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Indigenous women: Missing subjects of penal discourse and penal politics

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Abstract

Since the Royal Commission into Aboriginal Deaths in Custody (RCADIC) reported in 1991, rates of incarceration of Indigenous women have grown substantially, to a greater extent than for Indigenous men. However, despite their substantial over-representation in prisons, Indigenous women too rarely feature as subjects of penal discourse or penal politics. This chapter examines how the reach of criminal justice interventions has extended further into the lives of Indigenous people, driving up prison rates, while at the same time the gendered *and* racialising affects of those developments have often gone unremarked. The chapter draws on the limited available data concerning Indigenous women in the criminal justice system and examines the limitations of some recent initiatives intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. It also documents the use of anti-discrimination processes domestically and in international fora to bring attention to Indigenous women within the criminal justice system, and highlight the need to address systemic discrimination.

Introduction

Since the Royal Commission into Aboriginal Deaths in Custody (RCADIC) reported in 1991, rates of incarceration of Indigenous women have grown substantially, to a greater extent than for Indigenous men. However, despite their substantial over-representation in prisons, Indigenous women too rarely feature as subjects of penal discourse or penal politics. RCADIC was of enormous significance in providing detailed analysis of the underlying factors that contributed to the over-representation of Indigenous people in custody, and to deaths in custody (Johnston, 1991). However, the official reports 'lacked a gender-specific analysis' (Marchetti, 2007, p.8) and the experiences of Indigenous *women* were largely overlooked and subsumed in a generalised understanding of Indigenous experience, based on the experiences of men (Marchetti, 2008). The failure to examine the criminalisation and incarceration of Indigenous women [1] continues today in research, policy and criminal justice practices.

This chapter examines how the reach of criminal justice interventions has extended further into the lives of Indigenous people, driving up prison rates, while at the same time the gendered *and* racialising affects of those developments have often gone unremarked. Part 1 draws on the limited available data concerning Indigenous women in the criminal justice system. While this picture is partial, it is clear that the situation has deteriorated since RCADIC (Steering Committee for the Review of Government Service Provision (SCRGSP), 2011). Part 2 reviews two recent NSW initiatives that operate at different stages of the criminal justice process, pre-trial diversion and sentencing, and are intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. Part 3 documents the use of anti-discrimination processes domestically and in international fora to bring attention to Indigenous women within the criminal justice system, and highlight the need to address systemic discrimination.

PART 1: THE CRIMINALISATION AND INCARCERATION OF INDIGENOUS WOMEN

Administrative data alone provide an insufficient basis for the investigation of practices of criminalisation and patterns of incarceration, but they are a necessary starting point. However, there is a paucity of data concerning Indigenous women notwithstanding that many reports have criticised this omission (NSWLRC, 2000, para 6.11). Criminal justice agencies commonly report with respect to women *or* Indigenous people but rarely Indigenous women. Data is particularly poor concerning police and prosecutorial practices.

Policing and Indigenous women

Arrest

One indication of the reach of criminal justice intervention into the lives of Indigenous people is from arrest data. The most recent National Aboriginal and Torres Strait Islander Social Survey (2008), found that more than one-third of Indigenous women (35.2%) and men (40.7%) had been arrested in the past 5 years (Australian Bureau of Statistics (ABS) 2009, Tables 4a, 8a). The figures were even higher in Western Australia (WA) (45.6% of women, 44.1% of men).

Police data indicate markedly different levels of policing of Indigenous women compared to non-Indigenous women. Bartels reports offence rates for Indigenous women in New South Wales (NSW), South Australia (SA) and Northern Territory (NT) were 9.3, 16.3 and 11.2 times higher respectively than for non-Indigenous women, and in each state the disparity between Indigenous and non-Indigenous rates was greater for women than for men (2010a, Table 1). In Western Australia (WA), police arrests of Indigenous women have *increased* while the arrests of non-Indigenous women *declined* (Fernandez, et al., 2009), and by 2006, Indigenous women made up 44.5 percent of women arrested in WA, up from 29.4 percent in 1996. Over the same period, the proportion of Indigenous men increased from 8.0 percent to 26.0 percent. Researchers noted substantial increases in Indigenous arrests in 'offences against the person' and 'justice and good order offences', 'especially since 1999' (ibid) which may suggest that policing practices have changed.

Indigenous women in WA were most likely to be arrested for disorderly conduct (19%), breach of a justice order (14%) or assault (19%) (ibid).

Changing police practices can have a substantial impact on the custodial system. A NSW study found that a 10 percent increase in police arrests results in an estimated 4.6 percent increase in the full time prison numbers for women one month later, with ongoing effects at a cost of $2.2million (Wan, 2011, p.5). And of course, this does not begin to account for the human costs to the individuals involved, or their families and communities.

