

By Anna Kerr and Dr Rita Shackel

EQUALITY with a ven

The over-incarceration of women



The increased incarceration of women for violence-related offences in some Australian and overseas jurisdictions points to pervasive systemic gender bias and discrimination in the criminal justice process. Emerging anecdotal and recent research and court-related data are disturbing and suggest that women's fundamental human rights and freedoms are under attack.

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The national imprisonment rate has increased faster for women than for men over the past decade: in the previous ten years, the national rate of imprisonment of women increased 40 per cent which was almost double that of men; while from 1995 to 2009, the number of female prisoners increased by 154.5 per cent compared with an increase in male prisoners of 63.9 per cent.¹ Similar trends are evident in other countries including the US, the UK, and the Netherlands.²

According to NSW Bureau of Crime Statistics Director, Don Weatherburn, this trend is fuelled by a change in policing and toughness being exercised by the courts rather than an actual increase in the incidence of female crime.³ Rather than delivering justice, the police and judiciary would appear to be delivering 'equality with a vengeance.' This approach fails to acknowledge the distinct characteristics of female defendants and the inherent dynamics of domestic violence – including women's lower reoffending rates, their histories of trauma, increased suffering in custody and greater caregiving responsibilities.⁴ Further, domestic and intimate partner violence perpetrated against women is experienced very differently by women and children compared with men, due to a fundamental asymmetry and imbalance in power and control between men and women.⁵ While some acts of violence reflect escalation in couple conflict, much domestic and family violence is driven by a desire to subjugate.⁶ Violent behaviour is one of a variety of tactics that form a perpetrator's pattern of behaviour directed towards gaining power and control of the victim.⁷ Violence towards women is therefore a product of male desire for control, influenced, facilitated and perpetuated by the male-dominated structures of the community.⁸ Judicial failure to consider this particular context and the impact of domestic and family violence means that individual acts of violence are often misunderstood.⁹

Prison populations have always reflected an unpleasant truth – that men commit the overwhelming majority of crime. Globally, less than 5 per cent of prison populations are female. Violent and sexually predatory crimes are particularly dominated by men.¹⁰ This gender difference was largely ignored by criminologists, until feminist theorists from the 1970s onwards started to give it more attention.¹¹ Seemingly in response, recent years have seen a concerted effort by law enforcement agencies to attempt to equalise the numbers – arguably not by reducing male offending, but by charging and gaoling more women. In 2012 the NSW Parliament Domestic Violence Trends and Issues Inquiry expressed concern that there appeared to be an increase of 10 per cent a year in arrests of females for domestic violence offences between 2001 and 2010.¹² This was compared to an average yearly increase of 2 per cent for males.¹³ In its submission to the Inquiry, Legal Aid NSW argued that this was a result of pro-arrest policies mandated by s27 and s49 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) rather than increased levels of female violence. The submission noted that 'police officers are responding to domestic violence-related call-outs by arresting female defendants or making dual arrests. This has been the case even where men are unable to

Imprisonment of women must also be considered in light of the disproportionate role of women as primary caregivers of children.

demonstrate they are fearful of their female partner or that their female partner's violence is characterised by control.¹⁴

Many women are also being locked up on minor charges – often held on remand for offences for which they are unlikely to ultimately be sentenced to imprisonment.¹⁵ The largest increases of people in prisons in Australia have been in remand, Indigenous and women prisoners. According to the Australian Bureau of Statistics (ABS), 6,089 prisoners were held on remand in 2007 and 13,182 prisoners in 2017.¹⁶ The NSW Bureau of Crime Statistics reported in March 2018 that the number of women on remand had more than doubled between 2011 and 2017.¹⁷ As in the notorious Western Australian case of Mrs Dhu, some women are being locked up simply for unpaid fines.¹⁸ In 2014, Ms Dhu died after two days in custody from complications related to undiagnosed injuries from domestic violence. The coroner reporting on her death recommended an end to the practice of placing individuals in custody for unpaid fines. The government has since paid the family \$1.1 million *ex gratia* in compensation and it is likely civil litigation will follow.¹⁹

