

To: Australian Human Rights Commission

Re: Current and Emerging Threats to TGD Human Rights

From: Isabelle Skaburskis, Partner, Doogue + George Lawyers:

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Part I: Introduction

1. Doogue + George Lawyers is a criminal defence firm based in Melbourne, Victoria, with a social justice and pro bono portfolio. Isabelle Skaburskis, Partner, leads the social justice unit, with assistance from Maya George, Lawyer.
2. Representing and advocating for trans and gender diverse (TGD) people in the criminal legal system continues to be significant area of focus for the Doogue + George social justice unit. We have acted for a number of TGD people in indictable and summary criminal proceedings. We provide legal advice and assistance to TGD individuals facing prejudice and discrimination in prison or on parole. We lead a multi-disciplinary research collective with community leaders and academic researchers, to advance knowledge and advocacy in this area. Our advocacy seeks to include and amplify voices of trans people with lived experience of the penal system.
3. This submission will address human rights issues arising in the course of criminal proceedings and imprisonment. It is based largely on our own experience, given the little that has been published on this topic; and published sentencing remarks. Part II will address practices in court. Part III will address experiences in custody. Part IV will provide a brief conclusion.

Part II: Deadnaming and gender pronouns

4. The importance for an accused person of being referred to by their correct name will be taken as understood for the purposes of this submission. Refusing to recognise a trans or gender diverse person's preferred name and pronouns is an expression of discrimination. It is our experience that there is improvement in the context of court proceedings to minimise this discrimination, but areas for improvement remain.

Charge sheet and court file

5. Doogue + George currently have two TGD clients charged under their deadnames. In both cases, the charging police were aware of their preferred name and identity as transwomen. One is on bail and the other was in custody at the time they were charged. In both cases, the police summary refers to them using male gender pronouns, knowing they each use female pronouns. It is an exercise of police discretion to misname and misgender the accused.
6. If a charge sheet is filed with the court under a deadname, the matter is entered into the court register under that name. It follows that:
 - a. The matter is called in court under their deadname, with each court appearance. They are “outed” as a trans person, which is a violation of their privacy. Further, this alienates them from the court process, as they are undermined and disrespected every time their deadname is used;
 - b. As their lawyer, we are required to keep our own file under the name on the chargesheet and make a note on the side of their preferred name. As a consequence, even their own legal team may inadvertently deadname them in correspondence;
 - c. They are bailed in their deadname and have to present themselves under their deadname when signing in for bail;
 - d. If they are sentenced and there is a published judgment, the case name is likely to be published under their deadname.
7. We have had positive experiences in the Magistrates’ Court raising concerns about the deadname on the court file. In one case, the issue was raised at committal mention. The Court was receptive to our application to change the name and went to some lengths to change the name on the record and on bail conditions.
8. The prosecution in that case objected, indicating that the client had not have their name changed legally. The Court, to its credit, did not accept this position. We understand that the prosecuting agency did not have a policy position with regard to how a trans person is addressed in court documents.
9. On another occasion, we notified the court clerk of the client’s preferred first name, again in circumstances where it had not been legally changed. We experienced no difficulty in having the matter called by that name, despite it not being the name on the court record. In that case, it was not appropriate to request that the name be changed on the court record, as the client had not finalised her name decision.

10. I am not aware of other cases where lawyers have corrected the name of their TGD client in court to reflect their preferred name. Feedback we have received from other practitioners suggests that there is little understanding generally of the importance of using preferred names and pronouns; that they did not know what a deadname was; or that such a correction would be accepted by the courts.
11. This indicates that there is a need for more education across the profession. Equally, it would be desirable for Courts to be proactive in making inquiries of preferred names and pronouns, especially in circumstances where it is clear that the name on the court file does not reflect the gender that the accused person presents with.

Indictment and particulars

12. Different issues arise in relation to matters in the higher courts. Again, our experience is generally positive with respect to the County Court's willingness to use preferred pronouns and honourifics, including "Mx". We applaud the recent Practice Direction issued by the County Court advising practitioners to inform the court of the correct name, honourific and pronouns for accused and practitioners. That practice direction is Annexure A to this submission.
13. There is, however, room for procedural improvement with respect to the process of arraignment: in particular, the name on an indictment and particulars at the time of arraignment. Currently, a person will only be arraigned under their legal name. In many cases this remains their deadname.
14. An arraignment takes place before a plea in the higher court, and also before a jury panel in advance of a trial, and therefore during an arraignment the accused person will be deadnamed in open court. Beyond that, the accused is compelled to identify themselves by their deadname as part of this process. It would be preferable that the person's preferred name would be used in the arraignment process.
15. A second issue that arises is in relation to particulars, especially in the context of sex offences. In a case where a person is on trial for rape or sexual penetration, the particulars for such charges would reference "introducing his penis into her vagina" for example. In cases where the accused identifies as female, use of proper pronouns would suggest particulars that read "her penis". This is not an accommodation that judges have been willing make. A solution would be to use third person gender pronouns, but as far as I know this has not been done.

