

COSSEY *v* R – MISGENDERING AND THE SENTENCING OF GENDER-DIVERSE INDIVIDUALS IN AOTEAROA NEW ZEALAND

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I INTRODUCTION

In the last 10 years, domestic and international research has shown that gender-diverse inmates experience more hardship in custody than their cisgendered counterparts because, among other matters, gender-diverse inmates face a greater risk of violence, sexual assault, social exclusion and bullying.¹

As that research has developed, two issues have come before the courts in New Zealand. First, whether gender-diverse or transgender offenders should have their sentences reduced under s 8(h) of the Sentencing Act 2002 (the Act) on the basis that imprisonment will have a disproportionate impact on them compared to cisgendered inmates.² And second, if transgender offenders' sentences should be reduced, then by how much?

These issues came before the Court of Appeal in the 2021 decision, *Cossey v R*.³ However, the Court did not take the opportunity presented by *Cossey v R* to clarify the approach courts should take when sentencing gender-

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1 Rima Shenoy and others "The Rights of Transgender People in Prisons" (paper presented to the Equal Justice Project Symposium, Auckland, May 2016) at 8–9; and Oscar Battell-Wallace "Guarding Identity: An Investigation of New Zealand's Accountability Systems for Unrecognised Rights Claimants in Prisons" (LLB (Hons) Dissertation, Victoria University of Wellington, 2018) at 11. The author also acknowledges the relentless advocacy of People Against Prisons Aotearoa (formerly No Pride in Prisons) on this issue. See, for example, "Statement from Emmy Rākete, People Against Prisons Spokesperson (3 March 2016)" in Equal Justice Project "Cross-Examination: Running up That Hill – the Continuing Trials of Trans Prisoners" (14 April 2016) <www.equaljusticeproject.co.nz>.

2 This case note uses the word "offender" to reflect the fact that, by the time of sentencing, the charges have been proved either by way of guilty plea or trial, and for consistency with the language used in the Sentencing Act 2002.

3 *Cossey v R* [2021] NZCA 677 [*Cossey CA*].

diverse offenders. Thus, whether, and the extent to which, an offender's gender-diverse identity should be taken into account at sentencing remains uncertain, and, because of the amount of harm that can result from it not being taken into account, this is an important issue that warrants discussion.

This case note is divided into five parts. Part I is this introduction. Part II contextualises *Cossey v R* and outlines the current research around the impact of imprisonment on gender minorities. Part III sets out the facts, original sentencing decision, and appeal in *Cossey v R*. Part IV sets out the current approaches taken to sentencing transgender or gender-diverse offenders, and proposes how the issues with those approaches should be dealt with to properly acknowledge the particular circumstances facing these offenders. Part V then reflects on the harmful practice of misgendering by courts and practitioners.

Throughout this case note the word transgender is used interchangeably with gender-diverse as an umbrella term, to refer to any individual whose gender does not correspond with the sex they were assigned at birth.⁴ This includes transgender men and women, non-binary persons, and persons with culture-specific identities.⁵

II BACKGROUND

While gender diverse individuals will have diverse experiences in prison and not all will experience mistreatment, existing domestic and international scholarship establishes that when transgender prisoners are placed in prisons that do not correspond with their gender identity, they are at a greater risk of harm than cisgender prisoners.⁶

At present, there is limited literature concerning the impacts of imprisonment on gender minorities in Aotearoa New Zealand (Aotearoa), but the material that is available paints a concerning picture. Media reporting of discrete cases suggest transgender people in prisons in Aotearoa are at a higher risk of violence and sexual assault in prison compared to their cisgender counterparts at the hands of both other inmates and prison staff.⁷ A research paper presented by the Equal Justice Project noted the following examples:⁸

4 Albert Hornby *Oxford Advanced Learner's Dictionary* (Oxford University Press, Oxford, England, 1995) at definition of "transgender".

5 This article does not consider the experiences of other queer people, such as how bisexual defendants are treated by the courts. This is beyond the scope of the article.

