



Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System

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Abstract

Trans and gender diverse (TGD) people are disproportionately criminalised and face unique vulnerabilities when interacting with the criminal legal system. However, very little is known about TGD people's experiences of criminalisation in Australia or the strategies TGD people and their advocates use to navigate the criminal legal system. Based on survey responses from TGD people with lived experience of criminalisation and lawyers with experience representing TGD clients, this article identifies several critical issues with the criminal legal system's treatment of TGD people and outlines the strategies TGD people and their representatives suggest to address these issues. On this basis, we argue that criminologists and criminal legal practitioners urgently need to interrogate and work towards ameliorating the criminal legal system's treatment of gender diversity. These insights will be crucial in informing future advocacy efforts and reform agendas, given that knowledge in this area is severely lacking.

Keywords: Transgender; gender diversity; criminal justice; queer criminology; cisnormativity; LGBTIQ.

Introduction

Although many Western liberal democracies have repealed criminal codes prohibiting some sexual and gender nonconforming behaviours in recent years, gender and sexual minorities remain criminalised (Peterson and Panfil 2014a). Trans and gender diverse (TGD) people, in particular, are policed and incarcerated at a severely disproportionate rate compared to non-TGD people (Buist and Stone 2014; Van Hout, Kewley and Hillis 2020). Structural discrimination makes TGD people more likely to encounter the criminal legal system and more likely to receive adverse treatment from it (Glickman 2016; Rogers and Rogers 2021; Snapp et al. 2015). Adverse treatment comes in many forms, ranging from more direct instances of dismissive and contemptuous—if not violent—police encounters (Miles-Johnson 2016b, 2020) to less direct but not necessarily less harmful failures to affirm TGD people's identities and support their wellbeing (Benson 2020). Hence, if criminalisation encompasses not merely the formal prohibition of particular acts but also the processes through which certain kinds of people are subjected to censure by the criminal legal system (Jenness 2004), then these dynamics make it clear that TGD people remain tacitly criminalised.



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However, the criminal legal system and the criminologists that study it have largely neglected to take seriously, let alone address or redress, TGD people's criminalisation. Research explicitly concerned with gender and sexual minorities has been and remains marginal in criminology and the social sciences (Dwyer, Ball and Crofts 2016; Schilt, Meadow and Compton 2018). This is especially true for research concerned with TGD people and the issues that affect them (Namaste 2000; Schilt and Lagos 2017). Worse still, criminology has played and continues to play a role in strengthening and legitimising institutions and practices that harm TGD people (Valcore et al. 2021). Nevertheless, a growing body of research is beginning to expose the cisnormative and heteronormative prejudices built into criminal legal policy and reveal the destructive effects these policies can inflict on TGD people (Drakeford 2018; Edney 2004; Erni 2013; Stohr 2015). There is also a burgeoning victimology literature showing that TGD people experience greater rates of interpersonal violence, including abuse, harassment, physical and sexual violence, homicide, and unwanted medical interventions (Fernández-Rouco et al. 2017; Goldenberg, Jadwin-Cakmak and Harper 2018; Hereth 2021; Matsuzaka and Koch 2019; Perry and Dyck 2014; Stotzer 2009; Wirtz et al. 2020). This literature highlights, too, that the criminal legal system tends to exacerbate, if not participate in, violence directed towards TGD people (Lanham et al. 2018; Miles-Johnson 2015b, 2020; Papazian and Ball 2016; Stanley and Smith 2011).

Still, several gaps in this literature must be addressed. First, while this literature has offered crucial insights into the dynamics of victimisation and justice-seeking for TGD people, there has been less focus on TGD people's experiences of criminalisation. Second, this literature has rarely focused on the experiences of TGD people themselves, despite their firsthand knowledge of the system's effects and the ethical imperative to centre their perspectives (Namaste 2000; Radi 2019). Third, existing research has been conducted predominantly in a North American context, and there is very little research on TGD people's experiences of Australian criminal legal systems (Rodgers, Asquith and Dwyer 2017).

This article addresses these gaps by reporting findings from a collaborative project involving academics, activists, community organisations, and lawyers that examined TGD people's experiences with the Victorian criminal legal system. Our results come from two surveys we designed and distributed. One survey sought to capture TGD people's lived experiences of criminalisation, while the other sought to capture lawyers' experiences of representing TGD clients. We included these two groups in our participant pool because they have the most intimate knowledge of how TGD people navigate and experience criminal legal systems. As we have stated, there is currently limited research on TGD people's experiences of criminalisation that takes lived experience as its data source. Additionally, no research in an Australian context has engaged with the knowledge of legal practitioners who work with and for TGD people. By collecting the voices of these participants, we aimed to identify the key issues TGD people confront in their encounters with the Victorian criminal legal system and the strategies TGD people and their representatives suggest to address these issues. From our participants, we have learned that TGD people are experiencing multiple kinds of adverse treatment based on their gender identities. Our results indicate that this adverse treatment comes from police, lawyers, judicial officers, and corrections officers, and manifests at all stages of proceedings. These insights will be crucial in informing future advocacy efforts and reform agendas. We also hope that these findings provoke further research in this area where knowledge is severely lacking.

