

Human rights abuses and discrimination against women in the criminal justice system in New South Wales

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It is documented that imprisonment rates of women have been increasing rapidly, both worldwide and in Australia, over the past decade. Discrimination against women may help to account for their increased numbers in the criminal justice system, but is also a concern in its own right. Looking at the context of New South Wales, we explore how women are subject to direct and indirect discrimination based on sex, race and disability in the police, court and prison systems. Changes in legislation and practices within the system over the past two decades have impacted negatively upon particular groups of people, especially upon poor and racialised women and women with mental or cognitive health concerns. Further to this, practices such as strip searching have a pernicious effect on women in custody. These developments, along with other practices imposed upon women in the criminal justice system, are argued to constitute systemic discrimination.

Introduction

In February 2003, representatives of national equality-seeking groups in Canada made a submission to the Canadian Human Rights Commission (CHRC) outlining the extent and breadth of the systemic discrimination experienced by women in federal prisons based on sex, race and disability (Canadian Association of Elizabeth Fry Societies 2003). The submission requested an investigation into such discrimination and the consequent violations of human rights protected in the Canadian Charter of Human Rights and Freedoms. Various groups were included in the process, including women prisoners' groups, Aboriginal women's groups and women's mental health groups. The submission resulted in the CHRC conducting a

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broad-based investigation of Canadian federal women's prisons and issuing the report *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (December 2003), which outlined the various ways correctional policies and practices discriminated against women prisoners based on race, sex and disability.

Australian women prison activists, led by Sisters Inside in Queensland, employed a similar campaign and lodged a complaint with the Queensland Anti-Discrimination Commissioner in July 2004 (Kilroy 2004), resulting in a state inquiry and the report *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (March 2006). Through an alliance of community organisations, a similar complaint was lodged with the Equal Opportunity Commission of Victoria in April 2005 (Cerveri et al 2005). In New South Wales, the Beyond Bars Alliance took up the challenge and lodged a complaint with the NSW Anti-Discrimination Board in June 2005 (Armstrong, Chatrand and Baldry 2005). This article looks at the NSW complaint and how women in that state are discriminated against at the various levels of the criminal justice system based on sex, race and disability. The NSW complaint was made on the grounds that the manner in which women in the criminal justice system are treated is discriminatory and is therefore in contravention of several of the prohibited grounds articulated in the NSW *Anti-Discrimination Act 1977* and in federal antidiscrimination legislation based on sex, race and disability, such as the Minimum Standard Guidelines for the Treatment of Prisoners (1984). This article marshals the information about and arguments supporting these contentions in the NSW context.

Australia has had antidiscrimination legislation at both the Commonwealth and state levels for decades, covering both direct and indirect forms of discrimination. Direct discrimination refers to treatment of an individual that is immediately and obviously unfair or unequal, such as not providing a service to a person as a result of that person's race or gender and so forth. Indirect discrimination is seen to occur when there is a requirement or condition that is the same for everyone, but the effect of the requirement disadvantages people of a particular group (Anti-Discrimination Board of NSW 2006). This is reflected, for example, in cultural and social practices or legislative and administrative procedures that fail to consider the limited range of access, such as through language or mental/physical health limitations. With reference to the submission made to the NSW Anti-Discrimination Board, we argue that both direct and indirect forms of discrimination, as it pertains to sex, race and disability, is prevalent and magnified for women who are embroiled in the criminal justice system. This article details the nature and extent of this discrimination for women in contact with police, courts and prisons in NSW.

Overlapping and intersectional disadvantage

The regulation and management of women in the criminal justice system are often linked to their social makeup and survival practices, which are integral to understanding their criminalisation and treatment. There is ample evidence that women in the system often have backgrounds of multiple and interwoven social disadvantages, and this is particularly true for Aboriginal women and for women with mental health concerns. Women's attempts to cope, adjust, adapt or just otherwise survive their social and economically marginalised positions often result in their subsequent criminalisation — and usually for non-violent acts, such as fraud, theft, prostitution, drug offences, fine default and the like (NSW Department of Corrective Services 2004b, 5). The criminal justice system is thus established in a way that systemically (or indirectly) discriminates against the survival strategies of the most disadvantaged.

Within the criminal justice system there are four broad stages wherein women can experience various forms of discrimination: police, courts, community sentences and prison. Women with fewer resources, supports, formal education, employment skills and social and cultural advantages find themselves more often subject to the various interventions of the criminal justice system than other women. As they are shifted through the various stages of the system, these women have to deal with an overlapping series of difficulties in their lives, such as being wards of the state, having histories of abuse and/or unstable upbringings that tend to lead to dropping out of school, involvement with juvenile justice and missed opportunities to develop job skills, coupled with substance abuse, violence and mistreatment from many sources (Kilroy 2001). Separation from children, family and friends places a greater strain on women in prison, as they lose those supports and networks vital to their health and well-being.

