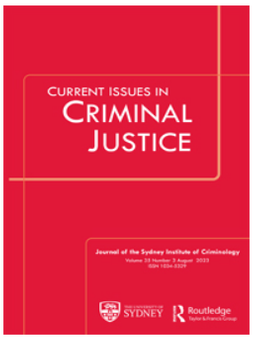

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Administering harm: the treatment of trans people in Australian criminal courts

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ABSTRACT

In this paper, I argue that the administration of the criminal law by Australian courts causes harm to trans people that compounds with that already experienced. Specifically, court staff and judicial officers can maintain harm when they engage with court forms and provide judicial judgments: court forms that limit descriptions of sex/gender prevent self-identification and increase the potential for misgendering; further, judicial judgments often disregard, dismiss or deny the experiences of trans people through including inappropriate gendered terminology, deadnames and other problematic expressions. I conclude by highlighting three transformations that may disrupt these harms through allowing court staff and judicial officers to become aware of how they perpetuate harm against trans people. These transformations include reviewing and amending forms, educating and training staff and implementing additional supports. Importantly, to effectively disrupt harm, any transformation must be informed, and led, by trans people with lived, intersectional, experiences.

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Introduction

Trans people who do not conform with binary or cisnormative conceptions of gender have long been subjected to extensive criminalisation, pathologisation and marginalisation at the whims of the criminal law system (Rodgers, Asquith, & Dwyer, 2017, p. 1). Theorists such as Lamble argue that trans people are 'funnelled into the criminal system for many reasons but primarily due to systemic oppression … with widespread discrimination, harassment, and violence … [increasing the] risk of social and economic marginalization' (Lamble, 2011, p. 241). Such harms are further amplified within prison, with trans people victimised by inmates and staff, subjected to physical, verbal and sexual assault, isolation in the name of 'protection' and difficulties in accessing gender-affirming care (Edney, 2004, pp. 333–34; Rodgers et al., 2017, p. 5; Witherspoon, 2011, p. 209).

Consequently, current scholarship delineates that trans people are exposed to harm from different aspects of society, and particularly the criminal law system.

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What is not explored to any meaningful extent is how Australian criminal courts contribute to these harms when administering criminal law. As such, in this paper I focus on how Australian criminal courts cause compounding harm to trans people. Specifically, I build from the premise that the harms experienced by trans people are compounded multifariously, in that they occur throughout every aspect of the criminal law system and result not only from trans identity but 'other dimensions of their identities, such as race and class' (Crenshaw, 1991, p. 1242). In particular, trans people who are also Indigenous, or racially diverse, are 'doubly disadvantaged' (Lynch & Bartels, 2017, p. 208), experiencing greater harm because of their multiple, intersecting identities.

In using this perspective, it is imperative that the issues discussed in this paper, and the proposed recommendations, are considered within the awareness that the court system is one aspect of the prison industrial complex.[1] Hence, the administration of criminal law must be perceived as a key area by which trans, Indigenous or other people who exist on the scales of intersecting vulnerabilities, are disproportionately subjected to harm. Accordingly, the deficiencies of Australian courts can only be adequately termed as intrinsic features that compound harm. Continuing with this trans/queer abolitionist politic (Stanley, 2011, pp. 6–8), while the proposed changes may allay harm, they should not be perceived as solutions that will rectify the faults of a system that otherwise works (Lamble, 2011, pp. 237–39). Rather, they must be regarded as fragmented forms of remedies, or 'transformations', that could be instituted to disrupt harm, by allowing actors within the court system to become aware of the structural and systemic perpetuations of harm that they inflict against minorities and disadvantaged groups (Davis, 2003, p. 108). This position recognises that transformations are part of 'an array of alternatives … [that aim to] address racism, male dominance, homophobia, class bias and other structures of domination' (Davis, 2003, p. 108). Consequently, I aim to emphasise that the courts' administration of the criminal law is one compounding harm against trans people, able to be eased by transformation that is meaningful and not merely inconsequential.

First, I assess two features of Australian courts to analyse how these features maintain harm. Specifically, I argue that court forms and judicial judgments can harm trans people when administered by court staff and judicial officers. I consider the language of certain criminal court forms, and 45 criminal judgments, to demonstrate how the culmination of these features is harm that compounds with that already experienced by trans people.

Second, I propose three transformations that may disrupt harm. These transformations include reviewing and amending court forms and processes, educating and training court staff and judicial officers and implementing supports for trans people. However, for these changes to effectively disrupt harm, they must be actioned by, and with the advice of, trans people with lived, intersectional, experiences. Ultimately, '[a]bolition is the practice of transformation in the here and now and the ever after' (Bassichis, Lee, & Spade, 2011, p. 37), and what might be addressed now is the way that Australian courts administer harm against trans people.

[1]This complex comprises multiple systems, institutions and interconnections that are ingrained with racist, classist and profit-seeking principles—those of which culminate to create the idea of criminal activity that warrants punishment (Davis, 2003, pp. 84–85; Stanley, 2011, p. 6).

Maintaining harm

Although the harm caused to trans people by administrative systems generally has been examined (Spade, 2015), the harm caused by the language of court staff and judicial officers has not.[2] Instead, academics have analysed criminal cases involving trans people to primarily critique legislation and policy (Kane, 2013; Lynch & Bartels, 2017). Further, even where the language of judicial officers has been assessed, the harm that gendered language causes to trans people is not considered (Rose, 2010). Accordingly, in this part, I address these gaps by analysing how the language of the judiciary causes compounding harm to trans people.

My analysis below shows that court staff may cause harm when relying on court forms that limit descriptions of sex/gender to prevent self-identification. I also argue that judicial officers may cause harm by having insufficient knowledge of trans matters, as viewed in judgments that include inappropriate pronouns and gendered terms, deadnames and problematic expressions. By assessing language, I emphasise that the harm caused by Australian courts must be addressed now, not only because it is a significant source of harm, but because it is indicative of broader issues associated with the administration of justice more generally.

Court forms

The impact of cisnormative language within court forms has not been extensively addressed in academia.[3] Rather, language has generally been criticised for being unduly complex (Grieshofer née Tkacukova, Gee, & Morton, 2021). Consequently, the presence of harmful, cisnormative language in court forms is greatly unexplored. I reviewed a sample of criminal court forms across Australian jurisdictions in May 2022 to find instances where sex/gender is classified. I found that some forms in the Australian Capital Territory and Queensland jurisdictions require gender to be classified as 'male, female, other',[4] or 'male, female, x'.[5] Some Western Australian forms provide 'male, female' only.[6] Victorian forms include 'male, female' only,[7] and others refer to gender as 'male, female, other',[8] or 'male, female, indeterminate/intersex/unspecified'[9] and to sex as 'male, female, indeterminate/other'.[10] Other forms, such as those in Tasmania

[2]But see Mitchell et al. (2022) who briefly note the experiences of trans and gender diverse people in court: Matthew Mitchell et al., 'Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System' (2022) 11(2) *International Journal for Crime, Justice and Social Democracy* 5 https://www.crimejusticejournal.com/article/view/2225

[3]But note that the Law Council of Australia recognised that within the family law system, court forms and associated documents do not offer alternatives to binary sex/gender: (LCA 2018).