6 Shenoy and others, above n 1, at 11.

7 At 8–9.

8 At 8–9 (footnotes omitted).

In October 2015, a transgender woman was repeatedly raped overnight while in a cell with a male inmate at a privately run prison in South Auckland. The DoC [Department of Corrections] were aware that she was taking hormone pills as part of her transition, yet took her out of protective segregation and did not transfer her to a women's facility.

In a similar case in April 2016, a transgender woman alleged that a guard raped her, and that prison staff had failed to investigate her previous claims of sexual assaults. The DoC confirmed that they knew the inmate was a woman, and held that her allegation had no substance.

As well as putting gender-diverse prisoners at greater risk of interpersonal violence, imprisonment poses additional challenges for individuals with non-binary identities such as *fa'afafine*.⁹ The binary nature of prisons makes placing those who live outside the binary challenging, with prison staff and inmates tending to treat non-binary individuals as though their gender corresponds with that of the prison they are placed in.¹⁰

Transgender inmates may also face *misgendering*,¹¹ which is when someone assigns the incorrect gender to a person through the use of incorrect honorifics, names or pronouns.¹² The use of voluntary segregation as a prisoner management tool to keep gender-diverse prisoners safe also risks having a negative effect on their mental health and rehabilitation.¹³

Overseas scholarship reflects similar trends. Research in the United States indicates that gender-diverse peoples are more likely to be victims of assault and face barriers in accessing hormone treatment.¹⁴ Other American research has noted the harassment and denial of transgender identities from both officers and other prisoners.¹⁵ In Australia, increased levels of psychological distress and self-harm have been identified amongst transgender prisoners.¹⁶ One Australian

9 Mette Hansen-Reid "Samoan Fa'afafine – navigating the New Zealand prison environment: A single case study" (2011) 3(1) *Sexual Abuse in Australia and New Zealand* 4 at 4.

10 At 5.

11 At 9.

12 Chan Tov McNamarah "Misgendering" (2021) 109(6) *CLR* 2227 at 2252.

13 Shenoy and others, above n 1, at 9.

14 Valerio Baćak and others "Incarceration as a Health Determinant for Sexual Orientation and Gender Minority Persons" (2018) 108(8) *AJPH* 994 at 996–997.

15 Valerie Jenness and Sarah Fenstermaker "Agnes goes to prison: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of "The Real Deal"" (2014) 28(1) *Gend Soc* 5 at 15.

16 Lorana Bartels and Sam Lynch "Transgender prisoners in Australia: An examination of the issues, law and policy" (2017) 19(2) *Flinders L J* 185 at 192.

study, which surveyed 17 transgender or gender-diverse participants with experience of the criminal justice system, found that participants unanimously reported adverse experiences in prison, with no positive interactions with prison staff.¹⁷

In Aotearoa, the Department of Corrections Prison Operations Manual (the Manual) states that transgender people must have their identities respected, and that they must be treated in a manner which seeks to preserve their dignity, safety and privacy, and enables the maintenance of their gender identity.¹⁸ The Manual deals with matters ranging from searches, ensuring transgender prisoners have access to gender-affirming items, guidance regarding initial cell placement and identifying the prisoner's preferred pronouns, and support plans for transgender prisoners, including considerations pertaining to their safety, and health and wellbeing. Although on its face, the Manual appears to take steps to mitigate the risk of harms to transgender prisoners, there is limited information available on how these policies are operating in practice.

Recent high-profile cases in Aotearoa indicate that transgender prisoners remain exposed to adverse experiences in prison. For example, in 2019, a transgender man who wished to be sent to a female prison due to his vulnerable position was denied a transfer, despite his birth certificate stating that he was female.¹⁹ The prisoner reported fearing for his safety while in men's prison, noting:

Repeatedly, staff would come ask why I insisted on segregation, and over and over again I had to tell [them] how I did not want to be beaten and/or raped.

In 2020, a transgender woman was held in a men's prison for three weeks before her application to be transferred to a women's prison was approved.²⁰ These examples indicate that despite the Department of Corrections' policies, the harms discussed above are still occurring in Aotearoa, and provide a basis

17 Matthew Mitchell and others "Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System" (2022) DOAJ 1 at 6.

18 Department of Corrections *Prison Operations Manual* at [I.10] ("Management of transgender prisoners"). This aspect of the Manual came into effect in 2018.