As detailed below, the system is designed in a way that directly focuses upon social disadvantage. For women, issues of poverty, Aboriginality, sexual and physical abuse, lack of education, poor physical or mental health, homelessness and lack of resources in general are the most common factors of criminalisation.

Discrimination on the basis of gender

Worldwide, women suffer a multitude of disadvantages often associated with poverty, a phenomenon commonly referred to as the 'feminisation of poverty'. Such poverty reflects systemic gender discrimination in social, political and economic practices (United Nations Population Fund 2000). Despite the relative economic stability enjoyed by most, this trend also exists for women living in Australia. On the whole, Australian women represent 85 per cent of the one-parent families

nationwide. They also represent the poorest in the nation (Australian Bureau of Statistics 2001). In NSW in 2003, the average weekly earnings of women in the workforce, including part-time and casual workers, was \$591.30; this was approximately 64.5 per cent of the average weekly earning of men (Commonwealth Office of the Status of Women 2003a, 33). Women in Australia are also more likely to occupy part-time and casual employment. According to the Australian Bureau of Statistics (2003), 70.8 per cent of part-time workers in Australia are women. In NSW, women make up the majority of poor heads of households: 60 per cent of families living in NSW public housing are headed by women and 27 per cent of new tenants each year are sole parent women (Commonwealth Office of the Status of Women 2003a, 6). Also, Australia has been witnessing a rapid increase in the rate of imprisonment of women, which escalated 209 per cent between 1984 and 2003 (Bastick 2005, 3). The vast majority of women caught in the criminal justice system come from disadvantaged circumstances such as those just outlined.

From victimisation to criminalisation

Women are often criminalised for poverty-related offences. A report of the Standing Committee on Law and Justice (2000, 61) found that a third of the urban women's prison population came from only three of the most disadvantaged suburbs of Sydney. It was also found that 75 per cent of women were unemployed six months prior to incarceration. A study done in NSW in 1995 showed that unemployment was creating 'urban ghettos' where whole neighbourhoods were dependent upon welfare without the informal networks necessary to find jobs and other supports (Standing Committee on Law and Justice 2000, 10). The stresses and lack of resources caused by poverty result in the depletion of health; the breakdown of social and family ties; and often the use of alcohol and other drugs as a coping strategy. In a self-reported health survey, 37 per cent of women prisoners in NSW reported their health as either 'poor' or 'fair', compared to 16 per cent for the general NSW community (Butler et al 2003, 347). According to the Hep C Council of NSW (2004), the rates of hepatitis C are 66 per cent for women prisoners in NSW (compared with 33 per cent for men), representing a massive over-representation rate when compared with the general population rate of 1–2 per cent. The prevalence of hepatitis C is most often linked to unsafe drug use, which is also common among women prisoners and is often associated with poverty. Indeed, both Australian and international research has shown a strong link between drug and alcohol use and the experience of sexual and physical abuse. The number of women incarcerated for drug offences increased 40 per cent between 1994 and 2003 (Johnson 2004, 25). Incidentally, it was found that 60 per cent of NSW women prisoners had been sexually abused before the age of 16, while 30 per cent had been sexually abused before the age of 10 (Butler and Milner 2003, 9). If this physical and sexual violence is viewed against a backdrop of gender

inequality, then such inequality should also be acknowledged in regard to the subsequent use of drugs-related activity and subsequent criminalisation. A woman's social and economic position is a good indicator of whether or not she will find herself in the criminal justice system and clearly constitutes gender discrimination.

Women in the criminal justice system also tend to pose very little threat to the community. For example, in 2003, of the 18,799 women who were found guilty in the NSW local courts, only eight were convicted of homicide and related offences and the vast majority were convicted of non-violent offences (Weatherburn et al 2003). When women do commit acts of violence, these acts are frequently against abusive husbands, de facto partners, relatives or friends, and such violence often occurs in the context of abuse by their partners or self-defence during arguments or fights (Easteal 1993; Cook and Bessant 1997). The Australian Bureau of Statistics (1996) reported that 1.1 million Australian women experienced violence from a previous partner during or after the relationship. Furthermore, there is a lack of emergency and supported housing for women who want to escape domestic violence. In NSW in 2002–03, the Supported Accommodation Assistance Program revealed that 67.1 per cent of women seeking assistance were doing so in order to escape domestic violence. Those who are turned away usually have to return to their environments of abuse for lack of any other alternative shelter available to them (Supported Accommodation Assistance Program 2004). The structural reality for poor women in domestically violent situations and the absence of support and accommodation cannot be disconnected from their subsequent criminalisation when murder or assault ensues. Nor can it be disassociated from a discriminatory state in which the protection of women is clearly not a priority.