Police Custody

At the time of RCADIC, Aboriginal women were 'massively disproportionately detained by police compared to non-Aboriginal women' (Hogg, 1991, p.3). A decade later, the Social Justice Commissioner (SJC, 2003) raised concerns that Indigenous women comprised nearly 80 percent of all cases where women were detained in police custody for public drunkenness. However, it is not possible to determine whether this pattern has continued.

The last police custody survey was in 2002, which found that Indigenous over-representation had declined somewhat but remained high. Nationally, women accounted for 23 percent of Indigenous people in police custody but no details were provided of the reasons they were in custody (Taylor and Bareja, 2005, p.26). The authors reported that the success of strategies to reduce Indigenous incidents of police custody varied by jurisdiction (ibid, p.25). It is notable that in NSW, a reduction in over-representation rates resulted from *the increased use of custody for non-Indigenous people* - Indigenous custody levels had not decreased (ibid).

Courts

Indigenous people constitute one in eight of the defendants in NSW magistrates courts, one in five in Queensland (Qld) and more than seven out of ten in the NT (ABS, 2012; data is not available for other states or territories). The proportion of women is higher among Indigenous defendants (NSW 27%, Qld 31%, NT 17%) than non-Indigenous defendants (NSW 17%; Qld 20%; NT 14%; ABS, 2012, p.55-6). However, there is scant data on the offences that bring Indigenous women before the courts.

Studies based on NSW and WA indicated that Indigenous women were particularly over-represented in the categories 'acts intended to cause injury', 'public order', and 'offences against justice procedures' (Bartels, 2010a, pp. 21-2). A more recent NSW study (Beranger, et al., 2010, pp. 3-4) found that more than a third of Indigenous appearances in the Local Courts were for road traffic and motor vehicle regulatory offences (25%) and breaches of justice orders (bail, apprehended violence order, parole, 11%) but provided no data specific to Indigenous women. The factors underpinning rates of breach of order are not well understood, but these offences are markedly shaped by police enforcement practices.

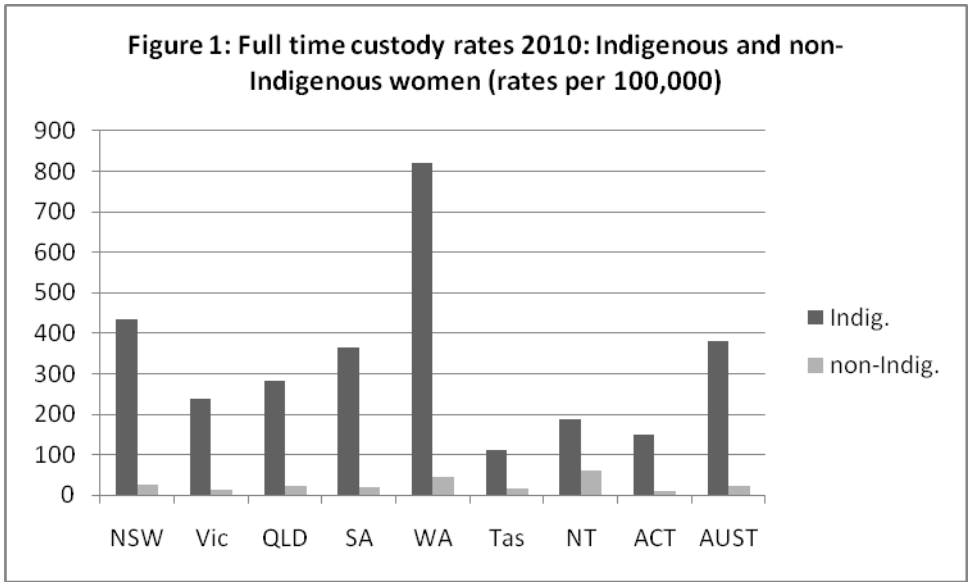
Patterns in women's incarceration

The number of Indigenous women in prison has grown substantially since RCADIC, from 104 in 1991 (SJC, 2003, ch.5), to an average daily number of 643 in 2010 (ABS, 2011a). The Indigenous women's imprisonment rate has increased more than for other groups. [2] From 2000-2010 imprisonment rates increased by:

- 58.6 percent for Indigenous women
- 35.2 percent for Indigenous men,
- 3.6 percent for non-Indigenous men
- 22.4 percent for non-Indigenous women (SCRGSP, 2011, 4.130 & Table 4 A12.7).

By 2010, Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men (ibid, 4.133).

There are very marked differences in rates of imprisonment between Indigenous and non-Indigenous women in each jurisdiction (Figure 1 and Table 1), with WA demonstrating the greatest disparity. Most Indigenous women prisoners are held in NSW, Qld and WA. Indigenous women make up 6.3 percent of the women prisoners in Victoria, but 82 percent in NT; for NSW it is 28.8 percent, Qld 27.1 percent, and WA 51.5 percent (at 2007-08, Bartels 2010a, Table 4).