16. Our experience representing trans or non-binary accused in the County Court is that judicial officers and prosecutors are respectful of the client's preferred title and pronouns. Whilst mistakes are regularly made by barristers and judges alike in using correct pronouns, there is an attitude of goodwill. There is recognition of the importance of using correct pronouns and titles even more challenging ones like shi/hir; and 'Mx'. Again, there needs to be improved knowledge and understanding across the profession, especially amongst solicitors, to ensure that courts and barristers are advised of their client's preferred name, pronouns and title.

Published judgements

17. Finally, with regards to pronouns and deadnaming, it is also relevant to consider how gender identity is treated in published judgments. The following practices have been observed:

- Deadnames are used in the names of judgments, even when the person's preferred name is referred to in the reasons.¹
- On occasion, a person's preferred name is included in the form of "also known as". For example: *DPP v Graeme Jock Austin (also known as Rhiannon Austin)*.²
- Female or gender-neutral names are used in sentencing judgments only when the judgment uses a pseudonym.³ It is preferred that if someone identifies as female, that a recognisably female pseudonym be used.
- There are at least two examples of a person's preferred name being used in a published judgment.⁴ It is believed that both of these cases, the person being sentenced had legally changed their name prior to sentence.
- In the one case found where a non-binary person was being sentenced, the judge referred twice to their "non-binary sexual identity", incorrectly confusing gender identity with sexual identity.⁵

18. The principle of individualised justice demands that a person who is being sentenced is recognised and acknowledged, as are their individual circumstances. Misnaming

¹ *DPP v Eddie Thomas Schliefert* [2023] VCC 936 (5 June 2023); *DPP v Jayden Williams* [2023] VCC 685 (4 May 2023).

² *DPP v Graeme Jock Austin (also known as Rhiannon Austin)* [2018] VCC 1849 (8 November 2018).

³ *DPP v Riley White (a pseudonym)* [2023] VCC 1672 (15 September 2023); *Shannon Packard (a pseudonym) v R* [2022] VSCA 128; *DPP v Moira Wills (a pseudonym)* [2021] VCC 2051 (7 December 2021); *DPP v Sam Mitchell (a pseudonym)* [2018] VCC 912 (21 June 2018).

⁴ *DPP v Gia Foley* [2018] VCC 2182 (19 December 2018); *DPP v Amala Paulson* [2023] VCC 703 (4 May 2023). Another case where it seems that a preferred name is used is: *DPP v Lee Lester* [2016] VCC 1445, where the person being sentenced is a transman.

⁵ *DPP v Brendon Harre* [2023] VCC 1178 (10 July 2023) at [48] and [68].

someone or misidentifying their gender is an erasure of their individuality and undermines the principle of individualised justice. It is a disrespect to the person being sentenced to undermine their preferred identity at the moment where they are most vulnerable. A person's preferred name should always be used, even if they have not yet had a chance to legally change it before sentence.

Part III: Sentencing practices and treatment in custody

19. There is a small but significant set of sentencing remarks pertaining to transgender accused which provide insight into the treatment of trans identity and vulnerability in prison. To illustrate the problems that arise in prison, and the judicial response to them, we will examine two representative decisions: the decision in the County Court of "Moira Wills",⁶ and the decision in the Court of Appeal of "Shannon Packard".⁷

Moira Wills

20. The Corrections Victoria Commissioner's Requirement titled *Management of Prisoners who are Trans, Gender Diverse or Intersex*⁸ sets out the official policy of Corrections Victoria in the management of trans and gender diverse people in prison. At para 6.1.1 and 6.1.2, the Commissioner's Requirement states that a person will be imprisoned in the prison of their gender, rather than their sex assigned at birth; and that in considering where to house a TGD prisoner, "the person's preference must be considered."
21. Moira Wills is a transwoman who was housed in the women's prison, Dame Phyllis Frost Centre (**DPFC**). She was on remand for approximately 10 months before sentence. The entirety of that time was spent in solitary confinement.
22. There are at least two other published judgments that we can find where transwomen in women's prison are held for longer than usual in solitary confinement. One is the matter of Jayden (Krystal) Williams⁹ who remained in solitary confinement at the time of sentence, some 447 days after reception. The other is the matter of Amala Paulson.¹⁰ Ms Paulson, who was not convicted of a sex offence was held in solitary confinement for six weeks after reception for no reason,

⁶ *DPP v Moira Wills (a pseudonym)* [2021] VCC 2051 (7 December 2021).

⁷ *Shannon Packard (a pseudonym) v R* [2022] VSCA 128.