Surveillance and policing

Women, by virtue of their social and economic disadvantage, often find themselves reliant on the services and support of the state. As a result, the state becomes increasingly more involved in their everyday lives. The greater the disadvantage, the more the state becomes involved in their affairs. This increased intrusion into and scrutiny of the lives of disadvantaged women also often result in their subsequent criminalisation. Socially and economically disadvantaged women generally tend to reside in social housing or low-income neighbourhoods or are homeless. Consequently, these women's lives are more heavily scrutinised because they are more visible and live in heavily policed areas. This further contributes to an increased intrusion of the state into these women's lives and often results in their subsequent fine, charge, arrest and revocation of community, bail or parole orders. Once women have been arrested and charged, the possibility of leaving the system is limited and, if they are released, re-arrest is more likely.

A surveillance and security approach to policing is given precedence over other possibilities of alleviating social harm. The Productivity Commission found that NSW spends below the Australian average on mental health, community health, housing and Indigenous services, and above the average on prisons and police (Productivity Commission 2006). The federal government has also stepped up prosecutions against those perpetrating social services fraud (Garnaut 2006), with a result that more poor women are being sentenced for such crime. The criminalisation of women is associated with poverty and the difficulty of caring for children and their attempts to live, cope and survive in their circumstances. Rather than money being directed to women's services to alleviate the symptoms of poverty, financial resources are instead directed towards invasive measures of control and surveillance.

Prisons

A regulatory framework of prison management

The *Crimes (Administration of Sentences) Act 1999* (NSW) establishes a complete statutory framework, which regulates all aspects of the confinement and release of those serving prison sentences. The Act provides that every member of society has certain basic human entitlements and that, for this reason, a prisoner's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded. The Act recognises the need to respect the dignity of those in prison and their special requirements by taking into account age, gender, race, disability status and the culturally specific needs of Aboriginal and Torres Strait Islander peoples. The Act also requires that anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Nevertheless, although there are clear provisions in the *Standard Guidelines for Corrections in Australia* (Australian Correctional Ministers 2004) for the rights of prisoners to be upheld in balance with others' needs and rights, the *Crimes (Administration of Sentences) Act* emphasises community safety and crime prevention through the humane containment, supervision and rehabilitation of prisoners. Such safety is ensured by giving precedence to the security and order of the institution; that is, the overriding concern of prison staff and administration is embedded in a traditional security-based model for prison management that sees virtually all decisions concerning imprisonment through a lens of security. As a result, human rights and entitlements are given secondary consideration. For instance, the Select Committee on the Increase in Prisoner Population (2000, 156) found security to be the overriding consideration in prisons, consuming most of the resources of the

Department of Corrective Services. Prisoners' human rights under the Act are easily ignored or restricted when there is a 'security or safety concern', no matter how important or fundamental the right and how tangential or speculative the security concern. Actions by departmental staff or administration, such as limiting or restricting access to goods, visits, and general autonomy and freedom, are not recognised as rights violation, or otherwise illegal, where the purpose of the action is for security and the 'good order of the institution'.

The legality of prison policy and practice tends to be assessed only against the requirements of the *Crimes (Administration of Sentences) Act* and the *Crimes (Administration of Sentences) Regulation 2001* (NSW), which clearly have security concerns at heart. It is suggested here that if the policies and actions of the NSW Department of Corrective Services were to be assessed in terms of the requirements of other legislation, such as the *Anti-Discrimination Act 1977*, which applies to all members of society and prohibits both direct and indirect discrimination, such policies and procedures may well be deemed to be contrary to human rights-based legislation and clearly reflect how discrimination can be manifest in a systemic and often non-intentional, but nonetheless restrictive and damaging, way.

Women in prison in NSW

In NSW, there are currently eight centres (prisons and transitional centres) for women in full-time custody located across the state: Mulawa Women's Correctional Centre, Dilwynia Women's Correctional Centre, Berrima Women's Correctional Centre, Emu Plains Correctional Centre, Bolwara Transitional Centre, Parramatta Transitional Centre, June Baker Centre (in Grafton Correctional Centre) and Mid-North Coast (Kempsey) Correctional Centre. Small numbers of women are also held regularly in men's prisons, mainly at Bathurst, Broken Hill, Junee and Long Bay Hospital.

While women represent a small proportion of the total prison population, their imprisonment rate has been fast increasing. Women make up approximately 7.5 per cent of the NSW prison population (Australian Bureau of Statistics 2006). There was a 13 per cent increase in the number of women in NSW prisons between 2001 and 2004, and there has been an 88 per cent increase since 1998 (Australian Bureau of Statistics 2004). Conversely, as the prison rates for women increase, there is a general downwards trend for women being placed in community-based corrections, which includes, but is not limited to, parole, probation, corrections orders, drug programs, conditional release and other alternatives to prison (Australian Bureau of Statistics 2004). These trends suggest the discriminatory character of a system that increasingly criminalises women, while reducing social and community supports.