This article unfolds in four parts. First, we provide a brief literature review that outlines the existing research on TGD people's interactions with the criminal legal system. Second, we discuss our methodology, describing the survey we designed and our approach to recruitment, and providing information about our participants. Third, we discuss our findings from our survey with TGD participants, outlining how TGD people reported neglect, harm, and abuse in their experiences with the criminal legal system and identified these as stemming from ignorance and hostility in those with whom they interacted. Fourth, we discuss our findings from our survey with lawyers, which suggest that those employed in the criminal legal sector need more resources, access to better training and educational materials, and more familiarity with TGD people and issues, to better meet TGD people's needs and address the adversity they face in the criminal legal system. To conclude, we discuss how criminologists, criminal legal practitioners, and activists might respond to our findings and call for the development of comprehensive strategies to ameliorate the criminal legal system's interactions with gender diversity. In particular, in reflecting on the value we found in partnership, we advocate for more collaborative approaches to redress and reform.

Literature Review

TGD people are oppressed on a global scale. Worldwide, TGD people report poorer mental and general health outcomes compared to cisgender (including lesbian, gay and bisexual) populations (Reisner et al. 2016; Winter et al. 2016). The distress and discrimination TGD people experience due to living in a hostile social environment predominantly explain these deficits (Tan et al. 2020; White Hughto, Reisner and Pachankis 2015). For example, research with TGD Australians has shown that a perceived lack of social support is significantly correlated with higher levels of depression (Boza and Nicholson Perry 2014). Conversely, international research has shown that socially accepting environments drastically improve health outcomes for TGD people (Lefevor et al. 2019; Olson et al. 2015; Veldhuis et al. 2018).

Violence against TGD people is endemic (Stotzer 2009). TGD people experience structural violence as a consequence of living within a social world that largely fails to accept, account for, or accommodate for them, rendering them vulnerable in a range of domains, including health, labour, housing, and, as we address here, the criminal legal system (Collier and Daniel 2019; Jauk 2013; White Hughto, Reisner and Pachankis 2015). TGD people also experience higher rates of interpersonal violence and discrimination across various contexts, including educational and employment settings, public spaces (such as restrooms), healthcare settings, and at home (Effrig, Bieschke and Locke 2011; Griner et al. 2020; Hoxmeier and Madlem 2018; Kuehn 2019; Lanham et al. 2018; Lombardi et al. 2002). For instance, research in the United Kingdom has shown that TGD people are more likely than the general population to experience verbal harassment, physical violence, and sexual harassment or assault (Ellis, Bailey and McNeil 2016). Similarly, researchers in the United States have shown that young TGD people are at greater risk of sexual victimisation and of engaging in risky sexual behaviours (Kuehn 2019). However, official reporting on violence against TGD people remains low compared to the rates of violence TGD people report when surveyed (Moran and Sharpe 2004). For example, researchers have shown that TGD people in Puerto Rico experience high rates of victimisation, yet official methods for tracking and responding to transphobic violence substantially underestimate the extent of the problem (Rodríguez-Madera et al. 2017).

The criminal legal system is a site where TGD people experience particularly intense interpersonal and structural violence. Historically, Western liberal democracies have criminalised same-sex sexual behaviours and gender nonconforming behaviours and have reacted violently to those engaging in such practices (Ball 2016). Accordingly, police and other criminal legal agents have maintained an antagonistic relationship with LGBTIQ people for decades (Dario et al. 2020; Owen et al. 2018; Russell 2019). This relationship has featured overt and explicit forms of aggression and hostility, like instances where police officers have profiled, entrapped, harassed, or enacted unjustified use of force against LGBTIQ people, or conducted unwarranted raids of LGBTIQ venues (Mallory, Hasenbush and Sears 2015; Russell 2019). Yet, it has also featured covert and implicit policing practices that treat public expressions of same-sex or gender nonconforming desires as suspicious, risky, or implying criminality (Dwyer 2011, 2014, 2015). Both modes of discrimination render LGBTIQ people less likely to seek justice from the criminal legal system, more vulnerable in their interactions with it, and more likely to become ensnared by it. These are some of the many reasons why queer criminologists have argued that criminal legal systems have been and continue to be among the primary institutions involved in constructing LGBTIQ people as deviant and treating them accordingly (Peterson and Panfil 2014b).