19 Murphy "Corrections 'have not followed process at all' for trans prisoner" *New Zealand Herald* (online ed, Auckland, 4 April 2022).

20 Edward Gay "Transgender prisoner spent three weeks in men's prison" *The Dominion Post* (online ed, 3 May 2020).

to argue, in accordance with s 8(h) of the Act, that sentences of imprisonment are likely to be disproportionately harsh for transgender offenders.

III COSSEY V R

A The offending

On 8 June 2021, Roman Cossey (Mx Cossey, who uses they/them pronouns) appeared before Jagose J in the Hamilton High Court for sentencing having pleaded guilty to two representative charges of supplying methamphetamine and offering to supply methamphetamine, and single charges of possession of methamphetamine for supply and breach of a parole condition.²¹

Mx Cossey's offending was identified through an Organised Crime Squad investigation into the manufacture and supply of methamphetamine in the Waikato and Auckland regions.²² The investigation uncovered what the Police categorised as a "highly organised and lucrative drug dealing business".²³ Mx Cossey was one of 29 people arrested in connection with this investigation. Justice Jagose described Mx Cossey as having occupied "the lowest tier of that group, having had the least degree of involvement in the operation".²⁴ In summary, Mx Cossey was supplied with methamphetamine from members of the group, which they sold to their own contacts. They accepted in Court that they had supplied or offered to supply methamphetamine on at least 36 occasions. These charges of supplying and offering to supply methamphetamine related to approximately 114.75 g in total. When arrested on 22 May 2020, they were found with a backpack containing approximately 20.74 g of methamphetamine and nearly \$20,000 in cash.²⁵

At the time of the offending, Mx Cossey was on parole, having been sentenced in 2017 to a term of seven years' imprisonment on charges of supplying methamphetamine.²⁶ One parole condition was that they were not to possess, use or consume any controlled drugs.²⁷

B Sentencing in the High Court

At sentencing, the Crown sought a sentence of between two-and-a-half to

²¹ *R v Cossey* [2021] NZHC 1333 [*Cossey* HC].

²² At [4].

²³ At [4].

²⁴ At [5].

²⁵ At [7].

²⁶ *R v Cossey* [2017] NZDC 16228.

²⁷ *Cossey* HC, above n 21, at [8].

three years' imprisonment.²⁸ Counsel for Mx Cossey sought a community-based sentence.

Mx Cossey had previously completed an eight-week Alcohol and Drug Programme in prison and, at the time of sentencing, the Higher Ground rehabilitation programme had a bed available to accommodate Mx Cossey had the Court been willing to impose a sentence other than imprisonment.²⁹

His Honour adopted a starting point of four years and six months' imprisonment, having regard to the quantity of methamphetamine involved and the lesser role that Mx Cossey played in the criminal operation.³⁰ The Judge then uplifted this starting point by 15 per cent to reflect the fact the offending took place while Mx Cossey was subject to parole for similar drug offending.³¹

The Judge then discounted Mx Cossey's sentence by a total of 60 per cent on the following basis:³²

Your methamphetamine addiction, your background circumstances as I have outlined them, and your remorse and preparation for rehabilitation all qualify as mitigating. *So too is the disproportionately severe nature of your imprisonment as a transitioning transgender prisoner in a men's prison, which may be viewed analogously with credit given for medical conditions with comparable effect.* And, given the complexities and delays in obtaining disclosure and pursuing resolution of charges, you are entitled to something approaching a full discount for your guilty pleas.

This resulted in a sentence of two years and 10 months' imprisonment.³³ Having regard to totality considerations (relating to the earlier sentence of seven years' imprisonment for which Mx Cossey was on parole at the time of the offending), Jagose J then deducted a further six months to avoid disproportionality overall.³⁴ His Honour did not increase Mx Cossey's sentence for breaching their parole conditions, on account of their "unsupported vulnerability on parole".³⁵ After all the adjustments were made, Mx Cossey was sentenced to two years and four

28 At [2].

29 At [12].

30 At [23]–[25].

31 At [27]–[28].

32 At [28] (emphasis added, footnotes omitted).

33 At [28].

34 At [30]–[32].

35 At [25].

months' imprisonment.³⁶ Given the end sentence reached, a sentence other than imprisonment was not considered further.