Source: adapted from Bartels, 2010a and ABS, 2011a.

The substantial variation in incarceration rates across Australia (Table 1) indicates the need for specific attention to jurisdictional differences and localised practises (Hogg, 2001, p. 370). NSW and WA rates have been consistently above the national rate, even with the decline in the NSW rate between 2009 and 2010. Data for NSW are considered in more detail below.

Table 1: Indigenous women in full-time custody, 2006-2010 (rate per 100,000 adult Indigenous population)

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	463.9	145.0	270.8	291.3	628.1	149.4	124.9	78.3	346.2
2007	473.2	150.1	265.9	343.9	836.9	137.9	159.1	71.4	380.1
2008	466.9	163.1	254.6	316.1	666.7	137.1	177.8	235.4	354.8
2009	492.1	186.9	266.2	343.5	731.4	121.2	189.4	198.2	379.2
2010	434.1	239.4	281.9	366.0	821.7	112.8	191.1	148.8	381.6
non-Indigenous rate 2010	27.0	14.5	24.7	19.2	45.4	61.1	62.4	10.5	24.4

Source: adapted from Bartels, 2010a and ABS 2011a; 2007 and 2008 data were updated by ABS in this publication to take the 2006 census into account.

Characteristics of Indigenous women in custody

Women prisoners in general have been described are 'victims as well as offenders', who 'pose little risk to public safety' (ADCQ, 2006, p.5). Indigenous women are more likely that other women prisoners to have been victims of violent crime (Lawrie , 2003), to have poor physical and mental health and to be considered 'at risk' (SJC 2003; WA Dept. of Corrective Services (WADCS), 2009). They 'almost universally have been subjected to social and economic hardship' (ADCQ, 2006, p. 32). The majority are mothers (SJC, 2003).

The offence profile for Aboriginal women in prison differs from that for non-Aboriginal women. For instance, a WA study found that Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women and non-Aboriginal women were over-represented in the *more* serious offence categories (WADCS, 2009, pp.31-2). Indigenous women are also substantially over-represented for offences related to 'acts intended to cause injury' in WA and elsewhere (Bartels, 2010a, Table 13), often linked to alcohol (SJC 2003) or in response to family violence (ADCQ, 2006, p. 108, p. 134). In WA approximately 60 percent of assaults for which Aboriginal women were in custody involved partners, family, friends or acquaintances as victims and most were committed while intoxicated (WADCS, 2009, p.36, p.38). Given evidence suggesting that increasing Indigenous imprisonment levels in part reflect greater law enforcement activity (Fitzgerald, 2009), it is possible that some of these remaining matters relate to charges of assault police.[3]

Indigenous women typically serve much *shorter* sentences than non-Indigenous women. Nationally, median sentences for Indigenous women were around half that for non-Indigenous women, and as little as one-third in NSW, SA and NT (Bartels, 2010a, Figure 4). Bartels (2010a) suggests this may indicate that they are being incarcerated for 'more trivial' offences.

Most Indigenous women prisoners have been imprisoned previously (65% as compared with 35 % for non-Indigenous women) (SCRGS, 2011, 10.A 6.1). One WA study found that a staggering 91 percent of all Aboriginal women in prison had served a prior sentence and 48 percent had served more than 5 previous terms of imprisonment (WADCS, 2009, p.30). Over two thirds of Aboriginal women prisoners had breached an order, most commonly bail, and typically by re-offending rather than non-compliance (ibid, p.39-40). These findings indicate the urgent need to examine whether the orders made are appropriate to the women's circumstances and to find strategies to improve compliance with orders and to reduce recidivism.

Bond and Jeffries have analysed sentencing patterns to determine whether the increasing over-representation of Indigenous people within prison is attributable to discrimination in sentencing, with mixed results. They found that in the WA higher courts, after controlling for other factors, Indigenous *women* were *less* likely than other women to be sentenced to imprisonment (2010). However, in Qld, they found no differences in the higher courts in the likelihood of a prison sentence for Indigenous and non-Indigenous *people*, but in the lower courts Indigenous people were *more* likely to be sentenced to imprisonment (no data were reported specifically for women; Bond and Jeffries, 2012). They suggest that because time poor magistrates in the lower courts are 'required to make sentencing decisions quickly with minimal information about defendants.... there may be greater judicial reliance on stereotypical attributions about offenders' (ibid). In both higher and lower courts being on remand and having a prior record increased the likelihood of imprisonment. Thus a shift to harsher bail decisions and tougher penalties produce ongoing escalating effects.

These findings together with the different offence profiles of Aboriginal and non-Aboriginal women suggests that in addition to sentencing, we need more analysis of policing practices and bail decision-making that bring Indigenous women before the courts and into custody.