The disproportionate rate at which TGD people are incarcerated globally is one dimension of the structural violence that criminal legal systems perpetrate against them (Stanley and Smith 2011; Van Hout et al. 2020). For example, in the United States, approximately one in six TGD people have been incarcerated at some point in their lives—and this rate is higher still for TGD people of colour and transgender women (Grant et al. 2011). Moreover, a significant volume of research has demonstrated that incarceration renders TGD people especially vulnerable to interpersonal violence from other prisoners and prison officials (Hereth 2021).¹ As we have suggested, these disproportionate incarceration rates are accounted for by the discrimination TGD people experience from law enforcement and the systematic factors that render TGD people more vulnerable to and more likely to encounter criminal legal agencies. For example, structural and economic barriers make TGD people more likely to be employed in sex work, making them more susceptible to adverse, if not violent, encounters with police (Lyons et al. 2017). High homelessness rates among TGD populations also contribute to their disproportionate incarceration (Begun and Kattari 2016). Many TGD people are kicked out of or flee their homes in their youth due to their gender nonconformity (Côté and Blais 2021; Dempsey et al. 2020; Norris and Quilty 2021). In this context, many trans youth are introduced into the orbit of the criminal legal system, having been compelled to turn to illegal means of supporting themselves, such as theft, participating in illicit drug markets, or outlawed sex work (Greenfield et al. 2021; Robinson 2020). Various other experiences, such as childhood abuse and drug use, may also lead to interactions with criminal legal systems and increase TGD people's vulnerability within those systems through high levels of depression, substance abuse, and suicidal ideation (Rogers and Rogers 2021).

Despite this growing international literature, very little is known about TGD people's experiences with the criminal legal system in an Australian context. However, existing research suggests that TGD Australians' experiences typically align with international trends. For example, TGD Australians have reported experiencing significant stigma and discrimination from police historically and through to the present (Miles-Johnson 2015a). These experiences make TGD Australians more likely to expect adverse interactions with police and therefore less likely to engage with police (including specialist LGBTI liaison programs) voluntarily (Dwyer et al. 2020; Miles-Johnson 2016a). Moreover, when TGD Australians contact police, police tend to homogenise and "transgenderise" crimes (Moran and Sharpe 2002: 281). Surveys of LGBTIQ people in Australia have supported these findings, demonstrating that LGBTIQ people—and TGD people especially—were more likely than the general population to have hostile encounters with the police (Dempsey 2000; Hill et al. 2020; Hill et al. 2021). For example, the TranZnation report (Couch et al. 2007) found that around 18% of the TGD Australians surveyed experienced discrimination

from police. In addition, approximately 35% of those surveyed who had reported a crime to the police felt that the police had not treated them with dignity during that interaction.

It is difficult to estimate the number of TGD people incarcerated in Australia because this data is not routinely recorded, and policies on the management of TGD prisoners differ between states. Only a few states and territories have dedicated management and record-keeping policies, and these have significant shortcomings (Lynch and Bartels 2017). Nevertheless, some research has been conducted on TGD prisoners in Australia, primarily focusing on transgender women. This research has found, in line with what has been reported internationally, that transgender women are at risk of sexual violence and assault when placed in men's prisons (Wilson et al. 2017).

More research is needed on TGD Australians' experiences with the criminal legal system. More comprehensive knowledge about the experiences of TGD people in the criminal legal system is necessary to identify how and why they may be receiving adverse treatment from the system and inform the development of advocacy and reform strategies directed towards ameliorating that adverse treatment. Additionally, given that each Australian state has separate frameworks, policies, and legislation for managing TGD prisoners and recognising TGD people, future research should be sensitive to the specific legal and social context within each state. Hence, research focusing specifically on Victoria and examining the issues facing TGD Victorians, such as that which we conduct here, is also imperative.

Method

To better understand how TGD people experience criminalisation in Victoria, we designed and distributed two surveys. One survey was designed for TGD people with lived experience of contact with the Victorian criminal legal system. The second survey was designed to capture lawyers' experiences of representing TGD clients and helping them navigate that system. Our survey for TGD people consisted of seven categories of questions, related to (1) demographic information (including questions about gender identity), (2) social support structures, (3) experiences with police, (4) experiences with courts, (5) experiences with legal professionals, (6) experiences with prison, and (7) experiences as a victim of crime. Our survey for lawyers also consisted of seven categories of questions, related to (1) demographic information (including questions about gender identity), (2) attitudes of the legal profession towards TGD people, (3) experiences working with TGD clients, (4) knowledge about TGD clients' experiences in custody, (5) experiences with courts, (6) experiences accessing services, and (7) experiences with TGD-related training programs. Each category in both surveys consisted of a mixture of Likert scale questions and questions seeking short written responses.

Participants

We received responses from 42 participants in total. The participants included 17 TGD people aged between 18 and 64, all of whom indicated that they had had some experience interacting with the criminal legal system. Of our TGD participants, ten participants identified primarily as trans women; three as trans men; and four as non-binary, genderqueer, gender fluid, or simply trans. However, some participants used more than one of these terms to describe themselves, for instance, describing themselves as a trans woman and genderqueer.

The participants also included 25 lawyers aged between 25 and 84, all of whom reported that they had worked with a TGD client in the criminal legal system. Nine (37.5%) of the participants in this group had been assigned male at birth, while fifteen (62.5%) had been assigned female at birth, and one chose not to disclose this information. Their gender identities were varied, with seven (28%) identifying as trans and/or gender diverse. Their sexual orientations were also varied, with ten (40%) identifying as heterosexual; ten (40%) as bisexual; three (12%) as gay, lesbian or homosexual; and two (8%) as queer.