To determine the appropriate sentence for Mx Cossey, Jagose J considered the presentence report, a cultural report, a rehabilitation progress report, and a drug and alcohol assessment report. In sentencing Mx Cossey, Jagose J referred to the following background information regarding Mx Cossey's gender identity:³⁷

You are a single person, without children. You have domestic and interpersonal skills. You would like to study Community Psychology, to help others. You say you have made “bad decisions” in the past, but want to move forward and “be the best version” of yourself. Your alcohol and drug habit began at an early age and escalated into methamphetamine dependency. *You are physically healthy but in the process of gender transition, for which you are prescribed hormones and anti-depressants. You feel you do not belong in a men's prison.*

...

Mr Gurnick also has provided me with your comprehensive alcohol and drug assessment. It explains the clinical and psychological consequences of your abused background, drug addiction, and *transgender orientation* — *for which you are said on parole to have lacked support from the Probation Service, leaving you isolated and alone* — *and concludes you should be referred to the Higher Ground service, which should put you in touch with a transgender or rainbow support agency. It recommends you continue to work with a psychologist experienced in transgender issues.*

Mx Cossey is non-binary and uses the honorific “Mx”.³⁸ Nevertheless, Jagose J referred to them using the incorrect honorific “Ms”.³⁹ This case note returns later in some detail to the misgendering of Mx Cossey, and similar issues echoed in other cases involving gender-diverse individuals.

C The Court of Appeal decision

The Court of Appeal, sitting as a divisional court comprised of Kós P, and

³⁶ At [36].

³⁷ At [13] and [15] (emphasis added)).

³⁸ *Cossey* CA, above n 2, at [3].

³⁹ *Cossey* HC, above n 21, at [1] and [36].

Simon France and Katz JJ, heard Mx Cossey's appeal against sentence.⁴⁰ Early in its decision, the Court of Appeal set out, in some detail, Mx Cossey's gender identity as follows:⁴¹

It is helpful by way of background to note that Mx Cossey identifies as non-binary. They have masculine physiology but identify as female in their thoughts and feelings. While on custodial remand for the current offending, Mx Cossey started taking testosterone blockers, apparently being the first person to receive this medication in prison. The reports available to the sentencing Court disclose Mx Cossey has had a damaged and traumatic upbringing involving both physical and sexual abuse, as well as dealing with internal confusion over their gender identity.

One of the grounds of appeal was that the 60 per cent discount for mitigating factors (including the reduction for the guilty plea) was insufficient. The appellant sought a total discount of 50 per cent for personal mitigating factors, in addition to the reduction for the guilty plea. The appellant emphasised their “impoverished and dysfunctional upbringing” and the difficulties that discrimination based on their non-binary status caused them both in prison and in the community.⁴² The appellant proposed that 40 per cent be allocated to upbringing factors and addiction, with a further 10 per cent for “the difficulties Mx Cossey's non-binary status cause them both in prison and the community”.⁴³

The Court dismissed the appeal, with Simon France J (writing for the Court) noting that a total discount of more than 60 per cent would engage an inquiry into how adequately the sentence achieved the principle of accountability.⁴⁴ The Court declined to comment on the allocation of “discrete” discounts, noting such an exercise was “difficult” when an offender presents with the complex and challenging circumstances Mx Cossey has confronted.⁴⁵

A second ground of appeal, based on a calculation error, was also unsuccessful. However, the appeal against sentence was ultimately allowed on

⁴⁰ *Cossey CA*, above n 2.

⁴¹ At [3] (emphasis added; and footnotes omitted).

⁴² At [11].

⁴³ At [11]. The Court did not elaborate on what difficulties counsel for the appellant pointed to, but noted in respect of the mitigating features raised: “[T]he material on appeal supports counsel's overview and do not consider it necessary to detail more than what we have the basis for the submissions”: at [11].

