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### **Submission to the OHCHR UN Working Group on the issue of Discrimination Against Women: Women Deprived of Liberty**

Feminist Legal Clinic Inc. is a community legal service operating in Sydney, Australia which focuses exclusively on advancing the human rights of women and girls.

We refer to the issues raised by the Working Group in relation to restriction or interference with women's personal liberty or movement by state and non-state actors, including on the basis of their sex and prescribed gender roles. We note with concern the recent increased incarceration of women for violence-related offences in Australia which points to pervasive systematic gender bias and discrimination in the criminal justice process.

#### **'Equality with a Vengeance' Approach**

Our concern is the 'equality with a vengeance' approach currently being employed by members of the police and judiciary which fails to consider the distinct characteristics of female defendants and the inherent dynamics of domestic violence. Rather than focusing on delivering justice, a change in policing and justice is being exercised by the courts which does not acknowledge the contextual circumstances and fundamental imbalance in power female defendants experience in comparison to men. Failure to acknowledge women's lower reoffending rates, their histories of trauma, increased suffering in custody and greater caregiving responsibilities significantly disadvantages women under the guise of 'formal equality.'

Fundamentally, it needs to be acknowledged that there is an inherent asymmetry and power imbalance between men and women, which results in domestic violence perpetrated against women being experienced very differently by women in comparison to men. While some forms of violence are reflective of escalation in couple conflict, a majority of domestic and family violence is motivated by a desire to subjugate. Violent behaviour is a method exercised by the perpetrator in their attempts to gain control and power over the victim. Violence towards women, in particular is reflective of this desire for control which is influenced, facilitated and perpetuated by the male-dominated societal structures. Judicial failure to acknowledge this particular context and the gendered undertones of domestic violence means that individual acts of violence are often not properly understood.

Moreover, in failing to consider these unequal power structures, methods of formal equality have influenced an increase in female incarceration for domestic violence offences. Prison populations have always reflected that men commit the overwhelming majority of crime, which has appears to have resulted in law enforcement agencies

attempting to equalize the numbers in recent years. This has, arguably been attempted not by reducing male offending, but rather by charging and goaling more women.

The period between 2001 to 2010 saw an increase of 10 per cent a year in arrests of females for domestic violence offences in comparison to an average yearly increase of 2 per cent for males. In its submission to the Inquiry, Legal Aid NSW argued that this was the result of pro-arrest policies mandated by s27 and s49 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) as opposed to actual increased levels of female violence. The submission noted that police officers when responding to domestic violence-related matters, either arrested female defendants or made dual arrests. This also applied in situations where men were unable to demonstrate that they were fearful of their female partner or that their female partner's violence was characterized by control.

### **Female Imprisonment for Minor Charges**

Many women are also being imprisoned for minor charges, often being held on remand for offences for which they are unlikely to ultimately be sentenced to imprisonment. According to the Australian Bureau of Statistics (ABS), 6, 089 prisoners were held on remand in 2007 and 13,182 prisoners in 2017. Of these, the largest increases of people in prisons in Australia in remand are Indigenous and female prisoners. The NSW Bureau of Crime Statistics reported in March 2018 that the number of women in remand had more than doubled between 2011 and 2017.

In some cases, many women are being imprisoned simply for unpaid fines. For example, in the notorious Western Australian case of Mrs Dhu, Mrs Dhu was arrested for unpaid fines and died in 2014 after two days in police custody. Her death was the result of complications relating to undiagnosed injuries from domestic violence. The coroner in reporting on her death, recommended an end to the practice of placing individuals in custody for unpaid fines. However, the practice of goaling women for unpaid fines has continued. In another Western Australian case in 2017, police imprisoned a woman who had contacted them for their assistance in a family violence matter. As she had outstanding fines relating to an unregistered dog, she was taken into custody, which left 5 children between 2 and 18 without their mother. The youngest child was still breastfeeding.

### **Disproportionate Number of Aboriginal Women in Custody**

The women discussed in the mentioned cases are Aboriginal and their stories reflect a wider problem of intersectional discrimination of Indigenous women. Aboriginal and Torres Strait Islander women represent the fastest growing prison population in Australia, and have gone from constituting less than 4 per cent of the female prison population to about 34 per cent since the 1980s. Such an increase is entirely disproportionate to that of the rest of the population.

Moreover, it is also important to acknowledge that both the 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 has previously been a victim/survivor of family violence. This clearly reflects that there is a systematic failure to respond effectively to underlying, interrelated and mutually constitutive root causes of single parenthood, poverty, mental health, substance abuse and family violence. Rather, a law and order approach has been applied, which has exacerbated rather than ameliorated the disadvantage underlying the problem.

## **Increase in Women Charged with Domestic Violence**

As mentioned before, there has been a significant increase in women who are themselves charged with family violence matters. This is due to a police policy which is presumptive of arrest or pro-arrest in cases of domestic violence. It is also influenced by a 'continuing failure' (as noted in a study by the Family Court of Australia) to understand the ways in which women might respond to violence perpetrated against them.

In relation to these two assertions, it is worth noting that 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, with this increase being three times higher than that of males. In many cases, both parties were arrested, with victims often being arrested for fighting back and defending themselves. This has occurred despite male arrestees demonstrating a 'significantly greater concern' for future violence than female arrestees and eliciting greater levels of fear and subjugation in victims.