Given that our sample size is modest, we recommend caution in making generalisations based on our findings. However, this sample provides valuable insights for several reasons. First, although our sample is relatively small, so too is our participant population. Exact figures for the number of TGD people in the general population do not and cannot exist for many reasons (Collin et al. 2016; Doan 2016), and there is no data on the number of TGD people who have had contact with the Victorian criminal legal system or who are incarcerated in Victoria. Yet, given that TGD people are a relatively small population (Meerwijk and Sevelius 2017), one might infer that the number of lawyers who have worked with TGD clients is also likely to be small. Second, a modest sample is expected—but valuable nonetheless—in research concerning marginalised and 'hard-to-reach' populations like TGD people (Abrams 2010; Sydor 2013). Third, our purpose is exploratory rather than exhaustive. Given the minimal research in this area, we see this project as a scoping and agenda-setting exercise. We hope this project inspires larger-scale research into TGD people's experiences with the criminal legal system in Australia.

Recruitment

Our survey was open between 1 March and 31 October 2020. We recruited TGD participants online through social media and distributed paper surveys through professional networks. Transgender Victoria, one of our partner organisations, was instrumental in distributing details about the survey through a broad network of grassroots organisations via Facebook and word of mouth. In addition, we reached TGD clients in custody via their legal representatives and organisations providing support to TGD people in custody. We also recruited lawyers through social media, by word of mouth, and through firms and legal organisations that distributed links to the online survey via their employees and networks.

The research team's professional networks were crucial for distributing recruitment materials to potential participants. As a collaborative research project between academic, professional, and community/advocacy organisations, team members had connections with criminal legal actors and advocacy organisations that they could approach with details about the project. As chair of Transgender Victoria, team member Brenda Appleton played a particularly crucial role in recruitment by facilitating contact with TGD people and potential participants working in a range of government and community organisations. Moreover, in helping to design the project and surveys, Brenda and Transgender Victoria were essential in helping the research team build trust with potential participants, ensuring the research aims were accountable and appropriately communicated to TGD communities, and providing assurance to participants about the project's commitment to confidentiality.

Findings and Discussion: Survey with Trans and Gender Diverse (TGD) People

TGD people in our survey reported having experienced a range of interactions with the criminal legal system, including appearing in court as a defendant or witness, being stopped by police, being charged with a criminal offence, being remanded in custody, and being sentenced to a term of imprisonment or non-custodial sentence. Most participants had experienced more than one of these interactions. Additionally, many participants who had been charged with a criminal offence had also experienced being a victim of a crime. Below, we outline what our participants told us about each of these kinds of encounters with the criminal legal system.

Experiences with Police

While the sample size of survey participants who reported interactions with police was small (five people), their experiences align with existing research conducted internationally and within Australia. Participants perceived the police as having very little knowledge about TGD people or issues, indicating that police may lack training or resources to interact appropriately with TGD civilians. One participant suggested that police should attend support groups for TGD people to help normalise contact and improve their interactions with them.

TGD people also indicated that they had had primarily adverse experiences with police. Four of the five participants felt that police treated them disrespectfully based on their gender identity, and four participants indicated that police never used their correct pronouns. Three participants rated their experiences with police as 'extremely negative,' and participants overall felt extremely uncomfortable disclosing their gender identity to police. One participant wrote that 'some police think that I am out to start trouble or make trouble because of the way that I dress.' Additionally, TGD people reported low trust in police. As one participant stated: 'You just never know[,] not all police are safe as they abuse their positions of trust and powers.'

Experiences in Court

TGD people reported mixed experiences in court. TGD participants were often unsure whether they had been treated worse by a judge or magistrate based on their gender identity. For instance, they reported that judges were inconsistent in using their correct pronouns. However, three out of five participants reported feeling that they were treated disrespectfully in court to some degree. All participants were uncomfortable presenting their gender identity authentically in court, and most felt 'extremely uncomfortable' disclosing their gender identity. Elaborating on the significance of this point, one participant suggested that judges and magistrates note 'that transgender people already suffer a great deal of traumatic experiences without adding humiliation and violation from wrong judgements and lack of understandings.' Another participant described one particularly negative encounter in court, writing:

I had to represent myself once cause I could not get a lawyer to represent me [and] they sat in the court room with smirks on their faces and laughed at me ... I never felt so belittled and let down by the law in my life[,] it was so degrading and discriminative and humiliating to experience such discrimination from so call profesheonals.'²

Experiences with Lawyers

Survey responses regarding TGD people's experiences with lawyers were also mixed. Half of the participants said they had been treated 'very respectfully' by lawyers, but the other half stated that they had been treated somewhat or very disrespectfully by lawyers. Participants were also divided on whether they had been treated worse by lawyers based on their gender identity, with some feeling like they 'definitely' had been, some feeling that their gender identity was 'definitely not' a factor, and others feeling unsure. Lawyers were reported to use TGD people's correct pronouns at least sometimes, but only two out of five participants reported that lawyers 'always' or 'nearly always' used their correct pronouns.