Nonetheless, the practice of gaoling women for unpaid fines has continued. In another Western Australian case reported in the press in 2017, police locked up a woman who had called for their assistance in relation to a family violence matter. Because she had outstanding fines in relation to an unregistered dog, they took her into custody, leaving 5 children aged between 2 and 18 without their mother. The youngest child was still breastfeeding.²⁰ Having read about the case in the media, a charitable pensioner approached Corrective Services to pay the woman's outstanding fines. It is reported that the prison authorities then had difficulty identifying the inmate in question, prompting this exchange:

“How many Noongar women with five children of her own, and six children that she looks after, who've been arrested in the last two days do you get?”

And she said, “oh we get seven or eight a day.” I said, “are they all being locked up because of unpaid fines?”

And she said, “yes, and they're mostly women,” he recalls in disbelief.²¹

The women in the cases just discussed are Aboriginal. Much of the increase in the incarceration of women has been concentrated among Indigenous women, who went from constituting less than 4 per cent of the female prison population to about 34 per cent since the 1980s.²² This

increase is entirely disproportionate to that of the rest of the population.²³ Aboriginal and Torres Strait Islander women represent the fastest growing prison population in Australia and are an acute example of intersectional discrimination.

Both women mentioned in the cases above were also victims of family violence. It is estimated that around 90 per cent of Aboriginal women in prison have previously been a victim/survivor of family violence.²⁴ Clearly there is a systemic failure to respond effectively to underlying, interrelated and mutually constitutive root causes of single parenthood, poverty, mental health, substance abuse and family violence. Instead, a law and order approach is applied which exacerbates rather than ameliorates the disadvantage causing the problem.²⁵

There has been a significant increase in women who are themselves charged with family violence offences, as noted above.²⁶ A UK study in 2009 found that male perpetrators were arrested once in every ten incidents of family violence, while the figure for female perpetrators was one in three.²⁷ Holmes found that from 1999 to 2009 in NSW, there was an increase of 12 per cent each year in the number of female offenders of domestic violent assault and that this increase was three times greater than the increase for males.²⁸ Some reasons for this include that the male aggressor is able to access police first, that they are often a stronger communicator in the circumstances and that when police arrive female victims may be distressed and respond antagonistically to the officer, and thus be seen as the aggressor.²⁹ Another concern is that of police policy which is presumptive of arrest or pro-arrest in cases of domestic violence, leading to the arrest of both parties including victims who are fighting back and defending themselves.³⁰ This is despite male arrestees demonstrating a ‘significantly greater concern’ for future violence than female arrestees,³¹ and eliciting greater levels of fear and subjugation in victims.³² A study of Family Court of Australia parenting decisions also found that while improved, many judicial officers and other professionals still demonstrated ‘a continuing failure’ to understand the ways in which women might respond to violence perpetrated against them.³³ Aboriginal women can be particularly fearful of contacting the police during an episode of family violence due to the victimisation-offending cycle or an outstanding warrant issued for their arrest, meaning that police arriving on the scene frequently charge the woman based on her attempts to defend herself.³⁴

Thus the concern is that many of these women who are in fact victims of violence are being inappropriately charged and that these statistics reflect increased use of legal processes by perpetrators to further victimise women. In a study conducted by the NSW Women's Legal Services (WLS) in 2014 the majority of female AVO defendants reported that they were the victim of ongoing domestic violence and acting violently in self-defence. They argued that their version of events had not been treated appropriately by police and that the other party was using AVO proceedings to threaten or control them.³⁵