⁴⁴ At [15].

⁴⁵ At [14].

account of lack of credit to the time Mx Cossey spent on recall. The original sentence of two years and four months' imprisonment was quashed in favour of a sentence of one year and eight months' imprisonment.⁴⁶

The end sentence imposed was within scope for a sentence of home detention.⁴⁷ Although consideration of a sentence of home detention may have been moot at the time of the appeal (given Mx Cossey had already served a considerable portion of their sentence), the Court did not comment on whether home detention would otherwise have been appropriate in this case, or on the analogy that Jagose J drew between transgender offenders' experiences to those suffering from medical conditions in prison.

IV THE DEVELOPMENT OF A CONSISTENT APPROACH TO SENTENCING GENDER-DIVERSE OFFENDERS

In its judgment, the Court of Appeal noted that Mx Cossey sought a specific 10 per cent discount for “the difficulties Mx Cossey’s non-binary status cause them both in prison and the community” but declined to consider this factor as a “discrete” matter.⁴⁸ If the Court had considered this factor as a “discrete” matter, and commented on the general principles warranting such a discount and the specific percentage discount appropriate in this case, it would have provided much needed guidance to the District Court and High Court on how to approach these issues in similar cases.⁴⁹ However, the Court of Appeal did not take the opportunity to provide such guidance. In addition, the Court did not comment on the analogy between transgender offenders' experiences and those suffering from medical conditions in prison that was drawn by Jagose

46 At [22]–[24].

47 Section 15A(1)(b) of the Act provides that the court is entitled to impose home detention where the court would otherwise sentence the offender to a “short-term sentence of imprisonment”. Section 4(1) of that Act adopts the definition of “short-term sentence of imprisonment” provided by s 4(1) of the Parole Act 2002, being “a determinate sentence of 24 months or less”. Accordingly, the end sentence on one year, eight months' imprisonment reached by the Court of Appeal was in range for home detention.

48 At [11] and [14].

49 The Court of Appeal has previously provided guidance around the principled approach, and appropriate quantum, for other mitigating factors at sentencing. See, for example: *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [149], where the Court indicated addiction causative of offending may warrant a discount of up to 30 per cent, noting that was not an “absolute limit”; *E(CA689/2010) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[88], where the Court of Appeal set out the general principles for discounting a sentence on account of mental health and discussed a previous decisions where it had held a range of discounts between 12 and 30 per cent appropriate for this factor; and *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76]–[92], relating to the assessment of the effect of youth on sentence.

J in the High Court. Because there has been no appellate guidance on these issues, it is worthwhile to examine the cases that preceded *Cossey* and analyse the approaches taken in those cases.

This Part first sets out a number of the inconsistent decisions that indicate a clear need for appellate guidance as to how gender diverse identities should be taken into account at sentencing. Second, it discusses how, in cases where the courts have considered the relevance of gender diverse identities, there is a trend in which judges draw an analogy between transgender offenders' experiences in prison to those suffering from medical conditions, and argues this approach is unduly narrow.

A Issues with the Court's approaches to sentencing transgender offenders

The decisions on the sentencing of transgender offenders (of which there are few) reveal considerable inconsistencies by the Court in its approach to the issue.

At one end of the spectrum, there are a handful of cases where the offender's transgender identity is not acknowledged or is acknowledged only in passing, and where it has either not been raised as a mitigating factor by counsel for the offender, or has not been commented on at all by the Court. In the 2017 case of *R v Blom*, a transgender offender was sentenced to imprisonment with only passing reference to their gender identity, and no consideration as to the offender's likely experience in custody.⁵⁰ Despite noting that the offender was "transgender, having identified so from a young age",⁵¹ the issue was not raised or considered again in the sentencing decision and the Judge simply concluded there were no personal mitigating factors warranting a discount.⁵² In the 2020 case *R v Winter*, no acknowledgment was made of the offender's gender identity whatsoever in respect of sentencing.⁵³

In one 2019 decision, *R v Rudolph*, the Court acknowledged the offender's gender identity and the potential hardship that may arise in prison but did not accord those factors any weight at sentence. In that case, Moore J acknowledged

⁵⁰ *R v Blom* [2017] NZHC 8273.