Participants rated lawyers as generally knowledgeable about gender diversity. However, written responses detailed areas for improvement. One participant simply encouraged lawyers to 'Treat people how you would like to be treated with respect and privacy.' Another participant urged lawyers to engage more actively with their clients, writing that they 'would encourage more curiosity/questions that pertain to the individual to gain more understanding.' This participant's invitation for lawyers to ask more questions of TGD people should be understood in a broader context where TGD people are often subjected to degrading forms of curiosity. Eleven (65%) of our seventeen TGD participants—including the same participant who made this suggestion—reported 'inappropriate personal questions' as among the adverse experiences they had encountered. Moreover, eleven (44%) of the twenty-five legal professionals we surveyed also reported witnessing TGD people being subjected to 'inappropriate personal questions' in criminal legal settings. Together, these findings suggest that *respectful* curiosity about relevant matters, advanced explicitly in TGD people's interests, is more likely to be helpful than curiosity per se.

Experiences with Prison

TGD participants unanimously reported adverse experiences in prison. No TGD participants reported positive experiences with prison staff. All survey participants felt that prison staff had treated them worse because of their gender identity, and most participants said their experiences with prison staff were either 'somewhat' or 'extremely negative.' They also expressed a need for support groups, access to preferred housing arrangements, hormone therapy, and clothing that expressed their gender identity. While some participants were housed in a facility aligned with their gender identity, equally as many were not, indicating a lack of consistency in housing TGD prisoners.

Experiences with other prisoners were slightly more varied. Most participants felt uncomfortable disclosing their gender identity to other prisoners and experienced disrespect, discrimination, or worse treatment based on their gender identity. TGD prisoners reported sexual harassment from other prisoners and bullying from both prisoners and prison staff. One participant wrote that 'I have and continue to be bullied or be sexually harassed daily as I am housed in a prison of high proportioned sex offenders and perpetrators of domestic violence and or misogynists and sexists.'

Experiences as a Victim of Crime

Seven survey participants reported being a victim of a crime in which their gender identity was a factor. The most common experience as a victim of crime was sexual assault (85% of participants), followed by a physical attack (71%), hate crime (57%), and family or intimate partner violence (43%). Some participants provided explanations regarding how their gender identity affected their victimisation. For example, one person who stated that they had been 'assaulted by a person who smashed [my] car window and punched me in the face 5 times' believed this occurred because the perpetrator 'could see I looked difference.'

Participants reported that they were hesitant to report crimes to the police. Only two out of seven (29%) participants had reported crimes against them to the police, citing police corruption, bullying, negligence, indifference, and refusal to take situations seriously as factors influencing them not to report. In some cases, they attempted to report but were dismissed, treated insensitively or disrespectfully, or refused help. For example, one participant wrote that the police responded to their report with 'indifference' and noted that they 'refus[ed] to take the situation seriously [or] intervene.' Another participant shared that 'as a victim of crimes I was made to look like the criminal' and 'experienced a great deal of bullying from ... police due to my gender status.' These participants reported similar experiences when appearing in court as a victim of crime, with 40% of the seven participants stating that they were treated 'very disrespectfully.' One participant said:

Nothing was done. I feel let down and alone. I already assume the worst from police and the lawyers and the courts as I have experienced the worst so far and being trans you always expect the worst and hope for the best due to the unfairness of our current system especially in small towns and courts and police.

Findings and Discussion: Survey with Lawyers

The lawyers who completed our survey had witnessed the criminal legal system discriminating against TGD people in a range of ways and suggested several strategies that they believed would help address this problem. Their responses concerned three primary issues: (1) ways the legal profession can improve its treatment of TGD people, (2) TGD people's experiences in custody and (3) ways the service sector can better meet the needs of criminalised TGD people. In this section, we discuss each of these issues in turn.

How Can the Legal Profession Improve Its Treatment of TGD People?

Participants reported mixed views on how well the legal profession understands TGD people and how well it treats them. Only 18% (four) of the participants said they would describe the legal profession as 'extremely' or 'very' accepting of TGD people, with the remaining 82% (18) describing the profession as only 'moderately' or 'slightly' accepting. Participants' views were similar regarding the legal profession's knowledge about TGD people, with two participants describing the legal profession as 'very knowledgeable,' sixteen as 'moderately knowledgeable' or 'slightly knowledgeable,' and four as 'not knowledgeable at all.' In professional settings, most participants reported witnessing 'negative attitudes, stereotypes, and/or beliefs about trans and gender diverse people,' 'prejudice or discrimination' and 'disbelief or discounting regarding pronouns or gender identity.'

One of our questions asked participants to suggest areas in which lawyers could improve the legal profession's treatment of TGD people. Responding to this question, participants identified three layers of problems. First, they suggested that lawyers lacked understanding of and respect for TGD people. Many participants said that most lawyers did not know how to address or discuss TGD people or perform basic courtesies like using respectful language and correct names and pronouns. As one participant wrote, 'Most legal workplaces do not know how to accommodate the needs of a trans staff member or client, and have not put in the training, policies or facilities to appropriately accommodate [them].' Another participant pointed out that lawyers should also understand how other facets of a client's personhood might intersect with their gender identity, writing that 'As an Aboriginal person, my culture is as important as my identity and I am more likely to describe myself as Aboriginal trans than just trans.'