Women in prison on remand

Women on remand in NSW represent a higher proportion of the women in full-time custody (30 per cent) than is the case with their male counterparts (21 per cent) (Corben 2005). They also represent a higher proportion (9 per cent) of all those on remand (males and females) than their proportion in prison would warrant (Australian Bureau of Statistics 2006). Given that women are charged with fewer serious and violent crimes than men, the number of women on remand should also be proportionally smaller compared to the number of men. Furthermore, remand prisoners are classified by the Department of Corrective Services as 'maximum security' prisoners. This results in higher levels of security, restrictions on personal property, visits entitlements and other 'privileges' for women who have yet to be found guilty (Select Committee on the Increase in Prisoner Population 2000).

Security classification

Clause 10 of the *Crimes (Administration of Sentences) Regulation* requires that every prisoner be assigned a security classification and the *Crimes (Administration of Sentences) Act* provides that security classifications apply to both men and women prisoners. Women are thus classified in accordance with the *Crimes (Administration of Sentences) Regulation* (cll 22, 23 and 24), which incorporates the classification system designated for women prisoners in July 1997 (Corben 2005). These classification decisions determine the quality of life and living conditions of prisoners, including supervision levels, type of accommodation, geographical location of incarceration, use of restraints, inmate privileges, programs available and eligibility for discretionary release (Webster and Doob 2004). The NSW Department of Corrective Services assesses security classification for women on the basis of 'risk', as determined by 'needs' (NSW Department of Corrective Services 2004a). Given their social and economic disadvantage, women with greater disadvantage are considered a greater risk and are consequently given a higher security classification. Women prisoners are thus discriminated against by a security classification system that equates a woman's 'needs' with risk factors. Consequently, a process that converts 'needs' into 'risk' penalises women for their disadvantage. Those with a greater social and economic disadvantage and mental health disorder or cognitive disability attract a higher security classification, as they are considered in more 'need' as well as difficult to 'manage'.

Access to programs and employment opportunities

As a consequence of their minority status, women have been penalised in many areas of prison life. Many correctional policies and practices applied to women are fundamentally an adaptation of those considered appropriate for men. Furthermore,

programs provided to women prisoners are not comparable in quantity, quality or variety to those provided to male prisoners (Select Committee on the Increase in Prisoner Population 2000). Women prisoners are not provided with adequate recreation or programs, particularly educational and skill-based training, and do not have the same access (as men) to pre- and post-release programs. The programs a woman can access vary according to whether she is in prison on remand or has been sentenced, if she has been released on parole or is on a community-based order, or if she has served a finite sentence. For instance, women on remand have virtually no access to programs as a result of their high security classification and are given less consideration, as they are most often in for shorter periods than non-remand prisoners. There is an argument that the transience of remand prisoners makes it difficult to provide suitable programs (Select Committee on the Increase in Prisoner Population 2000, 20) but, as women remand prisoners represent a much higher proportion than male remand prisoners, they suffer disproportionately from this lack. Also, the high proportion of women prisoners who serve short sentences (sentences of six months or less) is disproportionately restricted as to what programs they can participate in (Select Committee on the Increase in Prisoner Population 2000, 20). Inconsistent access to programming not only restricts women's opportunity to benefit from some form of activity while in prison, but also limits women's opportunities for early release, unduly restricting freedom and entitlements.

Opportunities to work and develop employment and trade skills are severely limited for women in NSW prisons. In addition to denying women opportunities to improve their economic situations, the type of employment offered to women in prison — for example, packing headsets or working in the dairy — is not useful for gaining work outside prison (Select Committee on the Increase in Prisoner Population 2000). Women also have very few opportunities to pursue education in prison, as there are limited places in educational programs (Standing Committee on Law and Justice 2000). Those who are able to participate in education have to do so at the expense of an already meagre pay for prison labour. Failing to provide women in prison with useful employment and educational opportunities limits their potential to succeed in their communities. By not gaining training, employment and education skills that reflect a highly competitive market, women do not have the earning options to alleviate their social and economic disadvantage, thus further contributing to the feminisation of poverty.

