an increase, which I suspect enjoys strong community support and is in line with increases in the sentencing for these offences in the other Australian jurisdictions. The increase in the prosecution and sentencing for these does not explain the growth in the Australian rate of imprisonment, which in the fifteen years to 2018 was among the fastest in the OECD. Only Turkey and Columbia were ahead of us[54]. And while women are a small percentage of the total prisoner population, the rate of female imprisonment has increased at a faster rate than the male rate. This is so notwithstanding that there is little evidence to suggest that women are committing more serious crimes[55]. The increase is the consequence of changes to our laws governing sentencing and bail.

To sketch these changes, let me return to my starting point, that watershed in the administration of criminal justice in New South Wales, the Nagle Royal Commission. The evidence at the Commission revealed a level of brutality in the treatment of prisoners that shocked the public conscience. During the hearings, the Prison Officer's Branch of the Public Service Association made a formal admission concerning the treatment of intractable prisoners on their admission to Grafton Gaol. The union admitted that the prisoner received "a physical beating … about the back, buttocks, shoulders, legs, and arms by two or three officers using rubber batons". Justice Nagle observed that merely reciting the admission, tended to conceal the enormity of the conduct involved[56]. Justice Nagle, not known as firebrand radical, concluded that the majority of informed opinion indicated that generally the effect of imprisonment as a deterrent is limited and in some cases counter

[53] See *Corliss v R* [2020] NSWCCA 65.
[54] Productivity Commission Report at 28.
[55] Productivity Commission Report at 30.
[56] Parliament of New South Wales, *Report of the Royal Commission into New South Wales Prisons*, 31 March 1978, at 16 ("Nagle Report)".

productive. He endorsed as a corrective to popular opinion, a statement made by a United States' National Task Force[57]:

> "The failure of major institutions to reduce crime is incontestable. Recidivism rates are notoriously high. Institutions do succeed in punishing, but they do not deter. They protect the community, but that protection is only temporary. The relieve the community of responsibility by removing the offender, but they make successful reintegration into the community unlikely. They change the committed offender, but the change is more likely to be negative than positive"

Against this finding, unsurprisingly Justice Nagle recommended that imprisonment be used as a 'last resort'[58]. He proposed as a fundamental principle that it is preferable to have a prisoner in the community and he suggested the question for the Parole Board should be "Are there any reasons why this prisoner should not be able to adapt to normal community life"[59].

In a brief window following the publication of the Nagle Report, the climate of public opinion was more favourable to rehabilitation than to retribution[60]. As Professor Tony Vinson, who was appointed to chair the Corrective Services Commission in the Commission's aftermath, said "the Royal Commission 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"[61]. Reflecting reforms introduced by Tony Vinson, the rate of imprisonment in New South Wales dropped for a short period in the early 1980s [62]. It has climbed ever since.

At the time the Royal Commission was taking evidence in 1976, the average population of women prisoners was 81. Justice Nagle assumed that there would be no significant rise in the prisoner population over the next

---

[57] Nagle Report at 20.
[58] Nagle Report at 448 [7].
[59] Nagle Report at 389.
[60] Hall, at 19.
[61] The Nagle Report – *25 Years on Symposium*, July 2004, Current Issues in Criminal Justice, Vol 16 No 1 at 94 ("Nagle 25 years on").
[62] M.Hall, *Key Themes in New South Wales Criminal Justice*, July 2010, Current Issues in Criminal Justice, Vol 22 No 1 19 at 20.

decade although there might be "some slight increase" in the number of women prisoners. The 1983 census showed a more than 100% increase in the number of women in custody in New South Wales in the eight years following the adoption of a philosophy aimed at being reductionist[63]. By 1984 when the Women in Prison Task Force was established to report on the adequacy of the facilities for women prisoners it was clear that the reductionist philosophy was no longer in favour. The rate of imprisoning women in NSW rate was almost twice as great as in Victoria[64]. The Task Force reported that most of the female prisoner population did not pose a danger to the community and suggested that it would be of benefit if some of the population could be supervised and supported in the community. In this respect, it recommended against the construction of a new women's prison in favour of the development of mechanisms to contain the growth in the prisoner population.