Indigenous women remanded in custody

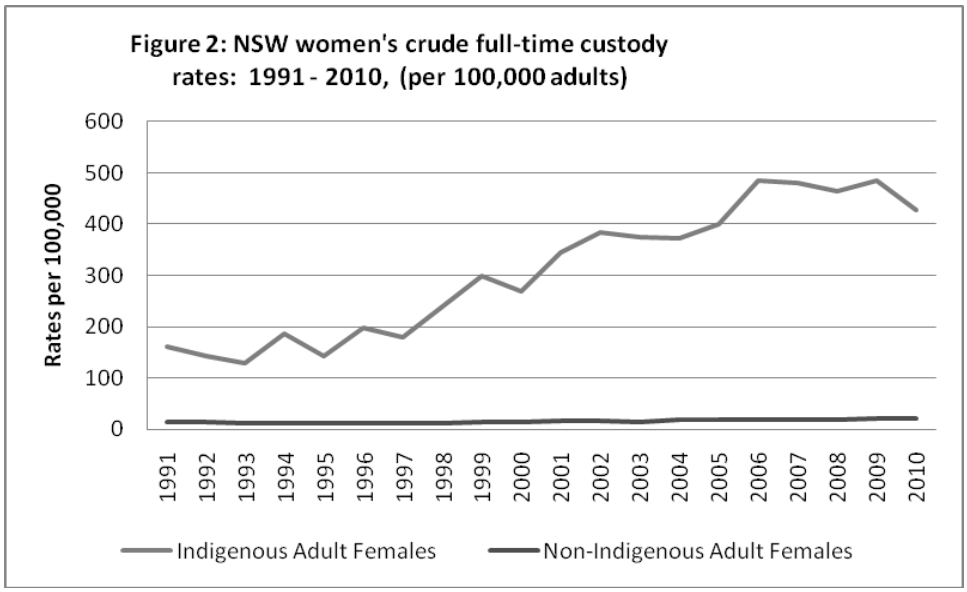
Harsher bail decisions and an associated growth in the number of unsentenced people in custody have been documented in several jurisdictions in the last decade (Hucklesby and Sarre 2009; NSW Parliament, 2001, p. xv). In Australia, the number of Indigenous people remanded in custody increased by 27 percent between 2006 and 2010 (Weatherburn and Snowball, 2012, p.50) and by 2011, 24 percent of Indigenous inmates were unsentenced (data were not reported by sex, ABS, 2011). While there has been little specific attention to Indigenous women, Fitzgerald (2009) notes that in NSW the growth in the number of Indigenous women remanded in custody has been greater than that for those who are sentenced.

Indigenous women in custody in NSW

NSW research provides compelling evidence of the impact of changing criminal justice practices on Indigenous people.

Figure 2 shows the very substantial increase in the Indigenous women's imprisonment rate since RCADIC (from 161.6 in 1991 to 428.3 in 2010), which exceeded that for non-Indigenous women (13.1 in 1991 to 19.8 in 2010). In 1998, the Indigenous women's imprisonment rate surpassed that for non-Indigenous men and by 2010 was more than one and a half times higher.[4]

Given the trend shown in Figure 2, it is extraordinary to note that in fact *fewer* Indigenous people appeared in NSW courts in 2007 than in 2001. However, the percentage found guilty increased, as did the percentage sentenced to prison. This was especially so for 'offences against justice procedures' which had a 33 percent increase in convictions, and an increase in custodial sentences from 17.7 percent to 27.6 percent. Sentence length increased for some offences, but decreased for 'offences against justice procedures' (Fitzgerald 2009, p.5) suggesting that more offences of lesser seriousness were resulting in incarceration. Fitzgerald concluded that 'the substantial increase in the number of Indigenous people in prison is largely due to changes in the criminal justice system's response to offending rather than changes in offending itself' (ibid, p.6).



Source: Corrective Services NSW, data provided to the author.

Fitzgerald (2009) also examined the growth in the remand population and found that it was due to *an increase in the proportion of people remanded in custody* (from 12.3% in 2001 to 15.4 % in 2007). It was not due to more serious offences but rather to *harsher bail decisions*. Weatherburn and Snowball (2012) found some evidence that Indigenous status per se was associated with the refusal of bail, suggesting the possibility of a racial bias, although the effect was small.

NSW has tightened bail laws substantially over the last two decades, to a greater extent than in any other Australian jurisdiction (Steel, 2009). This is clearly at odds with the recommendations of the RCADIC and other strategies intended to reduce Indigenous

incarceration. Data also suggests that bail decision makers are imposing harsher bail conditions and that police have begun targeting people on bail for compliance checking resulting in more breaches (Stubbs, 2010).