[4]Legal Aid ACT, *Legal Aid Act 1977 – Form – Application for Legal Assistance* (at 18 May 2022) https://www.legislation.act.gov.au/View/af/2011-50/current/PDF/2011-50.PDF; Queensland Courts, *Queensland Integrated Court Referrals* (at 18 May 2022) https://www.courts.qld.gov.au/__data/assets/pdf_file/0011/491375/qicr-f-screening-and-referral.pdf

[5]Queensland Courts, *Drug and Alcohol Court* (at 18 May 2022) https://www.courts.qld.gov.au/__data/assets/word_doc/0008/582506/daac-f-1.docx.docx

[6]Magistrates' Court of Western Australia, *Application to Cancel Surety/Responsible Person Undertaking* (at 18 May 2022) https://www.magistratescourt.wa.gov.au/_files/Bail_Form_14.pdf

[7]*Supreme Court (Criminal Procedure) Rules 2017* (Vic) forms 6-4G, 6-4H.

[8]County Court Victoria, *Court Integrated Services Program Referral Form* (at 22 July 2022) https://www.countycourt.vic.gov.au/files/documents/2021-02/court-integrated-services-program-cisp-referral-form.docx. But note there is space for identification corresponding to 'other'.

[9]*Victims of Crime Assistance Rules 2020* (Vic) form 1.

[10]Ibid.

and Northern Territory, merely include 'him/her' or 'he/she', respectively.[11] Significantly, New South Wales and South Australia jurisdictions rarely reference pronouns or require identification, with sex and gender, respectively, able to be self-identified on selected forms.[12]

Court forms that prevent sex/gender from being self-identified, particularly where such identification is unnecessary, perpetuate the notion that non-trans identity, and classification in general, is the unquestionable norm. When forms restrict self-identification, harm is caused through the limiting of linguistic agency and the subsequent right to specify what terms are used (Zimman, 2019). Further, specifying sex/gender also runs the risk of conflation, which acts to erase or misrepresent certain trans/queer identities (Davis, 2017). Additionally, when courts classify sex/gender according to different standards, this restricts the ability for sex/gender to be altered and increases opportunities for misidentification (Spade, 2015).[13] The result is a reliance on the idea that sex/gender is fixed and categorisable, relegating trans people to a presumed identity that is replicated by court staff as the matter progresses. In every instance of misgendering, trans people are subjected to additional psychological harm that compounds with harm already experienced, or that will be experienced, when engaging with society and the criminal system (Rodgers et al., 2017, p. 8). Accordingly, court forms increase the potential for court staff to harm trans people when self-identification is precluded.

Judicial judgments

I analysed criminal judgments across six Australian jurisdictions to ascertain how the language used by judicial officers causes harm to trans people. I obtained 45 judgments by searching AustLii, Westlaw AU, LexisNexis and Jade.io for the terms 'transgender' and 'transsexual'. I also searched for the terms 'gender diverse' and 'non-binary'; however, these terms did not result in any relevant results. While further search terms could have been included, such as those used by Zottola (2018) in the context of the British press, my terms were limited to construct a smaller corpus—thus allowing for in-depth analysis. I searched for these cases in May 2022 and only included cases heard from 1999 onwards that related to the criminal jurisdiction. In line with a corpus-based methodology, all cases that were retrieved as part of my initial search were included in this dataset (Baker, 2010).

My analysis revealed several cases where officers used language that disregarded, dismissed or denied the experiences of trans people; demonstrating a fundamental lack of understanding about trans matters, which ultimately causes harm. Such terminology included using incorrect pronouns and gendered terms, deadnames and other problematic expressions. Further, I found that certain cases related to sentencing, hormone treatment and other discrimination, reveal the broader implications of a lack of

[11]Magistrates' Court of Tasmania, *Form 5* (at 18 May 2022) https://www.magistratescourt.tas.gov.au/__data/assets/word_doc/0008/358289/Memorandum_of_Service_-_Bail_Act.docx; Northern Territory Local Court, *Form 1A* (at 18 May 2022) https://localcourt.nt.gov.au/sites/default/files/form_1a.pdf

[12]New South Wales Local Court, *Court Attendance Notice* (at 18 May 2022) https://localcourt.nsw.gov.au/documents/forms/Court%20Attendance%20Notice.pdf; Magistrates' Court of South Australia, *Private Application (Intervention Order)* (at 18 May 2022) https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager-files/court-forms/04-mc-court-forms/01-criminal-rules-current/01-general-forms/Form%2028AA%20-%20Private%20Application.pdf

[13]See Spade (2015, p. 11, 79, 81–3) in relation to how the varied administration of gender makes it difficult or impossible to alter gender categorisation, resulting in misclassification and restriction in access to services.

knowledge of trans matters. Particularly, my analysis of these cases queries whether a different outcome would have arisen, had the officer had greater knowledge about trans people. Crucially, my analysis of each case emphasises that the likelihood of causing harm to trans people depends upon individual officers' knowledge of trans matters.

Pronouns and gendered terms

My analysis below shows that the use of (in/appropriate) pronouns and gendered terms depends upon the specific judicial officer. That is, matters that have been heard at multiple instances before different officers, the varied consideration relating to how people identify and the decision to include harmful excerpts, indicates that the potential for officers to cause harm is highly individualised. While it is not always known why each officer chose to use the terminology that was used, harm is caused when misgendering occurs (Kapusta, 2016). Further, when officers consider how people self-identify, and then consistently use these terms, harm is less likely to occur.

