

# *Look Before You Leap!*

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*Women's access to justice – where are we now?*

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## *Women's access to justice –where are we now?*

- A reasonable way to measure the degree of justice in a given society is to consider how it treats its vulnerable citizens. And by this measure, we are far from achieving equal access to justice for women.
- To illustrate this point we need look no further than the most recent Social Justice Report of the Human Rights and Equal Opportunity Commission's Aboriginal and Torres Strait Islander Commissioner, Dr William Jonas.
- His report states that there is a crisis in the level and type of contact of Indigenous women with correctional systems in Australia.
- Indigenous women are currently incarcerated at a rate higher than any other group in Australia, including Indigenous men. In the decade from 1991 – 2001, the rate, nationally, of incarceration of Indigenous women in Australia increased by 255.8%. For the June 2002 quarter, Indigenous women were over-represented at 19.6 times the rate for non-Indigenous women<sup>1</sup>.
- In Queensland, Indigenous women represented 28.2 per cent of the female prison population at February 2001. In the five-year period 1994 - 1999, the growth of Indigenous female prisoners in Queensland was 204 per cent compared to 173 per cent for all females, over the same period.
- As Dr Jonas points out in his report, *"These women live in a landscape of risk and suffer at the crossroads of their race and gender....they are some of the most vulnerable people in our society and we must try now to address these alarming rates of incarceration."*
- The Aboriginal and Torres Strait Islander Social Justice Report 2002 also reveals that Indigenous women are more likely than non-Indigenous women to be incarcerated for violence, including assaults.
- So what? some might ask – do the crime do the time.
- But we need to understand the context if we want to know if justice is being served.
- Carol La Prairie's research regarding similar statistics for Indigenous Canadian women, suggests Indigenous women are convicted of violent crimes as a direct, or indirect consequence of violence perpetrated on them. La Prairie identifies three ways that Indigenous women may find themselves convicted of violent offences including that they may retaliate; resort to substance abuse to escape; or their victimisation may lead to the abuse or neglect of others.

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<sup>1</sup> Indigenous men were incarcerated at 15.2 times the non-Indigenous rate.

- Other American research<sup>2</sup> identifies:
  - Aboriginal women's reluctance to involve police because of concerns about police brutality;
  - Aboriginal women's deep mistrust and suspicion of outsiders and a lack of faith in perceived racist and oppressive state agencies;
  - the likelihood of Aboriginal women blaming structural factors, such as the effects of colonisation, rather than the perpetrator alone; and
  - Aboriginal women fighting back as resistance to violence.
- This fits with anecdotal information in Australia that Indigenous women use violence in self-defence because they believe that police will not act to protect them.
- However, Indigenous scholars argue that Indigenous Australian women's violence requires a more complex analysis of culture than is provided by the theories of La Prairie and others. For instance, customary law practices or less formal, physical payback systems are commonly used to settle disputes in Australian Indigenous communities, and Australian Indigenous women may utilise these customary practices and payback systems in response to violence perpetrated against them.
- The links between the impact of colonisation (manifested in social disintegration, poverty, substance abuse and violence), and the over-representation of Indigenous people in the criminal justice system has been raised in numerous previous reports, including the Queensland Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report, released in 2000 and the Fitzgerald Cape York Justice Study.
- With all of this in mind, I now want to turn our attention to the increasing momentum within the predominant white women's movement, for mandatory arrest and 'no drop' prosecutions, currently operating in several jurisdictions in the USA.
- Frustrated with the inadequate, and at times hostile response of the criminal justice system to domestic violence, women's advocates have lobbied for stronger criminal justice responses, including mandatory arrest and 'no drop' policies.

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<sup>2</sup> See Sorenson, 1996; Asbury, 1993; Peterson-Lewis et al, 1998; and Joseph, 1998.

- Mandatory arrest requires the police to arrest whenever there is probable cause to believe that a crime of domestic violence has occurred. If there is probable cause the police must arrest, even if the victim is opposed to arrest.
- 'No drop' prosecution means that prosecutors refuse to drop charges, even if this goes against the wishes of the victim.
- These policies offer advocates a measure of control over the state response, by increasing the likelihood that police and prosecutors will not reject domestic violence incidents as serious criminal matters.
- Further, they offer a solution to the very real problem of perpetrators using intimidating tactics to coerce victims of domestic violence into withdrawing charges.
- However, there are dilemmas in this approach that feminist law reformers must confront.
- I want to consider some of these dilemmas and in doing so I will draw particularly on a critique by Professor Donna Coker, from the University of Miami, School of Law<sup>3</sup>.
- Professor Coker identifies four areas in which these mandatory policies present difficulties for feminist law reformers.
- In the interests of time, particularly, and because it is sufficient to make my point, I will focus on only two of the dilemmas she identifies: the dilemmas associated with controlling men (which Coker calls the dilemma of differential deterrence); and the dilemmas associated with increasing state control of women (which Coker calls the battered women's agency dilemma).