Second, participants suggested that lawyers needed to better understand, and know how to respond to, TGD people's unique needs and vulnerabilities when interacting with the criminal legal system. One participant wrote plainly that they (the participant) 'don't profess to understand the issues well enough to understand the concerns TGD people have when dealing with lawyers.' Another participant suggested that lawyers, in general, need 'greater awareness of the issues faced by TGD people and their intersection with criminal justice.' Many participants suggested that more widespread and better education and training could address the problem. Some participants indicated that lawyers needed to 'educat[e] themselves' better, while others called for dedicated training programs to improve the profession's knowledge and practice regarding TGD people. One participant wrote, for instance, that there should be 'more training for Victoria Police in relation to gender identity and particular issues faced by trans and gender diverse people.' However, some participants questioned whether more or better training would address the problem, noting that 'Prisons have good training but attitudes are often challenging.'

Other participants suggested formal and procedural changes that would require people working in the criminal legal sector to use TGD people's correct names and pronouns. One participant advised, for instance, that 'police [should] not us[e] assigned birth sex in police summaries' and that court 'files [should] reflect [a TGD person's] gender identity and not the[ir] assigned birth sex.' Others suggested that there should be procedures to ensure 'clear implementation of appropriate pronouns to refer to clients and/or legal representatives in court,' as well as process to ensure that 'lawyers [can] hold other agencies (such as police and court staff) to account when witnessing discriminatory behaviour (such as police/magistrates' "deadnaming" clients).' Finally, another participant suggested that the Victorian criminal legal system should implement affordances to address 'TGD people who identify as non-binary,' noting that currently, the court only 'allows for parties to be referred to as Mr X and Ms Y.'

Participants also identified a need for other structural and systemic changes to support TGD people in the legal system. Some participants highlighted a need for lawyers to have access to better materials and resources to help them advocate better for TGD people in the system. One participant wrote, for instance, that they wanted to have 'material available that may assist on a plea ... [and] a greater cache of resources to bolster the criminal matter therapeutically.' Multiple participants advocated for expanding targeted 'in-court services' like 'LGBTIQ liaison officers or general court support' to aid TGD clients. Several participants also identified 'much more time in court' as critical for supporting TGD people in criminal legal contexts. One participant wrote, for instance, that the 'judge [should] allow 3x as much time[,] even if [the TGD] person is [the] perpetrator.'

TGD People's Adverse Experiences in Custody

All but one participant reported that they believed their client had been mistreated in prison because of their gender identity. In response to a question that asked participants to describe any adverse experiences that their TGD client had experienced in custody because of their gender identity, participants detailed a range of ways in which the Victorian criminal legal system harms TGD people or makes them vulnerable to abuse. Several participants referred directly to practices that might have been implemented to 'protect' TGD people from harm or reduce their vulnerability to harm but had the opposite effect. In particular, participants repeatedly cited the use of isolation to ensure TGD people's safety in carceral contexts. One participant wrote that their clients were 'often put into protection for "their own good"' but noted that 'this isolation can [adversely] affect [their] mental health.' Another participant stated that their client had been 'routinely not transported to court due to "protective issues" as a result of [their] TGD status.' Being kept in custody and thus unable to attend court can be harmful because it impedes proper access to a lawyer, interfering in a person's ability to give proper instructions or adequately understand the case against them. Furthermore, it can delay proceedings if hearings need to be adjourned, thereby extending a person's time in custody, depriving them of access to services, potentially compromising employment or housing, and prolonging the uncertainty associated with being on remand. All these factors can aggravate mental health concerns.

Many participants noted that incarcerated TGD people were often harassed or assaulted by other prisoners and prison staff. Some participants recorded that their clients had received verbal abuse, writing, for instance, that their client had been 'picked on because of [their] gender identity,' had endured 'negative treatments by the prison authorit[ies],' or had been 'subject[ed] to transphobic and abusive language ... on a regular basis.' Others reported that their clients had been 'bashed' while incarcerated, that they had encountered 'rough guys in CCO' (i.e., community corrections officers) or that they had been 'victimised physically and psychologically both by custodial staff and other inmates.' Many participants reported that the harassment and abuse TGD people experienced while incarcerated was sexual and was perpetrated by both prisoners and prison staff. One participant wrote that their client had experienced 'harassment and assault (including sexual) by both other prisoners and prison staff.' One participant recalled that one of their clients 'detained in a men's prison' had 'reported multiple sexual assaults and rape[s].' Several other participants also reported that their clients had been raped while detained in men's prisons. One elaborated by saying that one of their clients had been 'offered as [the] "prize" for a prisoner[s] billiard tournament and raped.'

Several factors compounded the harms experienced by incarcerated TGD people. For instance, participants often noted that prison staff either did not understand or failed to respond appropriately despite the prevalence of these harms. Participants frequently reported that staff failed to respond when victims brought these harms to their attention. For example, one participant wrote that 'harassment and assaults have often been downplayed or ignored by prison staff.' Indeed, the participant whose client had been 'offered as a "prize"' added that this client was 'told to get over it' when they reported the incident. In other instances, prison staff exposed TGD people to the risk of violence by not taking measures to guarantee their safety despite their increased risk of victimisation. One participant reported, for example, that their TGD 'clients have been placed in dual or triple cells instead of single cells as was meant to occur due to [the increased risk of violence posed by their] being trans.'