Matters Heard at Multiple Instances. I analysed matters heard at multiple instances before different officers to demonstrate that although similar facts exist in each case, the language used to describe the same respondent/defendant can differ.[14]

In *Attorney-General (Qld) v [Deadname]* [2018] QSC 166; [2020] QSC 142 each officer used different pronouns and gendered terms. Initially, Justice Jackson used masculine pronouns and terms to refer to the respondent, eventually finding that the respondent's trans identity was not stable (*AG (Qld) v [Deadname]* [2018] QSC 166, [31], [36]–[39], [91]). Along with other factors, the supposed instability of the respondent's identity meant that a supervision order could not be implemented (*AG (Qld) v [Deadname]* [2018] QSC 166 [90]–[93]). When the matter was heard at a later instance, Justice Davis recognised that '[t]he respondent is a transgender woman' (*AG (Qld) v [Deadname]* [2020] QSC 142, [1]), and referred to her using feminine pronouns and terms. The respondent was placed on a supervision order, largely because of the view that she 'is clearly committed to gender reassignment [*sic*] and she appears much more emotionally stable and secure' (*AG (Qld) v [Deadname]* [2020] QSC 142, [49]). Significantly, the primary consideration across both cases was the perceived 'stability' of the respondent's trans identity.[15] Rodgers et al. have discussed this issue, noting that the 'pathologisation of transgender people as innately psychologically unstable is grounded in a biomedical discourse that is framed by a cisnormative valuation of gender' (Rodgers et al., 2017, p. 3). The pathologised framework used in response to trans identity allowed the respondent's gender to be met with scepticism; with the final arbiter of identity being a Justice, essentially deciding how far into medical 'treatment' a person is in order to be considered actually trans. Accordingly, these matters demonstrate that the presiding officer chooses what language to use, even where the question of 'stability' arises.

Similarly, in *NSW v Arthurell* [2021] NSWSC 482; [2021] NSWSC 953, each officer used different pronouns and gendered terms to refer to the defendant. Significantly,

[14]Cf *R v Amati* ([2019] NSWDC 3, revd [2019] NSWCCA 193), where feminine pronouns and terms were used to refer to the respondent in both instances.

[15]See also *Lawarik v Corrections Health Service* ([2003] NSWADT 16, [3]), where despite an assessment of trans identity, appropriate terms were used.

the defendant was noted to 'identif[y] as aboriginal and transgender, in the defendant's phrase, a "trans womyn"' (*NSW v Arthurell* [2021] NSWSC 482, [32]). At first instance, Justice Wilson opined that alternating pronouns would 'more accurately reflect the reality of the defendant's life and crimes than would references to a female offender' (*NSW v Arthurell* [2021] NSWSC 482, [10]).[16] When combined with statements that focus on how the defendant dresses, and whether surgery has occurred, Justice Wilson emphasised how the defendant was perceived by society, as opposed to her actual identity (*NSW v Arthurell* [2021] NSWSC 482, [9]).[17] In comparison, the later instance before Justice Button included the statement: 'the defendant is a transgender woman … [but a]t the time of all of the homicides, however, she identified (at least in terms of presentation) as a male' (*NSW v Arthurell* [2021] NSWSC 953, [6]). Justice Button also consistently used feminine pronouns and terms. While this terminology is a better representation of the defendant's identity than Justice Wilson's, both Justices do not refer to the defendant as a 'trans womyn'. In fact, the aboriginality of the defendant, and the subsequent intersection with her trans identity, has no bearing on the risk assessment (*NSW v Arthurell* [2021] NSWSC 482, [32], [34]) and is not even mentioned by Justice Button. As such, these matters emphasise that how the defendant is referred to throughout proceedings is contingent upon the opinion of each Justice.

Different Consideration. I analysed specific cases to emphasise that some officers do not include consideration of pronouns and gendered terms, some include consideration but do not apply people's self-identified terms, and others both consider and apply self-identified terms.

In some cases, it is unclear whether the pronouns and gendered terms used are appropriate, because the judgment does not consider how the applicant self-identifies (*White v R* [2006] NSWCCA 340, [7] (Johnson J); *R v HS* [2013] QChc 12, [7] (Rafter DCJ)). Matters that do not consider self-identification must be queried, due to the potential for inaccurate terminology to be used. For instance, in *R v Richards*, the appellant is referred to as 'a transexual' ([2012] SASCFC 61, [8] (Doyle CJ)), with masculine pronouns used in the absence of considering self-identification. In a different matter related to the same appellant, it is noted that the appellant has 'identified as female since 1986', with feminine pronouns used (Ombudsman SA 2018, 10 [26]).

In contrast, in *R v Pearce (formerly known as [Deadname])*, Judge James considers what pronouns should be used to refer to the applicant, but ultimately concludes to use masculine pronouns on the basis of 'convenien[ce]'—despite psychiatric reports and the applicant's counsel referring to the applicant using feminine terms ((Supreme Court of New South Wales, James J, 20 October 1993) 3). Given that the choice of pronouns was not derived from how others, who directly engage with the applicant, refer to her, it is clear that individual officers determine what terminology to use.

In other matters, officers specifically consider how people identify and use the relevant pronouns (*Western Australia v C* [2021] WASC 160, [6] (Quinlan CJ) ('C'); *R v JW* [2018] SADC 95, [4] (Millsteed J); *[Deadname] v Western Australia* [2018] WASCA 225, [2] (Mazza and Mitchell JA, Allanson J); *R v Bunton* [2019] QCA 214). Notably, in

[16] See also *R v Hall* ([2001] NSWSC 1125, [1]–[2]).

[17] See also *R v Amati* ([2019] NSWDC 3, [8]–[9]), where Judge Williams' recognition of the respondent's 'physical transition … [and] gender reassignment [sic] surgery … [which] went well', was noted.

Patrick v South Australia (No 2), the Tribunal considered that 'Patrick describes herself as being transsexual or transgender, which for her are interchangeable terms … Patrick generally prefers to be recognized and referred to as a female person' ([2009] SAEOT 1 (Trenorden J, Members Backmann and Jasinski), [4]). Along with referring to the applicant in terms she specified, the Tribunal also used feminine terminology throughout the judgment.

Excerpts. I analysed cases that include excerpts of evidence or previous judgments, in a later judgment, to highlight how some excerpts can include inappropriate pronouns and gendered terms (*A-G (Qld) v [Deadname]* [2020] QSC 142, [22]–[26]).[18] Choosing to use excerpts, and the associated harmful terminology, is at the discretion of the individual officer. This is best exemplified by *NSW v Arthurell*, where the inclusion of harmful excerpts was avoided through the insertion of a hyperlink and a statement as to the findings in the previous judgment ([2021] NSWSC 953, [2]). Thus, including or avoiding excerpts that use harmful terminology depends upon the officer.

Deadnaming

Several judgments include the deadnames of trans people. Deadnaming occurs when trans people are misnamed through being referred to as the name they were given at birth, and not their chosen name (Sinclair-Palm & Chokly, 2022, p. 1). For some trans people, their deadname is a source of harm, 'leav[ing] traces of the past self that can bring about a wide range of reactions and emotions, and often point[ing] to sites of oppression and violence' (Sinclair-Palm & Chokly, 2022, p. 3). Within the legal system, the potential to deadname is increased, particularly because of the administrative challenges that come with legally changing one's name.[19] Despite this, some officers have demonstrated that using trans people's deadname can be avoided.