Fifteen years later the Legislative Council appointed a Select Committee to report on the factors responsible for the increase in the prisoner population[65]. The Select Committee noted the dramatic increase in the number of women prisoners in the five years to June 1999. It commented on the absence of any reliable research indicating that the increase had served to prevent crime or was the result of significant increase in criminal behaviour[66]. At the time the largest factor contributing to the increase was the growth of unsentenced prisoners on remand. The Select Committee recommended a moratorium on the building of a new women's prison in favour of serious exploration of the ways to reduce the number of women prisoners[67].

Three years after the Select Committee published its Report, a symposium was convened to discuss the impact of the Nagle Royal

---

[63] NSW Department of Corrective Services, *Report of the NSW Women in Prison Task Force*, March 1985 at 39 ("Task Force Report")).
[64] Task Force Report at 40.
[65] Legislative Council, Select Committee on the Increase in Prisoner Population, Final Report, Parliamentary Paper No 924, (November 2001) ("Select Committee Report").
[66] Select Committee Report at xv.
[67] Select Committee Report at 136 [8.2].

Commission after 25 years. Dr Eileen Baldry, a criminologist with a longstanding interest in female imprisonment, observed[68]:

> "The most outstanding developments regarding women in prison in New South Wales 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."

Dr Baldry went onto note the erosion of the principle of imprisonment as a last resort and to suggest that in its place, imprisonment had become the means of dealing with problems stemming from poverty, homelessness, mental illness, and drug abuse.

In 2017, the New South Wales Bureau of Crime Statistics and Research was commissioned to identify the reasons for a 50 percent increase in the adult female prisoner population since 2005[69]. The Bureau reported that the evidence did not show that women were committing more serious offences. Indeed, the offences more likely to attract longer sentences had remained stable or had fallen since 2011. The predominant source of growth was the increase in women who were on remand having been refused bail.

The law of bail was codified in the *Bail Act* 1978 (NSW). It embodied principles that in the immediate aftermath of the Nagle Report were enjoying a brief vogue. As enacted, it enshrined the presumption in favour of the grant of bail. In the years that followed, the Bail Act was subject to regular amendment almost always having the effect of limiting the circumstances in which bail could be granted. These amendments were usually reactive to highly publicised cases involving criticism of individual bail decisions[70]. By 2012, the New South Wales Law Reform Commission reported that "NSW now has one

---

[68] Nagle 25 year on at 101 – 102.

[69] Bureau of Crime Statistics and Research, *Recent Trends in the NSW Female Prison Population*, Issue Paper No 130, January 2018.

[70] A. Steel, *Bail in Australia: Legislative Introduction and Amendment Since 1970*, Australia and New Zealand Critical Criminology Conference, 2009, Conference Proceedings 228

of the most convoluted and restrictive bail statutes in Australia"[71]. The Commission went on to observe that there was no evidence that the restrictions had led to a reduction in crime[72]. And it pointed out that a substantial number of people held in custody on remand are not later convicted or sentenced to imprisonment[73]. A new *Bail Act* 2013 (NSW) based on the Commission's recommendations was enacted. It provided a workable model which appropriately balanced consideration of community protection with the general right to be at liberty. The new Bail Act had barely commenced operation when publicity surrounding three cases led to amendments[74] which have served to undercut its key provisions[75].

Changes to the law governing sentencing also explain the steady increase in the New South Wales prison population. Notably, the *Sentencing Act* 1989 (NSW) which was heralded as introducing 'truth in sentencing' led to an immediate and dramatic increase. The responsible Minister in his second reading speech stated that it was not the government's intention that the new scheme increase the length of sentences[76]. This was odd because the changes, which abolished remissions and further reduced the judge's discretion in fixing non-parole periods inevitably did operate to significantly increase the length of sentences in exactly the way practitioners had said they would. Successive amendments to sentencing legislation have further reduced the sentencing judge's discretion with the effect of increasing the length of the custodial component of the sentence[77].