⁸ Commissioner's Requirement, *Management of Prisoners who are Trans, Gender Diverse or Intersex*, CR 2.4.1, Issue Date: January 2017, < <https://www.corrections.vic.gov.au/commissioners-requirements-part-2>>.

⁹ *DPP v Jayden Williams* [2023] VCC 685 (4 May 2023) at [64]-[65].

¹⁰ *DPP v Amala Paulson* [2023] VCC 703 (4 May 2023) at [63].

and then transferred into a protection unit. Ms Williams, it is known to the authors, remains to this day in solitary confinement.

23. The sentencing remarks for Ms Wills outline evidence given by Corrections Victoria in the plea hearing. Evidence of Jenny Hosking, Assistant Commissioner, Sentence Management Division, Corrections Victoria, indicated that Ms Wills was placed in management for the security of other prisoners, as well as her own security. Evidence of a forensic psychologist and of a social worker who provide support for TGD prisoners, both indicate the extreme adverse impact that solitary confinement was having on Ms Wells.
24. It is known to the authors of this submission that Ms Wills remained in solitary confinement for the duration of her sentence, which expired earlier this year. Ms Wills was visited in custody towards the end of her sentence by the author of this submission, and can confirm short of providing a formal diagnosis, that her mental health was parlous. Not only was her treatment inhumane, but she was not provided with adequate physical or mental health support.
25. Every transwoman received into a woman's prison known to the authors has been placed in solitary confinement for an extended period of time. If the prisoner was not imprisoned on sex offences, she might remain in solitary confinement for 6-8 weeks. If she was, she could expect to spend her entire sentence in solitary confinement.
26. The overuse of solitary confinement of transwomen in women's prison needs to be further explored. It is an issue that affects every transwoman in custody, especially those in women's prisons. It is not acceptable to keep transwomen in solitary confinement for their own protection, and it ought not be considered the only measure available to ensure the security of others.

Shannon Packard

27. Ms Packard is a transwoman who spent her period of incarceration in a men's prison. She appealed against sentence some years after she was sentenced. New evidence was provided to the Court of Appeal of the treatment she had endured whilst in custody in a men's prison. She reported evidence of assault, sexual assault and rape, as well as transphobic abuse. Her position on appeal was that the full extent of the hardship in custody was not grasped by the sentencing court, and she deserved a greater reduction in sentence.

28. There are two matters of significance that arise from this judgement. The first is the evidence provided of violent treatment in custody.¹¹ This is consistent with other judgements for transwomen in men's prisons, which refer to evidence of abuse suffered whilst on remand.¹²
29. The second is the court's dismissive attitude towards evidence of extraordinary abuse in custody. Given the manner in which it dealt with the material before it, the Court of Appeal set a dangerous precedent suggesting that the near certainty of traumatic abuse throughout the period of a person's imprisonment is not a matter for significant judicial consideration. The attitude demonstrated in the language of this judgment—for example, referring to “gender identity” in quotes,¹³ and dismissing evidence of abuse as “an unhappy reality”,¹⁴ to name a few – abdicates the Courts from any judicial engagement with a transperson's conditions in custody. It tacitly endorses an attitude of tolerance and normalisation of transphobic abuse in prison.
30. Luckily, the lower and intermediary courts have not mirrored this attitude of dismissal and disrespect for trans identity and trans experiences in custody.¹⁵ However, as the decision in *Packard* is the only Court of Appeal decision dealing with the experiences of transphobic abuse whilst in custody, it suggests that there will be little prospect of using the court system to ameliorate the treatment of transwomen (in particular) in prison.

Part IV: Conclusion

31. Far more research is required to understand that full extent of transphobia experienced by TGD accused and offenders, especially whilst in custody and whilst on parole. Prisons (and parole boards) are notoriously devoid of accountability and oversight, and there is evidence to demonstrate that discriminatory and destructive practices are the norm—such as overuse of solitary confinement; failing to ensure the safety of trans prisoners; and failing to minimise a transphobic ethos that permeates prison management. A comprehensive investigation into the treatment of trans and gender diverse people in prison and on parole would be of great value for lawyers acting for TGD accused.

¹¹ *Shannon Packard (a pseudonym) v R* [2022] VSCA 128 at [57]-[59].

¹² See eg, *DPP v White (a pseudonym)* [2023] VCC 1672 (15 September 2023) at [92]; *DPP v Schliefert* [2023] VCC 936 (5 June 2023) at [44]; *DPP v Gia Foley* [2018] VCC 2182 (19 December 2018) at [24].

¹³ *Shannon Packard (a pseudonym) v R* [2022] VSCA 128 at [2].

¹⁴ *Ibid* at [17].

¹⁵ Cf, *DPP v Jayden Williams* [2023] VCC 685 (4 May 2023) at [64]-[65], and [75].