A noteworthy example of instances where officers have used a deadname, but others have not, are matters related to Maddison Hall. Significantly, Justice McClellan twice introduces judgments by including the phrase 'then known as [deadname]' (*R v Hall* [2001] NSWSC 1125, [1] affd *A-G (NSW) v NSW Parole Authority* [2006] NSWSC 865, [1]). In contrast, when providing background information, Justice Hall merely notes that 'the plaintiff was found guilty of murder' (*Hall v NSW Parole Authority* [2006] NSWSC 1411, [9]), without mentioning the plaintiff's deadname. In a different case, Member Britton provides background that includes the statement '(then known as [deadname])' (*Hall v NSW (Department of Corrective Services)* [2006] NSWADT 243, [14]). Interestingly, in further proceedings, Member Britton does not deadname the applicant (*Hall v NSW (Department of Corrective Services) (No 2)* [2007] NSWADT 105). This series of judgments illustrates that the inclusion of deadnames is unnecessary and does not need to occur.

Similarly, in *Chester v Queensland*, Member Gardiner does not deadname the applicant, and instead states that the 'names of the parties have been anonymised' ([2013] QCAT 208, [1]). The deadname is also not mentioned in a later matter (*Chester v Detective Senior Constable Barnaby (No 2)* [2014] QCAT 695, [14] (Member Gardiner)). These

[18]See also *R v Amati* ([2019] NSWCCA 193, [50] (Johnson J)), where the excerpt contained a problematic term.
[19]These challenges may include cost and differing policies: ACON, 'Changing Your Name', *TransHub* (27 May 2022) https://www.transhub.org.au/changing-your-name

judgments further demonstrate that deadnaming is opinion-based and may even be avoided through anonymisation of parties.

Other judgments also include references to people's chosen name and deadname (*Patrick v South Australia (No 2)* [2009] SAEOT 1, [5]; *Sinden v Queensland* [2012] QCAT 284, [1]; *R v Amati* [2019] NSWDC 3, [5]; *NSW v Arthurell* [2021] NSWSC 482, [1] (Wilson J)). For instance, in *R v Sartorel*, District Court Judge Buscombe uses the phrase 'the offender', but the accused is listed under parties as: '[Deadname] (Justine) Sartorel' ([2019] NSWDC 373).[20] Judgments such as these demonstrate better regard to trans people in including their chosen name.[21] Nevertheless, it is important to recognise that harm can be caused in including deadnames.

Problematic expressions

My analysis highlights that specific expressions across various judgments include terminology that is inappropriate and demonstrates a general lack of understanding regarding trans people. For instance, some judgments include references to people's sex assigned at birth, with a majority using terms such as 'born as' (*R v Bunton* [2019] QCA 214; *DPP (Vic) v Wills (A Pseudonym)* [2021] VCC 2051, [40] (Tiwana J); *DPP (Vic) v Lester* [2016] VCC 1445, [36] (Gaynor J); *R v Amati* [2019] NSWDC 3, [5]), and others using 'born physically' (*A-G (Qld) v [Deadname]* [2020] QSC 142, [11] (Davis J)), or 'sex at birth' (*Lawarik v Corrections Health Service* [2003] NSWADT 16, [2]). These terms are harmful because they affirm notions that the sex a person was assigned at birth is something that should be known alongside trans identity, needlessly qualifying gender, reinforcing the characterisation of sex and bolstering the non-trans fascination with 'biological' characteristics. It is unclear why this unnecessary information is included, particularly because some judgments do not mention the sex a person was assigned at birth,[22] or instead use the phrase 'birth assigned' (*[Deadname] v Western Australia* [2018] WASCA 225, [2]). Judgments such as these suggest that references to assigned sex are unnecessary, or if they must be included, can occur more appropriately. Accordingly, officers that refer to sex assigned at birth can further harm trans people.

Other judgments use terminology that undermines or misunderstands trans identity. For example, phrases such as '*prefers* to be referred to by the feminine pronoun' (*NSW v Arthurell* [2021] NSWSC 482, [9]), qualify gender, insinuating that a person has different pronouns, but the ones they use are favoured and not factual (Fowlkes, 2020). Terminology such as this can also discredit language that would have otherwise been appropriate. For instance, in *R v Bunton*, Justice of Appeal Morrison appropriately uses feminine terms, but also uses statements such as: '[s]he had only one relationship with *another* male' ([2019] QCA 214, [13]), and '[s]he commenced *seriously* living as a transgender female' ([2019] QCA 214, [13]). This semantic contradiction emphasises a superficial understanding of trans matters, as if regard is given it is typically to pronouns only. However, officers might focus on how trans people live and identify because some

[20]See also *Clark v R* [2012] NSWCCA 158, [2] (Johnson J), where the applicant is introduced as '[deadname] (now known as …)', before being referred to as 'the Applicant'.

[21]Also consider matters where the case name includes the chosen name: *DPP (Vic) v Austin (Also known as Rhiannan Austin)* ([2018] VCC 1849) ('*Austin*'); cf *R v Pearce (formerly known as [Deadname])* (Supreme Court of New South Wales, James J, 20 October 1993).

[22]See, eg, *Austin* (n 65) [21] (Wraight J).

legislation is drafted to emphasise these aspects (see, eg, *Anti-Discrimination Act 1991 (Qld)* sch 1 (definition of 'gender identity'). See also *Western Australia v C* [2021] WASC 160, [6]). That is, when officers' superficial level of comprehension is combined with legislation that fails trans people, phrases that undermine or misconstrue trans identity can result—with legislation creating problematic subjectivities that have effects well beyond the legal sphere. Similar examples include the erroneous beliefs that to be trans includes a 'change of sexual identity' (*Sinden v Queensland* [2012] QCAT 284, [10]), 'a female *identifying* as a male' (*DPP (Vic) v Jarvis* [2018] VCC 360, [18] (McInerney J) (emphasis added)), or involves 'gender *reassignment*' (See, eg, *A-G (Qld) v [Deadname]* [2020] QSC 142, [17] (Davis J) (emphasis added). Cf *Wills* (n 66) [89]). Accordingly, problematic expressions are not only harmful and propel problematic subjectivities into the wider domain, but they are demonstrative of a superficial level of knowledge.