Women in custody typically have histories as victims of sexual abuse and domestic violence. While in custody, these

women are often subjected to further violence.³⁶ Prisons and prison systems are also predominantly organised around the needs and requirements of male prisoners, despite the fact that female prison populations have more complex substance abuse, and physical and mental health needs.³⁷ Female prisoners have high rates of poor health,³⁸ and there is high degree of self-harm and self-mutilation in female prison populations.³⁹ Prisons are by their nature built on power, control and surveillance for the purposes of security and punishment.⁴⁰ Standard procedures such as searches and surveillance are often sexually abusive and re-traumatising,⁴¹ as are harassment and abuse from guards.⁴² In recent times this has been well documented in relation to the treatment of girls in detention in the Northern Territory, who were subjected to sexual harassment and assault by male staff.⁴³ The treatment of female detainees on Nauru is another example of the particular risks for women placed under the control of male staff.⁴⁴

Imprisonment of women must also be considered in light of the disproportionate role of women as primary caregivers of children.⁴⁵ There is no particular recognition of women's more substantive caregiving responsibilities or of the need for mothers to retain care of or contact with their babies, nor is there support for women to address grief associated with child removal.⁴⁶ This is despite the greater likelihood that children of imprisoned parents will commit crimes themselves: children of incarcerated parents can be

considered the 'forgotten victims of crime'.⁴⁷ Even though they have limited access to their children, imprisoned mothers are seen by the community as abandoning their role as mothers.⁴⁸

The incarceration of Aboriginal women is also a factor which facilitates the removal of Aboriginal children.⁴⁹ Child protection practices continue to involve widespread removal of Indigenous children, including newborns, at rates exceeding those that occurred in relation to the earlier stolen generations.⁵⁰ An estimated 80 per cent of Aboriginal women in prison are mothers.⁵¹ When an Aboriginal mother is placed in custody, the chances of this precipitating the removal of her children are high.⁵² This risk also affects non-Aboriginal women who are vulnerable on account of other factors such as mental illness, disability, substance addiction, extreme youth or poverty. The 'long-term cumulative effects' of imprisonment can be dire for children of incarcerated Aboriginal parents as they face disruptions to family life, education, housing and health.⁵³ Disadvantage is thereby transmitted through the generations.⁵⁴

It is ironic that an equality narrative, developed to supposedly further the rights of women and ensure their safety, is actively being applied to disadvantage women. As noted above many female victims of domestic violence are arrested for perpetrating violence and subject to cross-applications for Apprehended Domestic Violence Orders, and these experiences can be characterised as a further form of abuse.⁵⁵ Many claims of female-perpetrated violence do not in

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fact concern the use of violence but with women seeking their legal rights, disclosing abusive male behaviour, and calling men names or swearing at them.⁵⁶ The assertion by Brennan J that formal equality can be ‘an engine of oppression’ if the law entrenches inequalities is pertinent,⁵⁷ given that female defendants have different needs, are victimised in different ways, and find themselves in different situations to male defendants.⁵⁸

Sentencing guidelines do not allow for a distinction to be made between male and female offenders. Women are serving longer sentences today, including for minor crimes.⁵⁹ Current criminal and sentencing law in Australia also does not generally account for ongoing, controlling and coercive aspects of domestic violence, and gender in an intimate relationship context is not an aggravating circumstance.⁶⁰ Cases of prolonged violence and rape, concluding with convictions for common assault, are emblematic of incident-focused criminal law being a poor fit for the dynamics of domestic violence perpetrated by males.⁶¹ Coercive and fear provoking aspects are much more likely to characterise male-perpetrated violence, and have more severe consequences for the victim.⁶²

According to the Law Council of Australia, most women could safely serve their sentences within the community.⁶³ Organisations such as the Women’s Justice Network (WJN) have demonstrated the effectiveness of mentoring programs for keeping women from reoffending.⁶⁴

The increase in imprisonment of women has been primarily for non-violent crimes. Public order offences have risen four times faster for women than men. What we are seeing is arguably a tendency to arrest women who fight back against oppressive male control in any manner. Are we just witnessing the scapegoating of women for the crimes of men?⁶⁵

More and more women are being charged and incarcerated in family and domestic violence-related matters. It is time to expose this increasing systemic abuse and structural violence perpetrated against women through biased and discriminatory criminal law processes. ■

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