Strip searching

Mandatory strip searching is experienced in a discriminatory manner because women prisoners, as a group, have higher incidences of prior sexual assault, domestic violence and other forms of abuse (Lawrie 2003). Women also suffer from

related post-traumatic stress at higher rates than male prisoners and the general community (Butler and Milner 2003). As a result, women often find strip searching a particularly de-humanising and humiliating experience, and something that cannot be disassociated from past experiences of abuse. The loss of dignity and sense of powerlessness endured during a strip search for many women prisoners mirrors previous experiences of sexual violence. As such, it contravenes Australia's international treaty obligations. If punishment does not contribute to acceptable goals, such as greater safety and security, and results in purposeless and needless pain and suffering, it is considered cruel under international law. One indicator of cruel punishment is where the permissible aims of punishment (deterrence, isolation to protect the community and rehabilitation) can be achieved as effectively by punishing the offence less severely (Sieghart 1983, 166). There is no evidence that mandatory strip searching carries out its stated purpose of preventing contraband and other ways to search for and prevent contraband are available (George 2003).

Two important principles emerge from the international standards on the treatment of prisoners. First, individuals are sent to prison *as* a punishment, not *for* punishment; and second, despite having lost their right to freedom, prisoners' rights do not stop (O'Neill and Handley 1994). It is stipulated under the International Covenant on Civil and Political Rights (ICCPR) that prisoners will be treated with humanity and respect and that they shall not be subject to 'cruel, inhuman or degrading treatment or punishment' (Art 7). Furthermore, the ICCPR codifies the right of people not to be arbitrarily interfered with and to have the protection of the law against such interference (Art 17.1, Art 17.2). Mandatory strip searching in NSW is in breach of the ICCPR principles. Women in prison are routinely punished through the random and mandatory strip searches that are conducted without reasonable suspicion and that violate their right to personal security against unlawful and unreasonable invasion.

Strip searching of women is also in breach of Australia's commitment to the rights of women. The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) committee has articulated that discrimination against women includes gender-based violence — that is, violence that is directed against a woman as a result of her gender, or that affects women disproportionately (George 2003). As a large majority of women in prison are survivors of sexual abuse, strip searches impact upon women disproportionately.

Community and post-release

Relative to men, women pose a lower risk to the safety of the community. However, except for the 30 or so women in transitional centres, women are provided with

fewer opportunities for work release or other contact with the community prior to release than are men (Select Committee on the Increase in Prisoner Population 2000).

There are proportionally fewer services and post-release supports for women than for men, particularly taking into account the greater need women have for support with mental health disorders, looking after children, escaping domestic violence and adhering to parole orders. There are only 12 post-release supported places for women in NSW at Guthrie House, with some four or five semi-supported places attached to the Community Restorative Centre. These places must also serve women seeking housing support for bail, women awaiting a drug court hearing and women on parole.

The discrimination against women in the criminal justice system becomes clearer when it is understood in the context of their social and economic disadvantage. Women, by virtue of their gender, experience both direct and systemic discrimination within a correctional setting that targets and attempts to 'correct' social disadvantage at an individual level. Intervention needs to be directed at social, political and economic levels and not simply an individual one.

Discrimination on the basis of race

The blatant and systemic discrimination against women in the criminal justice system could not be clearer than in the context of Aboriginal women. Aboriginal women are subject to discrimination as women and as Aboriginal women:

Aboriginal women have experienced their children being forcibly taken from them, have lost many of their women specific roles as custodians of culture, have been imprisoned and died in custody, grieved over relatives who have died in custody and have been subjected to violence perpetrated by non-Aboriginal and Aboriginal men, all with the express or apparent sanction of the law. [ALRC 1994, online reference.]

In contemporary Australian society, Aboriginal women are the victims of racism, sexism and unconscionable levels of violence. The justice system has done little to address this impoverishment or to protect Aboriginal women from violence, and in many cases appears to further disrupt their lives when it comes to providing protective support (Andrews 1997; Goodstone and Ranald 2001). In fact, the overwhelming response to the complex matter of offences committed by Aboriginal women, who are themselves frequently victims of violence, has been to further criminalise and in many cases remove them from their communities through imprisonment (Aboriginal and Torres Strait Islander Social Justice Commissioner 2002; 2004).

In NSW, Aboriginal women constitute approximately 2 per cent of the female

population and yet represent approximately 30 per cent of the total NSW women's prison population (Australian Bureau of Statistics 2006); that is, almost one in three women in NSW prisons is an Aboriginal woman. Aboriginal women are sentenced to prison at a very much higher rate than the general population. About 1.6 per cent of Aboriginal women in NSW aged 20–24 received a prison sentence in 2001 (Weatherburn et al 2003). This rate is 18 times higher than the corresponding figure for the general population of women in the same age category.

Recent inquiries into the reasons for such over-representation have concluded that while the issue is complex, two factors may be identified as the most significant: the criminal justice system is discriminatory in its treatment of Aboriginal peoples; and Aboriginal peoples commit disproportionately more offences connected to their marginalised status in society (Select Committee on the Increase in Prisoner Population 2000; Aboriginal and Torres Strait Islander Social Justice Commissioner 2002; Lawrie 2003). This reality is rooted in a long history of discrimination and social inequality affected by colonial administration. The marginalisation of Aboriginal people stems from their historical exclusion from full participation in Australian society, as well as state interference in and, at times, suppression of Aboriginal culture. Economic and social deprivation and exclusion are significant contributors to high incidences of Aboriginal crime and to Indigenous peoples' over-representation within the criminal justice system.