Several cases also include outdated terminology, such as 'cross-dressed' or 'transsexual'. While it is unclear whether the people referred to identify with these terms, Gailey recognises that some trans people consider these labels offensive (Gailey, 2017, p. 1714). As acknowledged by Sharpe, 'if someone identifies as … any identity that is sometimes considered to be derogatory, an ethic of gender self-determination would make space for that identity as equally valid' (Sharpe, 2007, nn 9). When a consideration of self-identification does not occur, the language used risks being connoted with derogation. For instance, in *R v Hammer* [2019] ACTSC 182, Chief Justice Murrell discussed extenuating circumstances relating to the accused's parent, stating:

> [40] The offender's upbringing and schooling experience was further complicated by the fact that her father *cross-dressed*, which was a source of *great difficulty* for the offender … the offender's father would *dress as a woman* when acting as the crossing attendant at the offender's school, or when volunteering at the school tuck shop. *He became transgendered* [*sic*] when the offender was about 10 years old. (emphasis added)

Chief Justice Murrell fixates on how the offender's parent dresses and notes how this has negatively impacted the offender. Within this context, and without knowing how the accused's parent identifies, the use of the terms 'cross-dressed' and 'transgendered' constitutes slurs.

Further, a descriptor may be harmful because of syntax. That is, Zwicky notes that descriptors such as 'gay' are most objected to when used as a noun rather than an adjective: 'nouns denote an all-embracing, essential property, while the adjectives denote one characteristic among many' (Zwicky, 1997). This concern is present with respect to descriptors of trans identity, with some judgments using the phrases 'a transsexual' (*R v Keating* [2002] QCA 192, [8] (Thomas JA) ('*Keating*'); *R v Hookey* [2004] NSWCCA 223, [5] (Howie J); *Wright v R* [2008] NSWCCA 91, [12] (Buddin J); *R v McRae* [2008] VSCA 74, [12] (Vincent JA); *Richards* (n 47) [8]), or 'a transgender' (*R v TS* [2017] NSWCCA 247, [4] (Latham J)). Using the article 'a' alongside the noun is akin to what Motschenbacher describes as expressing 'an out-group perspective' (Motschenbacher, 2021, p. 27). That is, people who may be unfamiliar with the queer community, or who are transphobic, use 'a' to categorise trans people as part of a separate, essentialised group. The result is a cisnormative-imagined 'transsexual/transgender' out-group that is distinguishable from the non-trans in-group, further reducing people to their trans identity.

Even where descriptors are used as an adjective, they can cause harm if used unnecessarily. For instance, in phrases such as 'transsexual sex worker' (*Juma v Western Australia* [2011] WASCA 54, [12] (McLure P, Newnes JA, Mazza J)), or 'transgender inmate' (*A-G (NSW) v Rohan (Preliminary)* [2020] NSWSC 1610, [124] (Hoeben CJ)), it is unclear whether the people referred to use these descriptors. In the absence of any self-approval, the presumptive adjective acts to unnecessarily qualify people, with the noun alone potentially sufficient (Reidas, 2020). Qualifiers also have a greater chance of being harmful when used alongside the biological female/male binary. For example, Justice Bowskill described a victim/survivor as 'a [sex worker] working in the Valley, on this occasion a transsexual male [*sic*]' (*A-G (Qld) v Meizer* [2019] QSC 213, [33]). Not only is the term 'male' likely misgendering,[23] but when used with the medicalised adjective 'transsexual', the phrase reclasses the victim/survivor not as part of the (qualified) category of woman, but part of a qualified (biological) male category. Hence, descriptors of trans identity can act as harmful qualifiers where they are not used in accordance with self-identification.

Broader implications

I argue below that judicial officers' limited knowledge of trans matters can have broader implications on the outcomes of cases. Specifically, I query whether different, and fairer, findings would result from officers' having a greater understanding about trans matters. I argue this by analysing harmful reasoning in cases relating to sentencing, hormone treatment and discrimination, as such presumptions in these cases amplify the associated inadequate legislation and policy.

Sentencing. In matters related to sentencing, officers have considered the impact of trans identity to varying degrees. While it cannot be known if judgments would differ but for trans identity, officers often fail to appreciate the additional difficulties faced by trans people who are incarcerated. That is, trans identity has been noted to have no bearing on matters related to certain sentencing orders (*A-G (Qld) v Nelson-Adams* [2021] QSC 257, nn 1 (Callaghan J)). In other cases, where trans identity has been noted to result in harmful or difficult experiences in prison for the accused, this does not typically have any effect on the sentence (*R v Keating* [2002] QCA 192, 8–9; *R v Richards* [2012] SASCFC 61, [8], [13]–[27]).

Even where officers go beyond merely noting trans identity, such consideration has been unable to substantiate an appeal of sentence. Specifically, in *Clark v R*, Justice Johnson refused to grant a reduction of sentence on the grounds of exceptional circumstances, despite the applicant's 'non-association order for protection … giving rise to increased isolation and reduced access to services and programs and employment or educational facilities' ([2012] NSWCCA 158, [11](d), [48]). As noted by Lynch and Bartels, although it was within the Court's remit to consider the applicant's trans identity as a post-sentence event, this did not occur (Lynch & Bartels, 2017, p. 203). Notably, Lynch and Bartels also recognised that sentencing legislation across Australia 'do[es] not [acknowledge transgender offenders] to any significant extent' (Lynch & Bartels,

[23] Justice Bowskill also restated: 'As Dr Aboud notes, "[i]t would appear he ceased his attack when he realised she was not a woman"', *A-G (Qld) v Meizer* ([2019] QSC, [33]).

2017, p. 209), with varying policies of correctional facilities supplementing fallacies (Lynch & Bartels, 2017, pp. 208–28).

Additionally, even where resentencing has occurred, the weight provided to trans identity as one factor among many is generally unclear (Cf *[Deadname] v Western Australia* [2018] WASCA 225, [1], [71], [80]). For example, *R v Amati* [2019] NSWDC 3, revd [2019] NSWCCA 193 demonstrates that individual officers afford limited, albeit different, consideration to trans identity. At first instance, Judge Williams SC noted the impact on custody ([2019] NSWDC 3, [68]), and discussed 'mental health' in association with special circumstances ([2019] NSWDC 3, [70]), but did not consider evidence of scientific articles related to hormones and trans matters ([2019] NSWDC 3, [64]). On appeal, although Acting Justice of Appeal Simpson stated: 'I do not seek to understate the difficulties affecting her as a result of gender dysphoria and associated mental health difficulties including depression' ([2019] NSWCCA 193, [120]), in resentencing on the grounds that the initial sentence was manifestly inadequate, mention was only provided to the respondent's 'history of mental illness' ([2019] NSWCCA 193, [135]).