⁵¹ At [27].

⁵² At [55].

⁵³ *R v Winter* [2020] NZHC 1115.

the difficulties transgender offenders may face in prison. Nevertheless, the Judge found:⁵⁴

In your case, however, it appears that your time in prison has helped you to turn something of a corner in your life. In that sense it has had a beneficial effect and there is nothing before me to suggest that prison in your case will carry the particular burdens other transgender defendants may suffer. For that reason I am reluctant to give a discount on that score.

On the other end of the spectrum, in the 2019 decision *R v Beaumont*, Dunningham J discounted the sentence by approximately 16 per cent because of the offender's gender dysphoria and mental health issues.⁵⁵ Her Honour held that an offender's gender dysphoria would mean that:⁵⁶

...there is a risk that imprisonment will be more difficult for you than for other people and a lengthy prison sentence will impair your ability to be rehabilitated and to re-integrate at the conclusion of your sentence.

As identified earlier, in the 2021 decision *R v Cossey*, a 60 per cent discount was given for a number of reasons, including Mx Cossey's gender diverse identity.⁵⁷

Discounts are ultimately a matter for the sentencing judge in the individual case, and, as noted above, not all gender-diverse individuals will experience disproportionately severe impacts when imprisoned. However, they are far more likely to experience these issues than cisgendered individuals and the cases set out above show that, currently, there is no consistent approach taken by the Court (or by counsel acting for transgender offenders, who may not be raising the point where it is available).

B The “medical condition analogy”

Even where gender diverse identities are considered relevant, this may not be done in a manner which is appropriate. In two of the above cases where the relevance of an offender's diverse gender identity was considered (*R v Cossey* and *R v Rudolph*), the courts drew an analogy between transgender experiences in prison to having a medical condition.⁵⁸

⁵⁴ *R v Rudolph* [2019] NZHC 1050 [*Rudolph* HC], at [42].

⁵⁵ *R v Beaumont* [2019] NZHC 1235, at [20]-[21].

⁵⁶ At [20].

⁵⁷ *Cossey* HC, above n 21, at [28].

⁵⁸ *Cossey* HC, above n 21, at [27]; and *Rudolph* HC, above n 54, at [41].

In taking Mx Cossey’s gender identity into account for the purposes of a discount, Jagose J in the High Court perceived as relevant “the disproportionately severe nature of [their] imprisonment as a transitioning transgender prisoner in a men’s prison, *which may be viewed analogously with credit given for medical conditions with comparable effect*”.⁵⁹

Similarly, in *R v Rudolph*, Moore J stated that discounts for an offender’s transgender experience are:⁶⁰

...predicated on and analogous to a situation where a medical condition or mental health issue would render a sentence of imprisonment a more severe penalty for a particular offender.⁶¹ Parallels may also be found in the recognition Courts will give when a prison sentence may be especially onerous on young persons.

The sentencing in *Rudolph* was also brought before the Court of Appeal, but, as with *Cossey v R*, the Court did not engage with the approach to this mitigating feature.⁶²

This “medical condition analogy” approach significantly understates the disproportionate impact of imprisonment on transgender offenders. By unduly focusing on the medical element of transition, or by merely seeking to compare the transgender experience to those suffering from medical conditions, the approach unjustifiably narrows the basis upon which a transgender offender might receive a discount at sentencing. It ignores much broader issues faced by gender-diverse people in prisons set out at the commencement of this case note – most significantly, the discrimination, harassment, and risk of physical and sexual abuse faced by gender-diverse people in prison. Viewed in that light, even a discount of 10 per cent may be considered insufficient, given Mx Cossey’s gender identity is highly likely to make a sentence of imprisonment disproportionately harsh on account of more than merely medical considerations.⁶³

The Court of Appeal did not take the opportunity presented by *Cossey v R* to set out principles on how discounts regarding gender identity should be approached. The Court of Appeal should take the opportunity with a future

59 *Cossey* HC, above n 21, at [27] (footnotes omitted, emphasis added)

60 *Rudolph* HC, above n 54, at [41].

