

**SUBMISSION TO THE AUSTRALIAN HUMAN  
RIGHTS COMMISSION**

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**Threats to TGD human rights  
within the Australian Criminal  
Legal System**

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# Table of contents

|                                          |          |
|------------------------------------------|----------|
| <b>INTRODUCTION</b>                      | <b>2</b> |
| <b>ABOUT US</b>                          | <b>2</b> |
| <b>INTERNATIONAL CONTEXT</b>             | <b>2</b> |
| <b>OUR RESEARCH</b>                      | <b>3</b> |
| <b>KEY POINTS</b>                        | <b>3</b> |
| 1. Interactions with Police              | 3        |
| 2. Experiences in Custody                | 3        |
| 3. Experiences in Court                  | 4        |
| 4. Interactions with Legal Professionals | 4        |
| <b>RECOMMENDATIONS</b>                   | <b>4</b> |
| 1. Decarceration                         | 5        |
| 2. Legal and Procedural Reforms          | 5        |
| 3. Enhanced Training                     | 5        |
| 4. TGD-Specific Legal Resources          | 5        |
| 5. In-Court Support Services             | 5        |
| 6. Peer support and advocacy             | 6        |
| 7. Access to Gender-Affirming Care       | 6        |
| 8. Hybrid Service Models                 | 6        |
| 9. Fund Collaborative Research           | 6        |
| <b>CONCLUSION</b>                        | <b>6</b> |
| <b>ENDNOTES</b>                          | <b>7</b> |

## Introduction

As academics with internationally recognised expertise in the experiences of trans and gender-diverse (TGD) people with Australia's criminal legal systems, we welcome this opportunity to share insights with the Australian Human Rights Commission regarding threats to TGD people's human rights.

This submission outlines our knowledge of these threats in the context of Australia's criminal legal system and draws upon our community-engaged research regarding TGD people's interactions with the system to provide the Commission with recommendations to address them.

## About Us

Dr Matthew Mitchell is a Lecturer in Crime, Justice, and Legal Studies at La Trobe University whose research concerns the impact of legal systems on TGD people, especially regarding the legal regulation of gender-affirming hormone treatment and TGD people's experiences with the criminal legal system.

Dr Adrien McCrory is a transmasculine social scientist and historian who completed his PhD in 2023 at the Australian Catholic University researching the historical experiences of TGD people within Australia's criminal legal system. Dr McCrory is currently working at Our Watch, a leading national organisation in the primary prevention of violence against women and their children in Australia.

## International Context

International research has consistently shown that TGD people face a distinct and systematic form of criminalisation that renders them both more likely to come into contact with the criminal legal system and more likely to receive adverse treatment from it.<sup>1</sup> Historical practices within Western liberal democracies of criminalising gender-nonconforming behaviours have entrenched an antagonistic relationship between law enforcement and the TGD community.<sup>2</sup> This relationship is characterised by overt hostility, manifest in police profiling and harassment, and more covert forms of discrimination that treat gender nonconformity as inherently suspicious or potentially criminal.<sup>3</sup> Such discrimination significantly increases the vulnerability of TGD people to criminal legal contact, contributing to disproportionate rates of incarceration.<sup>4</sup> These rates are further exacerbated by structural inequities, including the fact that TGD people are more likely to be employed in marginalised sectors like sex work and experience high rates of homelessness, often stemming from social rejection on the basis of their gender identity.<sup>5</sup>

International academic research consistently shows that TGD people encounter systemic human rights abuses within the criminal legal system, particularly in carceral settings.<sup>6</sup> These abuses are multifaceted and pervasive, including heightened risks of interpersonal violence, such as physical and sexual harassment and abuse, poor physical and mental health outcomes, and a lack of access to gender-affirming healthcare. Transgender women are particularly vulnerable to disproportionate rates of violence and discrimination within carceral settings.<sup>7</sup> Such deficiencies are exacerbated by harmful housing assignments and policies that rigidly adhere to a binary interpretation of gender based on sex assigned at birth, coupled with an entrenched culture of transphobia that severely restricts self-expression and manifests in stigma from both prisoners and staff.<sup>8</sup>

Academic literature shows almost universal experiences of stigmatisation, discrimination, and violence against TGD people in carceral settings. Correctional staff have limited knowledge and understanding of TGD people's unique vulnerabilities and needs and are often unable and unwilling to offer adequate support or protection.<sup>9</sup> Sexual abuse is alarmingly common, especially for transgender women in men's prisons, with many reporting being placed in solitary confinement or 'special units' for their 'protection.'<sup>10</sup> Moreover, access to gender-affirming hormone therapy is frequently denied, leading to severe mental health declines and, in some cases, instances of self-administered surgical interventions.<sup>11</sup>

These harms are systematically embedded into the operation of contemporary criminal legal systems. Researchers have found that gender-normative and hetero-normative prison cultures and a lack of specialised training or awareness among prison staff underpin TGD people's experiences of violence and discrimination in these settings.<sup>12</sup> For example, the fact that prison design and prisoner housing policies predominantly rely on binary sex segregation—that is, based on sex assigned at birth rather than gender identity—has been shown to significantly harm TGD prisoners, subjecting them to intensified scrutiny, disrespect, and violence from both prisoners and staff.