While the influence of inadequate consideration of trans identity on sentencing outcomes is indeterminable, it is reasonable to query whether a greater understanding of trans matters would have resulted in fairer/different findings. Specifically, the above judgments can be compared to *Director of Public Prosecutions (Vic) v Austin* ([2018] VCC 1849, [34], [41]) where, in assessing sentencing considerations, Judge Wraight extensively engages with the accused's intersectional identities:[24]

> [47] … you will face additional hardships in prison taking into account the impacts of your aboriginality together with the protective concerns as a transgender woman. As noted in one of the articles provided, your protective status has impacts that traverse both gender and race identity … you have since being in custody, reported both physical and sexual abuse which has resulted in your transfer … [t]hat of course has ongoing impact in relation to proximity to family and legal representation.

Throughout the judgment, Judge Wraight immediately accepts that difficulties will be, and have been, encountered, with the evidence of articles supplementing this certainty. This thorough regard to the accused's identities differs from the above cases, which include less substantial consideration. From this, it is not difficult to postulate that greater recourse to harms whilst incarcerated, and other evidence, can allow the impact of trans identity to be perceived as substantial, and potentially special or exceptional.

In a different vein, a lack of awareness of trans matters is also significant to sentencing where the victim of an offence is trans. In *R v Toyer*, District Court Judge Lerve's ignorance of trans/queer matters is substantial, particularly within the context of the 'fundamental and significant error' (*R v Toyer (No 2)* [2021] NSWDC 92, [3] (Lerve DCJ)) of initially sentencing imprisonment for manslaughter—to be served by Intensive Correction Order ([2021] NSWDC 69, [97]). As an Intensive Correction Order is unavailable for a conviction and sentence of manslaughter, District Court Judge Lerve later corrected this error by 'impos[ing] a non-parole period of 12 months' ([2021] NSWDC 69 [2]–[3]). However, also in issue is District Court Judge Lerve's description of the victim:

[24]See also *DPP (Vic) v Lester* ([2016] VCC 1445, [36], [50]).

> [12] The deceased was a 25 year old *male* [*sic*] *Filipina* national who was in Australia on a Tourist Visa. The deceased *preferred* to be known as 'Mhelody' and *identified* as a transgender person. The facts recite that the deceased was *born male* and had *male genitalia*. However, the Crown in written submissions … indicates that the deceased was *known as a female*. Accordingly, this is the manner in which I will refer to the deceased.[25]

This discussion of Mhelody is marred by several misunderstandings about trans identity and other problematic expressions. Particularly, District Court Judge Lerve's confusion about the victim's identity, emphasis on biological characteristics, problematic grammatical inclusions and use of jarring incongruities such as 'male' and 'Filipina', ultimately overrides how the victim will be referred to. Additionally, the entire judgment is laced with queerphobic sentiment, with District Court Judge Lerve later explaining that 'Grindr is *apparently* a social networking "app" for gay, bi and transgender persons' ([2021] NSWDC 69, [16]). The inclusion of the word 'apparently' cements District Court Judge Lerve's insistence on separation from queer matters. The culmination of this harmful terminology is a general scepticism of Mhelody's identity, and a specific complicity with the defendant's transphobia. While it is impossible to ascertain how District Court Judge Lerve's ignorance impacted his ability to conceptualise an appropriate sentence, Mhelody was referred to with harmful hostility, and initially a sentence unavailable on the facts was ordered.

Hormone Treatment. In assessing matters associated with hormone treatment, I query whether the outcome of these cases would differ if officers' knowledge of trans matters improved. In *Lawarik v Corrections Health Service* ('*Lawarik*'), the Tribunal found that the refusal to provide the applicant with hormone therapy was not discrimination ([2003] NSWADT 16, [8]–[9] (Judicial Member Rice, Members Alt and Pun)). Specifically, as the applicant was not receiving hormone therapy prior to incarceration, the policy restricting the provision of hormones was not applied, as staff went beyond immediately refusing access (*Lawarik,* [30], [68]–[72], [76]). As the policy was not applied, 'no question ar[ose] as to whether or not application of the policy [was] discriminat[ion]' (*Lawarik*, [85]). However, the Tribunal also considered whether the patient management, which occurred instead of application of the policy, incorporated an unreasonable requirement that the applicant could not comply with (*Lawarik*, [75]–[80]). In finding that the requirement of additional assessment beyond self-diagnosis was reasonable, the Tribunal contextualised the assessment by stating that 'the condition is *not urgent or life-threatening*' (*Lawarik*, [82] (emphasis added)).

It is questionable whether the outcome of indirect discrimination would differ if the Tribunal had a greater understanding of trans matters—at least to alter their opinion that 'there would be no evidence which would displace the view … that the requirements were reasonable'.[26] For instance, the commencement of hormone therapy has a significant impact on psychological health, including 'reductions in depression and anxiety' (Baker et al., 2021, p. 2), conditions which have the potential to be urgent or life-threatening (Baker et al., 2021, pp. 8–12, particularly in the prison environment (Edney, 2004, pp. 334–35). Further, the pathologisation model that disregards self-belief in favour of medical diagnosis is regarded by some as problematic (Gailey, 2017, p. 1714), given

[25]([2021] NSWDC 69 (emphasis added)).

[26]Submissions on this matter were not permitted, but the framing nonetheless affirms that the Tribunal would not be swayed: *Lawarik v Corrections Health Service* ([2003] NSWADT 16, [81]).

trans identity means different things to different people. Accordingly, analysing *Lawarik* questions whether the findings would differ if knowledge about trans matters increased, in the absence of changes to legislation and policy.

Similarly, in *Sinden v Queensland* ('*Sinden*'), Senior Member Oliver found that the refusal to provide hormone therapy to the applicant, an 'Indigenous transgender woman' ([2012] QCAT 284, [7]), and failure to investigate the Gender Identity Disorder diagnosis, was not discrimination ([2012] QCAT 284, [79]–[80]).[27] Despite accepting the diagnosis, Senior Member Oliver agreed with reports that suggested an 'ulterior motive' ([2012] QCAT 284, [35]),[28] whereby the diagnosis could be used to 'minimise the impact of incarceration' ([2012] QCAT 284, [35]), 'improve … conditions and get advantages not available to others' (2012] QCAT 284, [42]). This suspicion of the applicant's gender is also evident from Senior Member Oliver including the applicant's deadname and referring to her with masculine terminology ([2012] QCAT 284, [1]). Significantly, Senior Member Oliver also agreed that 'there is a sound rationale for not permitting the commencement of hormone treatment whilst a prisoner is incarcerated' ([2012] QCAT 284, [37]). This conclusion largely stemmed from context provided by the Deputy Commissioner Custodial Operations, which stressed the impact of incarceration on the ability to make choices ([2012] QCAT 284, [34]), 'the motivation of self interest' ([2012] QCAT 284, [35]) and the 'potential' security threats by other prisoners in response ([2012] QCAT 284, [36]). With this characterisation, Senior Member Oliver found that there was no discrimination because a comparator would not have been treated differently ([2012] QCAT 284, [64]–[70]). Specifically, the comparator was found to 'be a prisoner with a diagnosed medical condition, *not life threatening*, and whose treatment with medication and/or counselling, is likely to *adversely impact on the good management and security of the prison*' ([2012] QCAT 284, [68] (emphasis added)).