In 2016, the New South Wales Government announced its $3.8 billion Prison Bed Capacity Program, which aimed to provide 6,100 beds by May

---

[71] New South Wales Law Reform Commission, *Bail*, Report 133, April 2012 at xviii [0.10] ("NSWLRC Bail Report").
[72] NSWLRC Bail Report at xviii [0.12].
[73] NSWLRC Bail Report at xix [0.15].
[74] *Bail Amendment Act* 2014 (NSW).
[75] L.Auld, J. Quilter, *Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions*, 2020 UNSW Law Journal Vol 43(2) 642 at 663-664.
[76] J.Chan, *Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release*, (1991) Vol 13(2) UNSW Law Journal 393 at 412-413; NSW Hansard, Legislative Assembly, 10 May 1989, at 7906.
[77] See *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW).

2021[78]. As part of this program the Clarence Correctional Centre opened in 2020. It is a privately operated prison with a 1700 bed capacity[79]. When the Prison Bed Capacity program was launched the Minister for Corrective Services was quoted as saying that "strong" bail laws and "efficient policing" had made the expenditure necessary[80]. An alternative view advanced by Professor Baldry and a colleague is that[81]:

> "Increasing numbers of people with poor educational backgrounds, mental and cognitive disabilities, very low financial capacity and who are Indigenous Australians find themselves imprisoned, and when released have even less capacity to negotiate their way around society successfully and are quickly returned to prison are evidence of criminalisation of socially disadvantaged persons and systemic failures of social and human services and of increasing inequity."

The New South Wales Audit Office reported in March 2019 that the prisoner population had grown by nearly 40 percent from 2012 to 2018 and the Department of Justice projected that growth would continue over the short and longer-term[82]. The economic consequences of spiralling rates of imprisonment have at last piqued the interest of the Productivity Commission in the operation, outcomes, and costs of the Australian criminal justice system. The authors of the Productivity Commission's recent research paper on prisons turn out to be bedfellows of Professor Baldry and her colleague. They identify the indirect costs of imprisonment in terms of loss of employment, poor health outcomes and separation from family noting that "it is people from society's most disadvantaged groups, who are significantly overrepresented in prisons and who tend to bear the brunt of these [indirect] costs"[83]. They observe that the increase in imprisonment is not adequately explained by changes in the amount or type of crime. Indeed, they note that the rise in rates

[78] Audit Office of New South Wales, media release, 24 May 2019.
[79] S. Russell, E. Baldry, *The Booming Industry continued: Australian Prisons a 2020 Update*, UNSW, at 12 ("The Booming Industry").
[80] Sydney Morning Herald, 16 June 2016
[81] The Booming Industry at 15.
[82] Audit Office of New South Wales, media release, 24 May 2019.
[83] Productivity Commission Report at 4.

of imprisonment in this century have occurred alongside a fall in many types of serious crime[84]. They make the obvious point that increases in the prisoner population are the result of policy choices. And they note that the cost of keeping a prisoner is more than $330 per day while the costs of community corrections can be as little as $30 per person per day[85]. Finally, they refer to evidence that intensive corrections orders are more effective in reducing re-offending than are short prison sentences[86].

Happily, economic arguments have a seductive power. Sentencing reforms were enacted in New South Wales in late September 2018 that are intended to reduce the numbers of prisoners serving short sentences by giving courts greater flexibility to tailor sentences that provide for the supervision of the offender in the community. They are reforms that accord with Justice Nagle's recommendations of nearly a half century ago. It is important that these reforms are not undermined in response to sensationalised media accounts of individual cases.

Justice Nagle was critical of all embracing theories of criminal punishment, observing[87]:

> "At one extreme are those who expound the theory of imprisonment as a deterrent, maintaining that conditions for prisoners have become too soft and that inmates are being housed in "country clubs". At the other extreme are those who confidently suggest that if proper rehabilitative measures were introduced, the problem of crime would disappear."

Maybanke Anderson was in the latter camp. She may have been overly optimistic in believing that "if from birth the child were cared for in a loving, educating and understanding environment, there would be no need for reformatories and prisons"[88]. Nonetheless, it is hard to argue with the underlying proposition that expenditure on early

[84] Productivity Commission Report at 10.
[85] Productivity Commission Report at 13-13, Ch 3.
[86] Productivity Commission Report at 61.
[87] Nagle Report at 19.
[88] Roberts, at 183.

childhood development is a better societal investment than an ever-expanding Prison Bed Capacity program.

*****