Social and economic disadvantage is of particular concern for Aboriginal women. Aboriginal women in custody are predominantly young and with low levels of education, often having left school before completing their high school certificate (year 10). They have experienced high levels of unemployment while not receiving social benefits and therefore relying on crime as a source of income (Lawrie 2003). For Aboriginal women generally, the labour force participation rate in 2000 was 42.6 per cent, compared with 54.8 per cent of non-Aboriginal women. The unemployment rate for Aboriginal women was 14.9 per cent, compared with 7.7 per cent for non-Aboriginal women (Australian Bureau of Statistics 2000). Aboriginal women's unemployment rate would be much higher if the Community Development Employment Program (CDEP), a work-for-the-dole scheme, numbers were excluded (Baldry and Green 2002). Many Aboriginal women have experienced disruption of their families and communities through the operation of racist government policies, such as the stealing of land and children; the infantilisation of Aboriginal women; and substandard education and health services over generations (Andrews 1997; Baldry and Green 2002). They continue to face discrimination directly and indirectly as individuals and as a community.

Policing and systemic discrimination of Aboriginal women

A 1985–86 study in NSW found that although Aboriginal peoples represented 1.5 per cent of the overall population, they comprised 47 per cent of police arrests (Bowling et al 2004). A more recent study in 1991 found that Aboriginal peoples were over-represented among the population held in police cells by a factor of 19 (McDonald and Biles 1991). Research carried out by the NSW Bureau of Crime Statistics and Research also shows that one of the main reasons for the over-representation of Aboriginal peoples in NSW prisons is high arrest rates (Hamilton Hunter 2001). For Aboriginal women in 2001, more than 6 per cent were arrested, subsequently charged and appeared in court, compared to 0.7 per cent of the overall number of women arrested and charged (Weatherburn et al 2003).

Discrimination against Aboriginal women by police is not limited to bail applications and over-representation. A number of inquiries and reports have noted various and numerous incidents of 'intrusive and intimidatory' policing against Aboriginal peoples, including unwarranted entry into households; physical abuse; discriminatory policing in public places and at private functions; and the maltreatment of Aboriginal women and girls, which included racist and sexist verbal and physical abuse (Chan 1997; Andrews 1997; Bowling et al 2004). Given the over-representation of Aboriginal women on remand, and the treatment of these women while in custody, it is not surprising that Aboriginal women in NSW named the police force as one of the services that regularly discriminated against them (Goodstone and Ranald 2001).

Aboriginal women in prison

Aboriginal women are consistently over-represented among women on remand (Ryan 2002). In NSW, the Select Committee into the Increase in Prisoner Population (2000; 2001) found that the most significant factor contributing to the increase in the incarceration of Aboriginal women was the increase in remand. The high incidence of Aboriginal women's homelessness and the breaching of orders (especially related to drug taking and drinking issues inextricably connected to poverty and dispossession) contribute to this form of indirect discrimination. When this is taken together with the information above about Aboriginal women's serious social and financial disadvantage, it suggests that Aboriginal women are over-represented in remand largely because they are so disadvantaged. For example, many have no one to put up bail, no one to speak up for them and no suitable accommodation to which to go.

Aboriginal women in the mainstream prison, where most are held, rarely have the opportunity to attend programs and courses that are Aboriginal centred or that take

into consideration their cultural and spiritual traditions and customs. Programs that fail to consider Aboriginal culture and their current social and economic disadvantage fail to prepare Aboriginal women for release or to support them in coping with the stress, boredom and isolation from their communities.

As noted above, the classification scheme equates social disadvantage with 'need', so Aboriginal women are disproportionately classified as higher security as a result of colonial oppression and the current social and economic realities of Aboriginal disadvantage. Since such disadvantage equates to 'risk', the 'individual' risk categories used in the classification scheme reflect the experience of the entire Aboriginal population, resulting in over-classification into higher levels for the majority of Aboriginal women. A higher classification for Aboriginal women results in very few being eligible for a range of opportunities, including, for example, programs, the Parramatta Transitional Centre, the Jacaranda Cottages at Emu Plains or a s 25 release (Lawrie 2003). Aboriginal women are also granted work release, conditional release or community release at a much lower rate than are other women in prison (Lawrie 2003).