Similar to *Lawarik*, the finding of discrimination may have differed if the comparator's medical condition was deemed 'life threatening', as this could have outweighed any considerations as to the security and good order of the prison. Further, the provision of hormones may have been perceived to have no (additional) adverse impact ([2012] QCAT 284, [37]), had the Tribunal sufficiently acknowledged that prisoners who are trans and Indigenous are typically already 'expos[ed] to ridicule and even assault' ([2012] QCAT 284, [37]). Accordingly, the presumptions of the Tribunals in *Lawarik* and *Sinden* are not only misguided and harmful, and may have differed with sufficient education, but they highlight the inadequate policies trans people are subjected to whilst incarcerated.

Discrimination. The progression of *Tafao v Queensland* demonstrates how insufficient knowledge of trans matters may influence a judicial outcome, particularly where inadequate legislation and policy is involved ([2018] QCAT 409, revd [2020] QCATA 76, revd [2021] QCA 56). The matter concerned a claim of direct and indirect discrimination by a Samoan transgender woman who was incarcerated in a male prison—with her prison records specifying that she was of the 'male gender' ([2018] QCAT 409, [3], [7]–[8]). While there were issues across each case, my analysis focuses on Member Fitzpatrick's judgment, because the errors were significant, and multiple appeals followed.

[27]For an in-depth analysis see Kane, 2013.
[28]See also Kane, 2013, pp. 78–82.

The claim of direct discrimination largely concerned the refusal to use the applicant's name or feminine pronouns and language within the Intensive Management Plans ('IMPs') ([2018] QCAT 409, [12]). Significantly, Member Fitzpatrick considered that deadnaming and misgendering the applicant was reasonable, because it 'was consistent with operating a high secure [*sic*] male overcrowded centre and protecting the safety of the applicant' ([2018] QCAT 409, [89]). With respect to the language of the IMPs, the IMPs referred to the applicant's 'provocative, sexually laden behaviour' ([2018] QCAT 409, [101](f)(ii)), and noted that the applicant 'has been observed skipping down the walkways, wearing flowers in his [*sic*] hair and adopting a feminised behavioural disposition' ([2018] QCAT 409, [101](f)(ii), [101](f)(v)). The IMPs further stated that the applicant must 'mitigat[e] this explicitly *transgendered* [*sic*] behaviour … to improv[e] custodial coping within the safety and security regime' ([2018] QCAT 409, [101](f)(v) (emphasis added)). Member Fitzpatrick considered that the IMPs merely addressed sexually-laden behaviour ([2018] QCAT 409, [143]–[151]), because they were inflicted in response to 'sexually provocative conduct which *not surprisingly* drew a response' ([2018] QCAT 409, [150] (emphasis added)). Due to this classification, Member Fitzpatrick found that inflicting the IMPs was not unfavourable, and the comparator would have also received them ([2018] QCAT 409, [156]–[163]). The appeal tribunal confirmed these findings, irrespective of errors ([2020] QCATA 76, [62]–[132] (Senior Member Howard and Member Traves)), and the matter was not revisited by the Appeal Court.

Similar to the above discussion, the balancing of the legislative requirements may have differed if the 'statutory, policy and operational framework' of the prison environment was not emphasised over other important factors ([2018] QCAT 409, [70], [153]). Additionally, the purported intention of IMPs to be a supportive measure to ensure the safety of the applicant, rather than a punitive measure that further vilified her, bolstered the perception that deadnaming, misgendering and criticising so-called 'transgendered behaviour' is justifiable in a male prison.

With respect to indirect discrimination, the applicant argued that the use of male pronouns, the language of the IMPs and the Custodial Operation Practice Directive ('COPD'), required her to 'be a man' ([2018] QCAT 409, [169]).[29] Member Fitzpatrick queried: '[h]ow can it be a requirement to "be a man" when one is a man?' ([2018] QCAT 409, [178]), relying on the conclusion that '[t]he applicant has the male "gender" because of her biological sex' ([2018] QCAT 409, [175]). The appeal tribunal confirmed that 'the applicant was a ["biological"] man' ([2020] QCATA 76, [43]), but Member Fitzpatrick erred in 'failing to apply Ms Tafao's identity as a female' ([2020] QCATA 76, [44]). That is, the appeal tribunal reconsidered Member Fitzpatrick's alternative discussion that the term 'be a man' could have been interpreted to mean 'identify as a man' ([2020] QCATA 76, [139]). The appeal tribunal found that the applicant was required to 'identify as a man' when the COPD was applied ([2020] QCATA 76), as the COPD relied on 'the prisoner's registered name and gender' ([2020] QCATA 76, [159]). The appeal tribunal also found that it was not reasonable that the applicant be required to 'identify as a man', because Member Fitzpatrick failed to adequately balance matters other than the security and good order of the prison ([2020] QCATA 76, [151]). These matters included the low

[29]Note that the Directive was an internal policy that governed the treatment of prisoners who are trans, including by ignoring self-identification in favour of 'biology' ([2018] QCAT 409, [40]–[41]).

cost in using appropriate language ([2020] QCATA 76, [149]) and subsequent amendments to the COPD—which required 'transgender prisoners to be referred to in a manner consistent with their gender identity' ([2020] QCATA 76, [150]). However, on a further appeal, the Court found that the appeal tribunal erred in considering these other matters, primarily because submissions were not made about these issues ([2021] QCA 56, [31]–[54] (Sofronoff P, Philippides and Mullins JJA)). Therefore, the order that a private apology be made in relation to the 'use of male pronouns' ([2021] QCA 56, [165], [176], [180]) was set aside ([2021] QCA 56, [67]).

Member Fitzpatrick's refusal to recognise that the applicant is a woman and failure to adequately consider additional factors, other than that related to the security and good order of the prison, resulted in the appeal tribunal finding an error.[30] Significantly, Member Fitzpatrick's initial assessment lacked a genuine understanding of trans matters, prioritising the good order of the prison and the supposed 'safety' of the applicant, over her dignity ([2018] QCAT 409, [91], [191]). If submissions about other matters were permitted, the outcome may have differed on balance. Instead, the applicant's sex/gender was ignored, and Member Fitzpatrick blamed her for the assault she faced while incarcerated. When this ignorance is combined with legislation that alters purported protections against discrimination, and policies that ignore self-identification, the potential for an accurate finding of discrimination is lessened, and transphobia is magnified.