## Our Research

Our research addressed the gap in Australian literature on TGD people's interactions with the criminal legal system. It is distinguished from similar research in countries such as Canada, the US, and the UK by its comprehensive focus on analysing TGD people's interactions with the criminal legal system at all stages of contact. This includes encounters with police, courts, judges and magistrates, legal professionals, and experiences within custodial settings.

The project was also unique due to the composition of its research team. Comprising two academics (the authors of this submission), two legal professionals, and a community leader from Transgender Victoria, our collaboration bridged the divide between legal practice, academic inquiry, and TGD advocacy. Employing a dual-survey methodology co-designed with community, our project explored the experiences of TGD people and the experiences of lawyers working with TGD clients.

The significance of this research is reflected in its publication in the high-impact journal *International Journal for Crime, Justice, and Social Democracy* and its recognition in the form of a Community Engagement and Activism Award from the Division on Queer Criminology in the American Society of Criminology.<sup>13</sup>

## Key Points

Our project identified several key threats to human rights experienced by TGD people in contact with the criminal legal system, which we outline below.

### 1. INTERACTIONS WITH POLICE

Our research on TGD people's interactions with Australian police revealed significant human rights concerns that resonate with international findings. Our findings indicate that police interactions frequently contravened the principles of dignity and equality enshrined in international human rights law and compromised the right to non-discrimination and the right to privacy of TGD people. Participants reported that police frequently did not use their correct pronouns and that they were repeatedly treated disrespectfully due to their gender identity. This aligns with international research, which has documented the adverse impacts of such practices on the mental and emotional well-being of TGD people but also emphasises that such practices dissuade TGD people from seeking police assistance in circumstances where they might experience harm.

A significant portion of TGD participants in our research had been victims of crimes directly related to their gender identity, with sexual assault, physical attacks, hate crimes, and intimate partner violence being alarmingly common. There was a strong reluctance to report these crimes to the police, driven by previous experiences of indifference, disrespect, and hostility from law enforcement officers. This hesitancy was compounded by a fear that their victimisation would not be taken seriously, further reflecting their mistrust towards the police.

### 2. EXPERIENCES IN CUSTODY

Our research illuminated the dire conditions faced by TGD people in prison, including widespread discrimination and abuse by prison staff and other prisoners. The unanimous reporting of adverse experiences by TGD participants in our study underscores a systemic failure to recognise and protect their rights to safety, dignity, and freedom from torture or cruel, inhuman, or degrading treatment or punishment. These issues mirror findings from international contexts, where TGD people in carceral settings face similar human rights abuses.

Our study also identified that prisons may be using solitary confinement as a means of ‘protecting’ TGD people and managing ‘risk.’ This finding is profoundly concerning. This practice is internationally recognised as a human rights violation, and it is known to exacerbate mental health issues and deprive TGD people of their right to social interaction and support, contravening international standards on the treatment of prisoners. A noted lack of access to gender-affirming care, including hormone therapy and psychological support, also constitutes a denial of the right to health, further highlighting the carceral system’s neglect of TGD people’s unique healthcare needs.

Instances of sexual assault and other forms of violence reported by participants reflect a grave violation of personal integrity and security. The carceral system’s failure to provide a safe environment for TGD people, alongside the pervasive culture of misgendering and deadnaming, underscores a profound lack of respect for their gender identity, violating their rights to recognition before the law and freedom from discrimination and abuse.

### **3. EXPERIENCES IN COURT**

Our research highlights a concerning level of disrespect toward TGD people in court proceedings, manifesting in practices that directly impinge upon their dignity and equality before the law. The reluctance or failure of judicial officers to use correct names and pronouns, as reported by most of our participants, is emblematic of a broader issue of non-recognition and lack of understanding of TGD identities in this context. The humiliation and dehumanisation described by our participants in court highlight a stark deviation from the principles of fairness, equality, and non-discrimination that are supposed to underpin the criminal legal system.

Comparatively, international research has documented similar patterns of discrimination and neglect in court settings, suggesting that these issues are not unique to the Australian context but part of a widespread systemic failure to accommodate and protect the rights of TGD people within judicial processes.

### **4. INTERACTIONS WITH LEGAL PROFESSIONALS**

Our study revealed significant variability in the legal profession’s recognition and respect for TGD identities. Notably, many of our participants experienced reluctance or outright refusal to use correct pronouns by some lawyers and felt that there was a significant deficit in the legal profession’s understanding and acceptance of TGD people more generally. This gap not only affects the quality of TGD people’s legal representation but also contributes to the marginalisation of TGD people within the criminal legal system, further entrenching barriers to accessing justice.

## **Recommendations**

Based on the findings from our study and relevant international research, we propose the following recommendations for the Australian Human Rights Commission to consider. These recommendations are intended to address the systemic issues identified in our research and contribute to the structural change necessary to end the discrimination and violence that TGD people experience with the criminal legal system in Australia.