According to participants, this lack of safety affected the wellbeing of their clients beyond the event of harm itself. One participant wrote that their client 'did not sleep because she was terrified about what would happen to her.' This problem was not isolated to men's prisons. One participant wrote that while their client was eventually able to be 'transferred to [a women's prison],' once they arrived, they 'did not feel accepted by the prison population.'

Participants also identified various practices of misrecognition as means by which the Victorian criminal legal system harmed TGD people. These practices were acts that denied or invalidated a TGD person's gender identity or refused to support TGD people's avenues for affirming or expressing their gender identities. Misgendering and deadnaming were frequently noted in this respect. Often these practices manifested in interpersonal encounters. One participant wrote that 'clients are misgendered and deadnamed on a daily basis in prison.' Another participant recounted the experiences of one of their clients—'a sistergirl who did women's ceremony in her community'—who had been 'placed in a male prison' where the prison staff 'call[ed] the client by her old male name and refer[red] to her as "he".'

Formal documentation was also a site where TGD people were denied recognition. One participant wrote that their client had been subjected to 'continued reference to the wrong gender on official documents.' Another participant noted that the Victorian Department of Justice and Community Safety 'sends [their client] letters in their dead name and refuse[s] to allow them to apply to [the Registry of Births, Deaths and Marriages Victoria] to change their names.'

One participant noted that the Victorian criminal legal system also exposes TGD lawyers to these kinds of harm. Writing about her personal experience as a lawyer, one participant indicated that 'Post-surgery I was called a "man" by a Federal Court judge

while sitting in the Appeal Court in skirt, blouse, jacket and heels.’ Further, she ‘was told by a Magistrate that it takes more than surgery to make a woman.’

Participants reported that another way the Victorian criminal legal system had harmed their TGD clients in custody was through failures to provide gender-affirming care. For example, several participants said that their clients had been refused access to hormone replacement therapy or had had their treatment ‘prescriptions controlled by [the] State, not their own Drs.’ One participant reported that their ‘clients have had difficulties accessing psychological treatment and some went several years in prison before being given appropriate medical care (including hormone replacement therapy and counselling).’ Other participants identified that failure to provide gender-appropriate clothing and personal care products is a crucial part of this neglect.

Suggested Service Improvements

Finally, we asked participants to identify services, or improvements to current services, that are required to address the needs of TGD people in the criminal legal system. Several participants described the service sector as generally lacking sensitivity to, or awareness of, the unique needs and vulnerabilities of TGD people. As one participant wrote, ‘TGD cultural competency and cultural safety needs to be established across the service landscape, rather than establishing TGD-specific services ... [because] TGD people need access to much the same services as others in the system.’ However, several participants cited a need for TGD-specific services. One participant argued that there should be ‘more funding for existing LGBTIQ services to allow them to continue on and expand operations.’ Another participant remarked that they found ‘services specifically targeted towards LGBTIQ clients and tailored to their needs (specific counselling services, legal services, community health services)’ especially useful when working with TGD clients. This participant elaborated that ‘much of the success of clients’ outcomes depends on them accessing these services, and if these services are not inclusive[,] often the clients cannot get out of [them] what they need and either stop accessing them or have negative/unhelpful experiences.’

Multiple participants argued for a hybrid approach. For example, one participant suggested that there should be ‘more LGBTIQ targeted services [as well as] more training and specific teams within existing services to target/assist LGBTIQ clients.’ Meanwhile, another participant wrote that while ‘mainstream services need to be better equipped to show a basic level of understanding and respect towards TGD people,’ lawyers with TGD clients ‘urgently need more funding for TGD specific programs.’

Conclusion

This article has presented findings on TGD people’s experiences with the Victorian criminal legal system and insights from lawyers working with TGD people in that system. We have shown that many aspects of criminal legal policy and practice require urgent attention, research, and reform because of their adverse consequences for TGD people. Prisons, in particular, are sites where TGD people have experienced significant and ongoing neglect, abuse, and other forms of harm. Both TGD participants and participants working in the criminal legal system emphasised a need for better training and educational materials addressing TGD people’s unique needs and vulnerabilities when interacting with the criminal legal system. Participants also emphasised that in addition to seeking better training, criminal legal practitioners must challenge adverse attitudes regarding TGD people, become more experienced in interacting with TGD people, and become more aware of and sensitive to their specific experiences and service requirements. Our findings are not exhaustive, but they have revealed significant problems in the criminal legal system’s treatment of gender diversity. Given that this topic is significantly understudied, we hope that our findings motivate further research into the issues we have identified.

The intensity and extent of harm TGD people experience in criminal legal settings make urgent the need for comprehensive redress and reform strategies. To this end, as part of our collaboration, Transgender Victoria will use our research findings to develop training materials for legal professionals and judicial officers. Our findings will also form the basis of a published manual directed towards practitioners representing or prosecuting TGD accused. These resources, and hence the research that informs them, should raise awareness among the legal profession about the issues that need to be considered when representing TGD clients—including how the client is to be addressed in court, what instructions must be taken, and what supporting material must be obtained about a person’s risks in custody and about their personal history. However, much more needs to be done.