Disrupting harm

In this part, I propose transformations that may assist in disrupting harm. These transformations include reviewing and amending court forms and procedures, educating and training judicial officers and court staff and implementing supports for trans people. It is imperative that the transformations discussed are qualified in two aspects. First, these transformations are one suggested avenue, and if they are carried out, they must occur alongside a view to examine and address other compounding forms of oppression, with a view to disturb the operation of the prison industrial complex (Stanley & Spade, 2012, p. 123). Second, these transformations must be led by trans people with lived, intersectional, experiences of the criminal law system. In centring the voices of trans people and their organisations, the potential for these transformations to 'reproduce the prison industrial complex's norms of transphobic, misogynist, and racist sexualized violence', is reduced (Bassichis et al., 2011, p. 35). These necessary qualifications aim to ensure that any transformations effectively disrupt harm, aligning firmly with an abolitionist perspective that the call for improved conditions alone is not enough (Stanley & Spade, 2012, p. 120).

Review and amend

My previous analysis supports the proposal that criminal court forms, across every Australian state/territory, should be reviewed to determine whether the use of gendered pronouns, or the request for identification of sex/gender, is necessary. Given some jurisdictions do not request the identification of sex/gender, or use any pronouns, it is reasonable to infer that there are limited instances where the use or request is necessary.

[30]This is significant, irrespective of the appeal tribunal's errors.

Where the request for identification of sex/gender is necessary, forms should be amended in favour of a self-identification model. In creating space for people to specify how they identify, rather than selecting from limited categories, trans people can 'express whatever genders they choose at any given moment' (Stanley, 2011, p. 5). A self-identification model would allow any identity to be self-prescribed, if people wish to specify at all.

It is imperative that reviewing and amending court forms occurs alongside other transformations. That is, Spade considers that 'legal equality claims that fail to challenge the broader conditions of maldistribution can cause us to inadvertently produce a trans politics that supports and legitimizes those very systems and institutions that make trans people so vulnerable' (Spade, 2015, p. 87). Subsequently, changes to forms are redundant if court staff do not use the self-identified terms, or if other administrative procedures restrict self-identification. Additionally, some services or programs are only able to be accessed by specific people, such as Men's Behaviour Change Programs, or legal services that do not assist men. If self-identification is endorsed in court forms, a review of identification of other services and programs must occur alongside it. However, what must occur is not an elimination of segregated spaces, but 'decertification'—which includes the 'remov[al of] legal status as a basis for determining access' (Cooper, Grabham, Peel, Renz, & Smith, 2022, p. 19). Accordingly, transforming the way that sex/gender is classified on court forms necessitates much broader transformations of how sex/gender is classified in other facets of the criminal law.

Educate and train

My exploration conducted above demonstrates an individualised and widespread lack of knowledge of trans matters by the judiciary. Consequently, court staff and judicial officers should be required to undertake 'safe and quality education[al]' (Bassichis et al., 2011, pp. 36–37) programs created by trans people and trans organisations. According to Transgender Victoria (2021, p. 3), this education must include:

> LGBTQIA + inclusive practice training … [which] should highlight the particular social and legal issues faced by [the] community as well as the significant additional risk of psychological and physical harm faced by the incarceration of trans and gender diverse people in … prisons.

Further, court staff and judicial officers should receive specialised and up-to-date training related to the use of gendered terminology and problematic expressions.[31] This training must emphasise that using appropriate terminology is a matter of respect, and presumptions about how people identify can and should be avoided.

Additionally, education must occur alongside 'an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime' (Transgender Victoria, 2021, p. 1). This recommendation should also be expanded to other areas associated with trans matters, and especially discrimination that occurs while people are incarcerated. An examination of judicial knowledge, combined with

[31]Cf Judicial Commission of New South Wales, *Equality before the Law Bench Book* (Judicial Commission of New South Wales, June 2019) cpt 9. Cf Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court Library, 2016, p. 2nd ed) 185–90. Cf Supreme Court of Western Australia, *Equality Before the Law Bench Book* (Department of Justice Western Australia, 2021, p. 2nd ed) 2.1.9, cpt 12A.

the implementation of meaningful educational and training programs, may assist in transforming how court staff and judicial officers engage with trans people.

Implement support

Courts should also implement additional supports for trans people as they progress through the criminal system. These supports could involve access to specialised counselling or legal services, a trans advocate or trans support groups. These supports are necessary because of the cumulative harms that trans people face when engaging with the criminal system. As above, any implementation of additional supports must be made by trans organisations that specifically work with trans people with lived experiences.

Conclusion

The administration of the criminal law by Australian courts can cause compounding harm to trans people. In this paper, I focused on harm caused by court forms and judicial officers. Harm is maintained by court forms that limit descriptions of sex/gender to prevent self-identification. In relying on such forms, court staff inadvertently uphold cisnormativity and may misgender trans people. Judicial officers also maintain harm when they use language in judgments that disregards, dismisses or denies the experiences of trans people. This harm can be attributed to a lack of understanding of trans matters and the opinion of the officer, as demonstrated by the varying use of appropriate pronouns and gendered terms, deadnames and problematic expressions. Significantly, a lack of knowledge of trans matters can also have implications on the outcome of cases, including those related to sentencing, hormone treatment and discrimination.

To disrupt the features that maintain harm against trans people, various transformations could occur. These transformations may include a review of court forms, with a view to remove gendered pronouns and amend unnecessary requests for sex/gender. This transformation must occur alongside a broader review of other services and programs to move towards decertification of sex/gender. Judicial officers and court staff should also undergo specialised education and training that sufficiently addresses trans matters. This transformation must involve a specific assessment of the general knowledge and expertise of judicial officers with respect to circumstances that impact trans people. Finally, additional supports should be implemented to assist trans people as they progress through the criminal system. Imperatively, each transformation must be directed by trans people with lived, intersectional, experiences, and their organisations, for any change to be truly effective. While Australian courts administer harm that compounds against trans people, such features can be disrupted through meaningful transformations.

Acknowledgment

I am not trans, and because of this I have attempted to centre the voices of trans people by emphasising the opinions and recommendations of trans scholars, organisations, and people with lived experience, where available. I would like to sincerely thank Dr Honni van Rijswijk, Dr Penny Crofts and Dr Tamsin Paige for the support received while writing this paper.

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