Baldry and Maplestone (2005) reported that in their sample of Aboriginal women post-release, 60 per cent returned to prison within nine months of release. This was significantly faster and in greater numbers than the non-Indigenous women (30 per cent) and than men (38 per cent), which suggests that they face significantly greater barriers to social integration. Many on parole are often breached due to lack of suitable housing, failed attempts to reclaim their children and the necessity of having to consort with partners, family and friends with whom they may be ordered not to mix. Such re-imprisonment due to these breaches of administrative orders appears to affect women disproportionately (Ryan 2002). The lack of post-release support, and particularly post-release accommodation, results in a high likelihood of a return to custody. Finding adequate shelter should not be the responsibility of the women as a condition of parole, and consequently their freedom, and reflects a social justice concern rather than a criminal justice matter. Difficulties women have in 'escaping' the web of criminal justice agencies, even when they have completed their prison sentences, is indicative of the insidious nature of discrimination within this system.

The Aboriginal and Torres Strait Islander Social Justice Commissioner states: 'The discrimination faced by Indigenous women is more than a combination of race, gender and class. It includes dispossession, cultural oppression, disrespect of spiritual beliefs' (2002, 13). The report goes on to note that the situation will not be rectified simply by 'allowing' Aboriginal women access to the principles and standards of living in the dominant culture. Non-discrimination requires vigilance to ensure that legitimate cultural differences are respected.

Culturally and linguistically diverse women

Culturally and linguistically diverse (CALD) women are a minority group within NSW prisons. 'Imprisonment is one of the most isolating, horrifying and depriving experience for any woman. For women from non-English speaking backgrounds (NESB) the prison experience is one of desperate isolation' (Easteal 1992, 96).

CALD women in NSW find contact with prison staff very difficult (Select Committee on the Increase in Prisoner Population 2000). Although there is very little formal research into the area, it is likely in NSW (as is the case in Queensland) that CALD women have to rely on a 'trusted other' inside prison to help them gather information, fill in forms or work out how to navigate the procedures for seeing a counsellor or accessing educational programs (Kilroy 2003). The use (by prison staff) of other women prisoners as interpreters is not a long-term, systematic or adequate response for women in prison who require assistance overcoming the difficulties presented by language and cultural difference.

All prisoners suffer difficulties in maintaining ties with families and friends. Visiting times and the number of visitors are restricted, as are times for telephone calls. The cost of telephone calls is also prohibitive for those whose families are interstate or overseas, as women are required to pay for all telephone calls (local and international) at premium rates. Women whose relatives are in other countries cannot use reduced rate international call cards, but must pay the full international rate. These prison practices severely restrict women's contact with families, especially their children. As a much larger proportion of women than men have dependent children, these practices can be understood as indirect discrimination.

Discrimination on the basis of disability

Police

Women and girls with a disability experience discrimination in relation to forced institutionalisation, denial of control over their bodies, physical restraint, medical exploitation, humiliation, harassment and lack of financial control (Frohman 2002). Given the lack of sensitivity to and awareness of the issues faced by women with mental, cognitive and/or physical disabilities, these women often find it difficult to deal with the police because the evidence they provide is not seen as credible, or the police are not skilled in addressing or working with people with such disabilities. The Anti-Discrimination Board receives a significant number of complaints against the NSW Police Service related to disability. In the years 2000–02, the total number of

complaints received by the board increased from 40 to 54; 24 of those complaints, or 44 per cent, were related to discrimination based on disability (Anti-Discrimination Board of NSW 2002).

Nevertheless, the complaint system itself is discriminatory. Section 127 of the *Police Act 1990* (NSW) requires that complaints be made in writing, with allowance made for those with intellectual disability. This poses significant problems for women with mental health disorders, as well as women who are culturally and linguistically diverse. Literacy and language barriers for these groups result in compromised access to complaints processes. The Anti-Discrimination Board has indicated that there are many instances where individuals are unable to lodge complaints about the discriminatory treatment they have suffered and that many complaints of alleged discrimination, harassment, vilification and victimisation by the NSW Police Service may go unreported (Anti-Discrimination Board of NSW 2002).

Women with mental health disorders and intellectual disabilities often have what is referred to as 'deficits in adaptive behaviour' (Select Committee on the Increase in Prisoner Population 2000, 43). This refers to limited communication skills and includes limitations in writing and speech, as well as limited ability to sustain friendships; to engage in recreational and social activities; to work; and to manage finances or run a household (Select Committee on the Increase in Prisoner Population 2000, 53). Aboriginal women in prison show very high levels of adaptive behaviour problems, which, according to Hayes (Select Committee on the Increase in Prisoner Population 2000, 53), may result in their criminalisation. The situation for these women contributes to their inability not only to lodge complaints, but also to manage themselves ably once in police custody. This can result in harsher custodial treatment towards these women, who may be considered uncooperative or unmanageable (Anti-Discrimination Board of NSW 2002).