Deaths in custody

The last comprehensive analysis of the deaths in custody of women was undertaken for the period 1980-2000 (Collins and Mouzos 2002). The deaths of Indigenous women were distinctive in several respects. Indigenous deaths accounted for 32 percent of female deaths but only 18 percent of male deaths in custody (ibid, p.2). Half of Indigenous women were found to have died of natural causes as compared with 20 percent of non-Indigenous women and 38 percent of Indigenous men (ibid, p.3) for whom the most common cause of death was self inflicted injury. Indigenous women were much more likely to be in custody for 'good order offences' as their most serious offence (54%) than non- Indigenous women (28%) or Indigenous men (19%) (ibid). Most Indigenous women died in police custody (79%) but the majority of deaths of non- Indigenous women and Indigenous men occurred in prisons. RCADIC had also found 'a high incidence of good order offences' in the criminal histories of the women whose deaths it investigated (ibid, p.5).

Indigenous deaths in custody have decreased over time, and despite increases recorded in the last five years remain lower than they were in the mid 1990s (Lyneham, 2010, p.11-12). However, Inga Tinge (2011a) has documented increases of 'about 50%' in deaths in prisons in NSW and Queensland over the past decade. Tinge also notes ongoing concerns about failures by correctional authorities to implement recommendations from the RCADIC and from subsequent coronial inquiries (ibid). As Chris Cunneen has noted, '[t]he current tragedy is that so many of the circumstances leading to deaths in custody, and identified by the RCADIC, are still routine occurrences' (2008, p.144).

PART 2: REDRESSING OVER-REPRESENTATION?

The data reviewed above indicate that there are notable differences in trends in the criminalisation and incarceration of Indigenous women between jurisdictions, and point to the role of harsher laws, policies and practices as exacerbating the levels of over-representation of Indigenous women in custody. Fitzgerald (2009) identified harsher bail decisions, higher conviction rates and longer sentences as driving trends in NSW. In this part, I examine two initiatives in NSW intended to reduce incarceration rates. The first, Magistrates Early Referral into Treatment (MERIT), is a mainstream program operating at Local Courts to divert offenders into treatment programs. The second, the 'Fernando principles', is an Indigenous specific set of principles intended to assist judges in sentencing relevant cases.

Bail based diversion: the MERIT program

MERIT is a diversionary program that operates across NSW and offers eligible adults access to drug treatment prior to entering a plea and while on bail. A report on the

defendant's participation may be taken into account by magistrates at sentencing. It has been found to result in 'improvements in dependence and psychological distress as well as general and mental health' (Matire and Larney 2009, p.1). MERIT is said to be a 'highly appropriate intervention program for Aboriginal defendants' (Audit Office, 2009, p.2).

A review of MERIT examined whether Aboriginal people had access to the program and whether their needs were met, but did not specifically consider Aboriginal women. It found that referrals of Aboriginal people to MERIT had increased over time, but remained low; in 2007-08, only 427 of an estimated 19,000 Aboriginal defendants were referred and 273 participated (Audit Office, 2009, p.28). The rate of Aboriginal people being *accepted* into the program had decreased, while the rate for non-Aboriginal people remained the same. This decrease coincided with a change to the *Bail Act* which made it harder for repeat offenders or those who had breached bail to be released to bail. Also some Aboriginal people charged with assault were not accepted into the program because the criteria exclude those who have committed serious violent offences (Cain, 2006).

The Audit Office found that that eligibility criteria and location of the courts 'disproportionately affected Aboriginal defendants' (2009, p.36). Barriers to the program for Aboriginal defendants included: few alcohol specific programs (ibid, p.34); solicitors were a key point of referral, but many defendants were unrepresented (ibid, p.30); and 'the generally poor level of engagement and communication with Aboriginal defendants' (ibid, p.6). For instance, '[a] standard, case plan approach is used ... [that] did not recognise any special needs Aboriginal participants may have or recognise alternative treatment models that may be more suitable for Aboriginal clients' (ibid, p.41). These issues may underlie that finding that one in three Aboriginal people referred to the program did not accept (ibid, p.37). Completion rates for Aboriginal people (50%) were less than for non-Aboriginal people (60%) and for both groups non-completion commonly occurred following a breach by staff for non-compliance (Cain, 20006, p.4). Outcome data was not reported by sex.[5] One hopeful finding was that after an 'Aboriginal Practice Checklist' was trialled, completion rates for Aboriginal clients increased to approximately 64 percent (Audit Office, 2009, p.44).

A further evaluation which focused on women, found that at entry to, and exit from, MERIT 'women had significantly poorer general and mental health scores than men'(Matire & Larney, 2009, p.7). The proportion of Aboriginal participants was higher for women (22%) than men (13%) but the findings did distinguish between Aboriginal women and other women (ibid, p.4). Women were found to be less willing than men to participate due family responsibilities and concerns about 'the mandatory child protection obligations' of staff, and less likely to complete the program often due to a failure to attend. Women had more complex commitments and higher rates of 'co-morbid chronic mental health disorders and trauma' than men, which was 'a significant barrier to female participation' (ibid, p.3).