Aboriginal women in particular, can also be fearful of contacting the police during episodes of family violence due to the victimization-offending cycle or an outstanding warrant issued for their arrest. This means that police arriving on the scene often charge the woman based on her efforts to defend herself. As a consequence, women who are in fact victims of violence are inappropriately charged, with these statistics reflecting the increased use of perpetrators to further victimize women.

A 2014 study by the NSW Women's Legal Services (WLS) states that the majority of female AVO defendants reported that they were the victim of ongoing domestic violence and acting violently in self-defence. They alleged that their version of events had not been handled appropriately by police and that the other party was using AVO proceedings to threaten or to control them.

## **Impact of Incarceration on Women**

Women in custody tend to be the victims of sexual abuse and domestic violence. While in custody, these same women are further subjected to further violence. As prisons and prison systems are predominantly organized around the needs and requirements of male prisoners, female prisoners experience significant disadvantage when their contextual circumstances are not considered. Female prison populations are found to have more complex substance abuse, and physical and mental health needs. Moreover, there is a high degree of self-harm and self-mutilation in female prison populations. Prisons, by their nature are built on control, power and surveillance for purposes of security and punishment. Consequently, searches and surveillance for many female prisoners is sexually abusive and re-traumatizing.

Reports of the treatment of girls in detention in the Northern Territory, who were subjected to sexual harassment and assault by male staff have been well documented. Similarly, the treatment of female detainees on Nauru is another example of the particular risks for women placed under the control of male staff.

## **Impact of Mother and Child Separation**

The impact of incarceration of women should also be considered in terms of the disproportionate role of women as primary caregivers of children. The act of separation between mother and child can be traumatic for both parties. There is no particular recognition of women's more substantive caregiving responsibilities or of the need for mothers to retain care of their babies. This is despite the greater likelihood that children of imprisoned parents will commit crimes themselves. Nor is there support for women to address grief associated with child removal when forcibly separated.

The incarceration of Aboriginal women, is also a factor which facilitates the removal of Aboriginal children. Unfortunately, child protection practices continue to involve widespread removal of Indigenous children, including newborns, at rates exceeding those that occurred during the notorious stolen generations. An estimated 80 per cent of Aboriginal women in prison are mothers. It is worth noting that when an Aboriginal mother is placed into custody, the chances of this precipitating the removal of her children is high. Consequently, the long-term cumulative effects become intergenerational, as the children of incarcerated Aboriginal parents face disruptions to family life, education, housing and health.

## **Summary**

- There is systematic abuse and structural violence towards women through criminal law practices that fail to take account of the particular human rights of mothers and children.
- An increasing number of women are being charged and incarcerated in domestic violence-related matters. There is a tendency to arrest women who fight back against oppressive male control in any manner.
- The increase in imprisonment of women has been primarily for non-violent crimes with many women also being unnecessarily held on remand.
- Bail and sentencing guidelines do not make sufficient provision to take account of caregiving responsibilities or any allowance for a distinction to be made between male and female offenders generally.
- Police and judiciary are not taking enough account of the gendered nature of domestic violence, including its ongoing, controlling and coercive aspects and other contextual factors including physical and financial disparities and the broader cultural and societal context.
- The devastating impact of even a short period of incarceration on women who have caregiving responsibilities and on those receiving their care is inadequately considered by police and judiciary.
- There is a disproportionate number of Indigenous women in custody, with most of these women having been victims of domestic violence.
- This overrepresentation is emblematic of 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.
- According to the Law Council of Australia, most women could safely serve their sentences within the community. Organisations such as the Women's Justice Network (WJN) have demonstrated the effectiveness of mentoring programs tailored to keep women from reoffending.
- There needs to be an acknowledgement that female defendants have different needs, are victimised in different ways, and find themselves in different situations to male defendants.

## **Conclusion**

Unfortunately, an increasing number of women are being charged and incarcerated in domestic violence-related matters. However, the increase in imprisonment of women has been primarily for non-violent crimes. Public order offences have also risen four times faster for women than men. It would appear there is an increasing tendency to arrest women who fight back against oppressive male control in any manner.

It is our submission that legislation that does not allow for a distinction to be made between male and female offenders is increasingly failing women and those who depend on them for their care. Women are serving longer sentences today, including for minor crimes and spending unnecessary time on remand. Additionally, current domestic violence laws do not adequately take account of relevant factors such as physical and financial disparities between the parties and an ongoing, controlling and coercive context.

The impact of incarceration on women's ability to fulfil their caregiving responsibilities must be given greater consideration to ensure the human rights of both women and children are protected. The current approach is causing intergenerational harm, particularly within indigenous communities. According to the Law Council of Australia, most women could safely serve their sentences within the community. Organisations such as the Women's Justice Network (WJN), for example, have demonstrated the effectiveness of mentoring programs tailored to keep women from reoffending.

We would like to conclude our submission by quoting Australian High Court Justice Brennan that formal equality can be 'an engine of oppression' if the law entrenches inequalities, as female defendants have different needs, are victimised in different ways, and find themselves in different situations to male defendants. The result is a form of systematic abuse and structural violence towards women through biased and discriminatory criminal law practices.

This submission is entirely based on an article - 'Equality with a vengeance: The over-incarceration of women' which was published in *Precedent*, the journal of the Australian Lawyers Alliance, issue 147 in August 2018 (Sydney, Australia, ISSN 1449-7719), pp20-25. It contains all the necessary citations and has been attached for reference.

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