Our research, training, and advocacy efforts come at a critical time. Australian governments, both state and federal, are making substantial LGBTIQ-related policy reforms, and there appears to be significant momentum for change. For example, the current Victorian government has developed an explicit long-term strategy dedicated to achieving equality for LGBTIQ people. This strategy is informed by a whole-of-government “LGBTIQ+ Taskforce” and assisted by organised and vocal community-based

advocacy. If developed and implemented fully and effectively, these reform agendas will go some way towards addressing the discriminatory treatment of TGD people. However, our findings suggest that these agendas must be strengthened and expanded drastically to achieve this goal. In their current form, they either do not address most of the issues highlighted in this article or do so insufficiently. To put it plainly, current measures will not and do not promise to protect TGD people from the criminal legal system and its associated harms. Consequently, the criminal legal system will continue to harm TGD people in all the ways we have described until it comprehensively remedies the factors involved in producing those harms. An intensified research and reform agenda—as well as efforts to ensure that these reforms are reflected in practice—is necessary to do that work.

Based on our experience as a research team, one approach that we can endorse is collaboration. As we have mentioned, the research and advocacy work we have described here emerged from a partnership between academics, activists, community organisations, and lawyers. Working in partnership has been deeply beneficial for all of us and for the causes we serve.

From an academic standpoint, this partnership has enabled us to conduct research that otherwise would not have been possible. Working together meant that we were able to contact and recruit participants who might otherwise have been difficult or impossible to access. Hence, we owe the insights we report here—that is, the insights participants shared with us—to collaboration. Working together also ensured that our research was accountable to the communities it concerns. Because of the pressing nature of many of the issues raised in this article, such accountability is essential to ensure that research is sensitive and responsive to participants' needs.

Collaboration has also been crucial from a legal practitioner's standpoint. Most significantly, it has provided data and a mandate for lawyers to make more informed submissions about the complex experiences of TGD accused, their vulnerabilities in custody, and the need to seek appropriate support services to assist them throughout the criminal legal process. Given that individualised justice is a tenet of the present criminal legal system, practitioners need resources, such as those we have developed, that make courts aware of the circumstances of those who come before them so that courts can take those circumstances into account. If legal representatives do not make proper submissions about their clients' vulnerabilities, circumstances, and rights, courts can do little to protect them. Conversely, well-informed and well-supported submissions can change how courts treat TGD people and how TGD people's needs are recognised in subsequent case law. Working collaboratively has been crucial for producing knowledge of a kind that practitioners can use to situate their individual clients' experiences in the context of systemic discrimination and, accordingly, to promote systemic change. Defence lawyers equipped with this knowledge will be better able to seek the instructions and evidence they need to act in, and advocate for, their clients' interests and be sensitive to their particular needs and vulnerabilities.

From an advocacy standpoint, this collaboration has enabled professionally informed and ethically driven research to be undertaken in a manner that TGD communities often struggle to achieve by themselves. The skills, expertise, time, and labour provided by the lawyers and researchers on this project were fundamental to its success, given that TGD communities and the organisations that represent them have limited access to these resources. Also, by helping TGD people share their lived experience, this collaboration has enabled them to participate directly in co-producing knowledge about their communities and expanding collective understanding of the issues they face. Transgender Victoria, in particular, has benefited significantly from this partnership. It has learned a lot about the criminal legal system in Victoria—and the experiences of its community members within that system—that it can use to sharpen its advocacy and training efforts.

Noting these benefits, we hope our work will inspire more collaborative projects of this kind. Indeed, we think this kind of collaborative work will be crucial for challenging the oppressive structures we have identified. In particular, we call on governments and other state parties to seek out and fund these collaborations as part of a long-term commitment to improving TGD people's lives. Seeking justice for LGBTIQ people has, after all, always been a collective struggle. The stronger that collective grows, the more possible justice becomes.

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- ¹ We use the word ‘prisoner’ to refer to people held in the state’s custody in relation to a criminal offence, either pre-trial or post-sentence. We prefer this term to the more commonly used word ‘offender’ for two reasons. First, ‘offender’ refers only to persons under sentence and does not extend to other people in custody such as those on remand. Second, we do not endorse the moral judgement ‘offender’ implies, which reduces a person to a wrong they apparently committed. We have also chosen not to use other terms that might soften the language of imprisonment, such as ‘incarcerated person’ or ‘person detained in a prison.’ In withdrawing a person’s liberty as a form of punishment, the state actively removes that person’s agency. Accordingly, we use the term ‘prisoner’ because we believe it describes a person’s *circumstances* in the criminal legal system rather than a characteristic of their personhood. Moreover, in our view, the term ‘prisoner’ connotes the vulnerability the state imposes upon the person and indicates the state’s responsibility for that person’s welfare. We acknowledge, however, that these terms and the values they carry are contested and that their meanings are liable to change.
- ² Sometimes participants used unconventional spelling and grammar in their responses. Out of respect, we have chosen to preserve the integrity of their responses where practical when quoting.

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