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<sup>3</sup>*Crime Control and Feminist Law Reform in Domestic Violence Laws: A Critical Review*  
in the Buffalo Criminal Law Review Vol 4:801)2001

## *Dilemma One: Controlling men who 'batter'*

- Coker examines the evidence that arrests act as a specific deterrent to future violence. She concludes that the best evidence is that it provides modest and short-term deterrence.
- However, the evidence also suggests that for particular groups of men, arrest may result in more incidents of violence, than does separation of the parties or other police interventions.
- Based on his research, which shows that arrest may increase violence for certain groups of men, particularly unemployed, black men, Sherman concludes that arrest may result in increased violence perpetrated by those men who lack a 'stake in conformity' ie dominant white, middle class standards.
- These findings have led Sherman to develop a defiance theory<sup>4</sup> to help understand why arrest can backfire. At the foundation of this theory is the idea of individual liberty and rights, which has resulted in what he describes as a major cultural contradiction: obedience to the law, but only when the law is right. The price we pay for this principle, he says, is its twisted application by men such as those who perpetrate violence against women.
- The lack of respect for 'white law', represented by criminal justice agents and especially police, was a recurring theme in the discourse of Aboriginal and Torres Strait Islander women I interviewed last year for a study on Indigenous and non-Indigenous women's views about the application of the criminal justice system and restorative justice practices in cases of domestic and family violence.
- Further, the Indigenous women told me that police intervention in domestic and family violence frequently resulted in increased violence for the victims, either directly by the perpetrator, or at the hands of the perpetrator's family as punishment for turning in a brother.
- The Indigenous women also had strongly held views that the criminal justice system was inherently violent and that it created more violence, rather than curtailing it.

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<sup>4</sup> Domestic Violence and Defiance Theory: Understanding Why Arrest Can Backfire AIC Conference

## *Dilemma two: Increasing state control of women*

- Given our knowledge of perpetrators' control over the victim, it is tempting to give little weight to women's expressed preferences about arrest.
- Further, there is the case for removing the burden of such decisions from women, which advocates argue may remove women as the target of the offender's rage in response to police intervention.
- Then there is the case of "acting in the public interest". That is where the victim doesn't want to take action for herself, the state should act in the interests of all women.
- But mandatory policies directly and indirectly increase state control of women, particularly, says Coker, women who are already vulnerable to state intervention.
- **Mandatory policies increase the risk that battered women, themselves, will be arrested for domestic violence**, and because of the ongoing nature of domestic violence and gendered responses to it, women's strategies may not meet the requirements of self-defence.
- The report of an evaluation of New York State's mandatory arrest policies says, "problems of dual arrest often emerge following the introduction of mandatory arrest policies. For example, the introduction of mandatory arrest policy in the state of Washington resulted in 50% of domestic arrests involving dual arrests". Other states implementing mandatory arrest policies recorded lower but still significant (between 10 and 20%) dual arrests.
- Therefore, mandatory policies may criminalise women's resistance to male violence, particularly Indigenous women who seem more likely to fight back.
- **Mandatory policies increase the risk that women involved even peripherally in criminal activity, will be prosecuted.**
- Abused women's criminal activity, such as illegal drugs or prostitution, is often related to their abuse. They may be coerced into these activities by the abuser, or they may resort to criminal activities to raise funds needed to escape.
- Mandatory arrest and no drop policies related to domestic violence may also increase the risk of women being charged with and convicted of these offences, because of increased police attention.

- **Finally, mandatory policies increase the risk of unwarranted removal of children by state child protection agencies.**
- The interaction of mandatory arrest policies and other areas of policy aimed at increasing safety for women and children subjected to violence could be catastrophic for women in terms of custody and access to their children.
- Where women are arrested for assault, or other offences arising as a consequence of their being abused, they are at risk of losing their children, even if they are not jailed.
- This is exacerbated by limitations on women's access to material resources, which may be magnified by, or begin with, the arrest of their partner.
- To summarise, the dilemma of mandatory arrest and no drop policies in controlling men, is its differential deterrence of violence. It may in fact escalate violence against marginalised women. The dilemma of mandatory arrest in controlling women's decisions is the unintended consequences, which may result in women themselves being arrested, made poor and possibly losing their children.
- These dilemmas might not translate directly to the Australian context. However, in our efforts to increase women's access to justice through strategies to control the criminal justice system, we must consider potential implications for all women, before we leap into strategies such as mandatory policies.