## **1. DECARCERATION**

The Commission should advocate for strategies that prevent the incarceration of TGD people, including the redirection of resources from carceral systems towards community-based support services. This would include developing and funding mental health services, housing assistance, and employment initiatives specifically tailored to keep TGD people out of prison. For those TGD individuals currently incarcerated, we urge the development of targeted support services within custodial settings to address the unique challenges they face.

Advocating for decarceration and the redirection of funds toward community-based support is a practical response to the human rights abuses TGD people face in custody. It acknowledges that the incarceration of TGD people is often a direct result of systemic discrimination, not individual circumstances. It also recognises that incarceration not only fails to offer safety for TGD people but also subjects them to further victimisation.

## **2. LEGAL AND PROCEDURAL REFORMS**

The Commission should advocate for legislative reform and the development of judicial guidelines that mandate the acknowledgment of TGD identities in all legal contexts. This acknowledgment would include using correct names and pronouns and the reflection of a person's gender identity rather than assigned birth sex in all legal documents and processes. This request is crucial because enshrining respect and recognition for TGD identities within legal procedure will directly counter the systemic misrecognition TGD people face within that context. This requires significant formal changes to ensure the legal system meaningfully accommodates non-binary and gender identities outside the gender binary as well.

## **3. ENHANCED TRAINING**

The Commission should advocate for the implementation of mandatory, comprehensive training programs for all individuals working within the legal, law enforcement, and correctional systems. These programs should focus on TGD cultural competency and sensitivity and the unique vulnerabilities and needs of TGD people. They should also be developed in collaboration with TGD community organisations to ensure relevance and effectiveness. This recommendation is essential because it addresses the lack of awareness and understanding within legal, law enforcement, and correctional systems regarding TGD issues. Mandatory training programs on TGD cultural competency and sensitivity will promote a more respectful and informed approach to interacting with TGD people in contact with the system, reducing instances of discrimination and harm.

## **4. TGD-SPECIFIC LEGAL RESOURCES**

The Commission should develop and disseminate comprehensive legal resources and materials designed to assist legal practitioners in effectively advocating for TGD people's rights and navigating the legal system on behalf of TGD clients. Developing these resources is crucial because it will equip legal practitioners with the necessary tools and knowledge to advocate for TGD people effectively, ensuring that TGD clients receive competent and sensitive legal representation. Additionally, the Commission should develop and disseminate resources specifically designed for TGD individuals in contact with the system, informing them of their rights, available support networks, and guidance on navigating the system.

## **5. IN-COURT SUPPORT SERVICES**

The Commission should support the development and implementation of targeted in-court support services to provide direct assistance and advocacy for TGD people navigating the legal system. These services should also extend to custodial settings, ensuring TGD people have access to supportive services that respect their identity and address their specific needs. This recommendation is vital because it addresses the significant

barriers and challenges TGD people face within the legal and custodial systems, from discrimination and misunderstanding to a lack of support that respects their gender identity.

## **6. PEER SUPPORT AND ADVOCACY**

The Commission should support the establishment of structured peer support and advocacy services within custodial facilities. This initiative would aim to provide incarcerated TGD individuals with consistent access to emotional and social care from trained specialists and members of their community. Such support is vital to mitigate isolation and foster a sense of community among TGD people in custody. This is necessary for all incarcerated TGD people but of specific and urgent importance to those in solitary confinement.

## **7. ACCESS TO GENDER-AFFIRMING CARE**

The Commission should advocate for legislative and policy development that ensures TGD people have uninterrupted access to gender-affirming healthcare, including hormone therapy and psychological support, regardless of their custodial status. Ensuring uninterrupted access to gender-affirming healthcare for TGD individuals, regardless of custodial status, is critical for their well-being. Consistent healthcare access supports mental and physical health and upholds the dignity of TGD people in custody.

## **8. HYBRID SERVICE MODELS**

The Commission should advocate for improvements in the service sector. This includes securing funding for TGD-specific programs that cater to the health, legal, and social support needs of TGD people. However, improving both TGD-specific and mainstream services is crucial because it ensures that all facets of the service sector are equipped to meet the diverse needs of TGD individuals. TGD-specific services provide tailored support that directly addresses the unique challenges faced by this community, offering a space where individuals can access care and assistance that is acutely aware of and responsive to their specific circumstances. However, given that TGD individuals interact with a wide range of services beyond those specifically designed for them, it is equally important to enhance mainstream services to be inclusive and sensitive to TGD people's needs.

## **9. FUND COLLABORATIVE RESEARCH**

The Commission should advocate for government funding for collaborative research initiatives to address the significant gaps in understanding regarding the experiences and needs of TGD people in criminal legal settings. Such funding should enable the development of targeted training, resources, and policies informed by robust evidence and meaningful engagement with TGD communities.

# **Conclusion**

Our research and recommendations underscore the urgent need for systemic change within the criminal legal system to address and rectify the pervasive human rights abuses TGD people face.

We thank the Commission for its attention to this issue and hope the insights provided here will effectively inform necessary structural change. We are happy to offer further consultation regarding any of the issues identified in this submission.

## Endnotes

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