The results demonstrate that the potential benefits of MERIT are not available to many Aboriginal women due to the failure to recognise their more complex needs, the

additional barriers they face in accessing and completing the program, (see also Cunneen and Allison, 2009) and the use of a standardised, mainstream program. The development of the Aboriginal Practice Checklist seems promising, but may prove inadequate if it does not explicitly consider their needs. For instance, high levels of victimisation experienced by Aboriginal women may affect women's capacity to participate and require attention to their safety. The competing demands of child care and other familial responsibilities may make regular attendance difficult and mean that location and transport are very significant considerations. Together with the fear of mandatory child protection reporting, these are formidable obstacles to Aboriginal women's participation. Further, a checklist is not an adequate substitute for the involvement of Aboriginal women in developing and delivering appropriate programs and services.

Sentencing – the Fernando Principles

Several reports in NSW have recommended the trial of the abolition of short term sentences, especially for Indigenous women, in recognition of the damaging effects of imprisonment, evidence that Indigenous women commonly serve shorter sentences, lack of access to programs for short term inmates and the likelihood that short sentences serve little rehabilitative purpose, and the need to overcome Indigenous over-representation (NSW Parliament, 2001; NSW Sentencing Council, 2004). However, these recommendations have not been acted on. The sole Indigenous specific sentencing initiative has been the development of common law principles guiding the sentencing of Indigenous offenders.[6]

In *R v Fernando* (1992 76 A Crim R 58), Wood J set out sentencing principles that may be relevant to Aboriginal offenders in certain circumstances, with particular reference to alcohol abuse and violence, but did not establish Aboriginality *per se* as mitigating.

In a review undertaken for the NSW Sentencing Council, Manuell (2009) found that the Fernando principles were not always applied and were seen as applicable in only a very narrow range of circumstances. The potential ambit of the principles has been read down in subsequent appellate decisions. Commentary points to decisions which seem to turn narrowly on questions of whether a person is 'Aboriginal enough', and whether the principles might apply to Aboriginal people in urban settings (Edney, 2006; Flynn, 2005). Research undertaken for this chapter found six cases in which the Fernando principles had been considered or applied to women defendants, but no elaboration of how the principles might relate to women.[7]

By contrast Canada has a statutory provision, *Criminal Code* s. 718.2, which provides that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders.'* This was considered in *R v Gladue*. [8] The Supreme Court of Canada described the over-representation of Indigenous people in Canada as a crisis, and recognised systemic discrimination in the criminal justice system. The court found that

> [t]he remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case (*R v Gladue*, para 25).

The provision 'amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders'(*R v Gladue*, para 38). Canadian governments have subsequently developed a system of community based justice programs including the Aboriginal Justice Strategy.

Consistent with the approach adopted in RCADIC, Aboriginal over-representation in Canadian criminal justice is understood to have complex roots arising from the legacy of colonisation, factors that are relevant in sentencing (Rudin and Roach (2002, 19ff). However, these developments have been controversial. For instance, Stenning and Roberts (2001) criticise the approach on several grounds including because: they find no evidence of discrimination in sentencing; and, as 'violat[ing] a cardinal principle of sentencing (equity) relevant to all...'. In reply Rudin and Roach (2002) argue, inter alia, that: the intent of the provision is to reduce over-representation in prison and is not to limited to redressing any discrimination in sentencing; that Aboriginal defendants are distinguishable from other disadvantaged defendants by reference to the impact of colonisation; and, that Stenning and Roberts mistakenly adhere to formal equality when Canadian law favours substantive equality.

A substantive equality approach has not been endorsed in NSW where the clear preference lies with formal equality (Edney, 2006, p.23). By contrast with the approach of the Canadian Supreme Court in recognising systemic discrimination in the criminal justice system, the NSWLRC commission noted only that 'the *potential* for discrimination against Aboriginal offenders still exists, but [NSWLRC] rejects the notion that this would be overcome by a legislative statement of sentencing principles' [emphasis added] (2000, para 2.47). The NSW Sentencing Council (2004, at fn49) dismissed the Canadian approach preferring the present Australian position 'that the same sentencing principle apply irrespective of the offender's identity or membership of an ethnic or racial group'. The rejection of an approach founded on substantive equality by two eminent NSW bodies is regrettable, since, there are clear policy reasons for endorsing such an approach.[9] However, as in Canada, it may require legislative action to bring it about, an unlikely outcome in an era of punitive populism.

The explicit adoption of a substantive equality approach has the potential to bring a more contextual understanding to the experiences of Indigenous women as both Indigenous *and* as women. In 1994 the Australian Law Reform Commission (ALRC) promoted reforms based on substantive equality, but these have not been adopted (ALRC, 1994, ch. 3 & 4).