Psychiatric labels in prison

A NSW prisoner health survey (Butler and Allnutt 2003, 14) indicated that some 61 per cent of women prisoners had a 12-month prevalence of a mental disorder (psychosis, affective or anxiety disorder) compared with 42 per cent of men, indicating a significantly higher prevalence among women. These rates were also significantly higher than those in the general community (approximately 18 per cent for all mental health disorders) (Australian Institute for Health and Welfare 2006, 97).

These rates reflect the unacceptable practice of warehousing people with mental health disorders in prisons. It is recognised that people with such difficulties can and do benefit from community-based services that are now the preferred approach

(Butler and Milner 2003). Although community integration is a highly valued principle, relentless cuts to social and health programs over the last two decades have eviscerated progress in this realm. Currently, the shortage of adequate community resources causes many persons, particularly those with mental health disorders, to 'fall through the cracks' of the system. In too many cases, the attempts of such persons to survive, such as self-medicating with drugs and alcohol and responding violently to partner abuse or police intervention, are characterised as 'criminal' and institutionalised in the criminal justice system. Social and economic challenges such as homelessness, unemployment, social isolation, malnutrition and substance abuse further compound the struggles and challenges of these persons. Thus, prisons are increasingly becoming the default placement for people with mental health disorders.

Historically, women have been over-represented in psychiatric facilities and under-represented in the prison system. However, with the closure of psychiatric institutions and increasingly overtaxed and under-resourced community-based services, NSW is now witnessing a marked increase in the number of women with mental health disorders being criminalised. Studies of women in prison in NSW indicate that they have significantly higher incidences and psychiatric labels of mental health disorders — including schizophrenia, major depression, substance use disorders, psychosexual dysfunction and antisocial personality disorder — than do women in the general community and than does the male prison population (Butler and Allnutt 2003). For example, psychiatric medication is more common in women than men, while methadone is prescribed more often (Butler and Allnutt 2003, 348). As women are often considered to be more 'needy' and hence more difficult to manage, such rates suggest that medication is also used as a means to better 'manage' women prisoners and for the maintenance of security and order. Women with mental health disorders often serve long sentences and are labelled as having significant disciplinary problems, while the prison system is ill equipped to provide the services and supports required by such women. As a result of this tendency to give women with such disabilities higher security classifications, they are less likely to obtain conditional or community release. According to the *Crimes (Administration of Sentences) Act* and the *Crimes (Administration of Sentences) Regulation*, 'community safety' is the paramount consideration in sentencing. It is not surprising then that the administration and staff prioritise security and risk management over all other institutional and/or individual needs.

The process, discussed earlier, that converts 'disadvantage' or 'needs' into 'risk' penalises women for their mental health disorder or cognitive disability by attracting a higher security classification. As a result, women's health and well-being are given secondary consideration, with many staff having little awareness of how to respond

appropriately to prisoners with mental health disorders. It is not uncommon for women with such problems to suffer some form of punishment or be placed in physical restraints or administrative segregation as a result of behaviours largely due to their disability.

Prison conditions of isolation and the lack of appropriate services exacerbate existing mental health conditions and underscore the harsh and discriminatory nature of placing women with such concerns in prison. Additionally, these women prisoners and those who are in need of support due to self-harming are confined in exactly the same way as women who are perceived as disciplinary problems, while the risk assessment tools and classification schemes that are used for women fail to consider the diverse challenges they face. Delivering a more punitive response to women as a result of mental health labels constitutes discrimination.

Conclusion

It has been argued in this article that there is direct and indirect discrimination based on sex, race and disability, as well as abuses of the rights of women, throughout the criminal justice system. This discrimination and these abuses are related to a number of key areas and tend to be exacerbated and compounded for Aboriginal women; culturally and linguistically diverse women; and women with mental health disorders. The discrimination and abuses include:

- the excessive difficulty women have 'escaping' the clutches of the criminal justice system;
- the particularly harsh treatment experienced within prison related to both women's minority status and their acute disadvantage — in the context of the prison environment, disadvantage is related to need, which in turn is equated with high risk, which is then translated into high security designations;
- the over-surveillance and over-representation of women at various points in the criminal justice system and particularly on remand;
- the impact of practices such as strip searching of women and particularly those who have experienced sexual and physical violence; and
- the disproportionate effects upon women leaving prison of the paucity of women-centred post-release support.

We argue therefore that women are subject to discrimination and their human rights are breached at various points in the criminal justice system. Given the evidence, such violations can no longer be simply considered a matter of 'criminal justice', but rather must be recognised as a system that directly targets and impacts upon the lives

of those who are the most dispossessed and the most marginalised. The criminal justice system has become the preferred response to addressing societal ills and harms created by social, cultural, political and economic relations that directly and indirectly affect certain groups of people, particularly poor and racialised women and women with mental health concerns. ●

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