However, while there are compelling reasons to prefer a substantive equality approach to justice, Canadian experience indicates that this is unlikely to be a sufficient means of

redressing Indigenous women's over-representation within the criminal justice system. Ten years after *Gladue* the capacity of Canada courts to reduce the over-representation of Aboriginal people in prison has been described as 'dismal'(Martel et al., 2011, p.251). The percentage of Aboriginal women in Canadian prisons has grown more than that for men, and by 2008/2009, Aboriginal women represented 28% of all remanded women and 37% of sentenced women (Calverley, 2010, pp.11-12).

Toni Williams has questioned the apparent assumption behind *Gladue,* that requiring judges to consider the social context of an Aboriginal defendant will reduce the likelihood of a prison sentence (Williams, 2007, p.278). She argues that consideration of 'an individual's experience of hardship or needs' does not necessarily produce lesser sentences since those factors can be interpreted in different ways, including as indicators of risk or dangerousness (Williams, 2007, p.274). She sees a danger that a contextual analysis may portray Aboriginal women 'as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality that render the stereotyped group more vulnerable to criminalization' (Williams 2007, p.286).

One possible implication of William's research is that justice practices that have Indigenous legal actors, including Circling Sentencing and specialist Indigenous courts, may be better placed to undertake such contextual analysis and sentencing. Indigenous justice practices are now well established in some settings in Australia, and have even been endorsed by the Productivity Commission (e.g. Aboriginal sentencing within the SA magistrates courts, the Port Lincoln Aboriginal conferencing initiative, the Murri court in Qld and the Koori court in Victoria (SCRGS, 2009, p.28). However, these too, need to give explicit recognition to Indigenous women's needs and interests.

PART 3 - CHALLENGING THE 'INVISIBILITY' OF INDIGENOUS WOMEN

As noted above, studies that have examined whether the over-representation of Indigenous people in custody is attributable to racial bias have typically looked for evidence of direct discrimination, with mixed results. However, indirect and systemic forms of discrimination may have profound effects which are difficult to quantify. For instance, successive Social Justice Commissioners, Dr William Jonas and Tom Calma, have noted the 'apparent invisibility of Indigenous women to policy makers and program designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances' (SJC, 2005, p.15). There is a dearth of specific programs for Indigenous women and little data on women's participation in Indigenous programs, or in generic programs (Bartels, 2010b; Baldry and McCausland, 2009).

Intersectional and systemic discrimination

Indigenous women are vulnerable to intersectional discrimination within the criminal justice system and elsewhere, that is, a compounding of discrimination in specific ways brought about by race and gender (and other social categories). They are not well served by programs designed for Indigenous men, or for women generally (SJ C, 2005, pp.158-9). Activists in Australia and internationally have instituted complaints on the grounds of

discrimination as one avenue to bring recognition of the needs and interests of Indigenous women within the prison system and to seek redress.

In 2003, the Canadian Human Rights Commission (CHRC) found breaches of the human rights of women prisoners 'by discrimination on the grounds of sex, race and disability' (Kilroy and Pate, 2010, p.331). The CHRC investigation followed a complaint lodged by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada in coalition with other activists on grounds including the inadequacy of community based release options, the inappropriate classification system used, and inadequate and inappropriate placements of women with cognitive and mental disabilities (Kilroy and Pate, 2010). The CHRC made 19 recommendations aimed at bringing Correctional Services Canada into compliance with the *Canadian Human Rights Act* (Canadian Human Rights Commission (CHRC) 2003, preface).

Australian activist group Sisters Inside inc. followed the Canadian lead and lodged a formal complaint with the Anti Discrimination Commission Queensland (ADCQ) (Kilroy and Pate, 2010, p.332). The ADCQ found 'a strong possibility of systemic discrimination occurring in the classification of female prisoners, particularly, those who are Indigenous' (2006, p.45) and that the 'absence of a community custody facility in North Queensland… is a *prima facie* instance of direct discrimination' (p.110). The report also questioned the validity of a risk assessment tool, and found that Indigenous women were among those likely to be assessed as high risk using such measures (p.51). Indigenous women were commonly in prison for shorter sentences, but they were over-represented in secure custody, and were less likely to receive release-to-work, home detention or parole and they had higher recidivism rates (ADCQ, 2006, p.32, p.108). Following a similar complaint lodged in the Northern Territory, the Ombudsman also raised concerns about systemic discrimination. Notwithstanding the requirement in the *Standard Guidelines for Corrections in Australia* that 'the management and placement of female prisoners should reflect their generally lower security needs but their higher needs for health and welfare services and for contact with their children' (2004, at para 1.14), the Ombudsman found 'a failure to consider women as a distinct group with specific needs' which had 'resulted in a profound lack of services' and 'discriminatory practices' (Ombudsman NT, 2008, p. 4).

Both reports emphasise *substantive* equality, rather than formal equality:

> Preventing discrimination requires addressing differences rather than treating all people the same.… Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and try to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners (ADCQ, 2006, para 10.1.3).

Anti-discrimination actions have been lodged in other Australian jurisdictions but there have been few outcomes for criminalised women (Kilroy and Pate, 2010, p.334).

Concerns about discrimination against women prisoners, and especially Indigenous women, have also been taken up in international fora. The NGO submission to the United Nations Committee on the Elimination of Racial Discrimination (2010) noted the substantial growth in the Indigenous women's prison population and expressed concerns *inter alia* about the inadequacy of health and other services for women in prison. The Australian Human Rights Commission submission to Universal Periodic Review at the United Nations Human Rights Council also noted the growth in the number of Indigenous people in custody, and the distinct human rights issues affecting women in prison who are subject to strip searching (AHRC, 2010, note 57).

In 2010 the UN Special Rapporteur on the rights of Indigenous peoples recommended *inter alia* that the government fully implement the recommendations of RCADIC (Anaya, 2010, rec. 122, p.22) and importantly also made a separate recommendation that '[t]the Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and *women* in custody' (ibid). The separate recognition of Indigenous women is important because while RCADIC continues to provide a significant, unrealized, foundation for reform, it does not provide an adequate basis for addressing the criminalisation of Indigenous women. Other recent reports have also recommended returning to RCADIC to guide future developments.[10] It is vital that Indigenous women have a voice in determining how best the blueprint provided by RCADIC can be reconfigured so as to adequately represent their interests.

CONCLUSION

This paper has documented the impact of harsher criminal justice practices on Indigenous women exacerbating their level of over-representation within the criminal justice system, together with enduring, repeated failures to pay sufficient regard to their interests. An intersectional analysis that recognises the specific circumstances that contribute to Aboriginal women's criminalisation and incarceration, coupled with an approach to the provision of services and support which recognises systemic discrimination and focuses on substantive equality is crucial. But it is also not enough. As William's (2007) work suggests, an intersectional analysis provides a vital first step in bringing recognition to Indigenous women but does not determine how that recognition is given expression within criminal justice practices. Indigenous women need to be fully involved in shaping the meanings that emerge, including in Indigenous justice practices.

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[1] In this paper the words Aboriginal and Indigenous are used interchangeably.

[2] The *SJC (2005)* report noted that '[b]etween 1993 and 2003 the general female prison population increased by 110 %, as compared with a 45 % increase in the general male prison population. However, over the same time period the Indigenous female prison population increased from 111 women in 1993 to 381 women in 2003. This represents an increase of 343 % over the decade', p. 15. http://www.hreoc.gov.au/social_justice/sj_report/sjreport04/2WalkingWithTheWomen.html#3.

[3] Thanks to Chris Cunneen for this observation.

[4] Data supplied by CS NSW, based on the NSW inmate census at 30 June each year.

[5] L Bartels (2010b) notes that only 11 Indigenous women were referred to QMERIT, 8 of whom were eligible; 3 had graduated, 6.

[6] I acknowledge the introduction of circle sentencing, and Indigenous courts, which use different processes but apply the same sentencing laws and principles as other courts.

[7] *R v Kristy Lee Croaker*, NSWCCA 14/12/2004 Unreported Judgments NSW; *R v Rachelle Lee Kelly*, NSWCCA 11/08/2005 Unreported Judgments NSW; *R v Carol Anne Trindall* NSWCCA 14/12/2005 Unreported Judgments NSW; *R v Lacy Lee Jukes*, NSWSC 13/10/2006 Unreported Judgments NSW; *R v Wendy Olive Lawrence*, NSWCCA 11/03/2005; *R v Mary Ann Melrose*, NSWSC 31/08/2001 Unreported Judgments NSW.

[8] [1999] 1 S.C.R. 688; see also *R.* v. *Wells*, [2000] 1 S.C.R 207, 182 D.L.R. (4th) 257; *R. v. Ipeelee*, 2012 SCC 13.

[9] Research such as that by Bond and Jeffries (2010), which found that higher courts in that jurisdiction may sentence Indigenous women *less* harshly, suggest that some courts may take a more contextual approach to sentencing Indigenous women. However, their mixed findings for Qld, including harsher sentencing in the local courts, may suggest the need for more explicit consideration of sentencing principles aligned with substantive equality. Moreover, their findings do not negate the argument offered by Rudin and Roach for sentencing provisions explicitly focused on reducing Indigenous over-representation.

[10] Standing Committee of Attorneys-General Working Group on Indigenous Justice, National Indigenous Law and Justice framework, Commonwealth of Australia (2010) 1.3, includes as objective 1.3 'Ensure that the findings of RCADIC continue to guide governments, service providers and communities to address current issues in law and justice for Aboriginal and Torres Strait Islander peoples'.