61 *R v Verschaffelt* [2002] 3 NZLR 772 (CA) at [22]; and *R v Wright* [2001] 3 NZLR 22 (CA).

62 *Rudolph v R* [2019] NZCA 451 [*Rudolph* CA].

63 Shenoy and others, above n 1, at 8–9.

case to guide the sentencing of transgender offenders in a principled way, and in doing so, directly address the appropriateness of the present narrow “medical condition analogy” approach.

C Improving sentencing practice for transgender offenders

Considering the current inconsistent approaches set out above, it appears that the relevancy of an individual’s diverse gender identity is left largely up to chance. Having regard to the clear evidence of the challenges faced by transgender prisoners this case note suggests that gender-diverse identities should be a mandatory consideration at sentencing and that Aotearoa should consider adopting a rebuttable presumption in favour of a discount for offenders in these circumstances.

First, to ensure the Court turns its mind to the gender identity of the individual, Parliament should consider including “the gender identity of the offender” in the list of mitigating factors in s 9(2) of the Act.

Similarly, as this case note builds on further below, there is clearly a need for better resources and training for counsel and the judiciary to properly recognise issues relating to gender identity, and to understand and uphold the dignity and safety of gender-diverse individuals.⁶⁴

With respect to the sentencing approach, it is clear gender identity needs to be better taken into account. This may include consideration of a rebuttable presumption of a discount. A presumption may be beneficial as at present the evidence demonstrates that transgender prisoners are likely to find any sentence of imprisonment so severe as to justify a discount at sentencing. A presumption could stand until sufficient change takes place to ensure that gender-diverse individuals do not experience disproportionate hardship during their time in prisons. This approach would recognise the particular risks faced by gender-diverse people when imprisoned and would require the judiciary to turn their minds to this point at sentencing, avoiding the situation seen in cases such as *R v Blom*.

D Alternative sentences to imprisonment

Lastly, in respect of the decision in *Cossey v R*, despite ultimately substituting a sentence of one year and eight months’ imprisonment, the Court of Appeal gave no consideration to alternative sentences to imprisonment. It is not

⁶⁴ Bartels and Lynch, above n 15, at 229.

apparent from the judgment whether alternatives to imprisonment were sought on appeal, or whether such a sentence would have been practical given the amount of time Mx Cossey had already served. However, it is observed that, had this sentence been reached in the first instance, the High Court would have been permitted to consider sentencing Mx Cossey to home detention at Higher Ground, avoiding the trauma associated with imprisonment altogether and enabling Mx Cossey access to treatment specific to their gender needs.

Given the clear benefits of home detention and other non-custodial sentences for non-binary individuals such as Mx Cossey, it is unfortunate that the Court did not confront the issue – particularly given the requirement to impose the least restrictive sentence appropriate in the circumstances.⁶⁵ Where such a sentence would otherwise meet the purposes and principles of sentencing, the court should impose alternative sentences to imprisonment for gender-diverse individuals, acknowledging the difficulties they are likely to face during imprisonment.

In addition, where a sentence is reduced to reflect the fact that a sentence of imprisonment would be disproportionately harsh in terms of s 8(h) of the Act, and the end sentence falls within the range for home detention, continuing to impose a sentence of imprisonment could be viewed as inconsistent with the basis upon which the earlier discount given. Guidance from the Court of Appeal regarding how courts should approach such circumstances would be welcomed.

V MISGENDERING

As demonstrated by the High Court decision in *R v Cossey*, transgender offenders appearing before the Court remain at risk of being misgendered. This case note now turns to consider the issue of misgendering generally, examine the approaches taken in *Cossey* and other cases, and suggests how courts and participants might avoid this harmful behaviour.

A Defining “misgendering”

Misgendering can refer to the use of honorifics, names, or pronouns which are not those used by a particular individual.⁶⁶ Misgendering is disrespectful,

⁶⁵ Sentencing Act 2002, s 8(g).

⁶⁶ McNamarah, above n 12, at 2252.

humiliating, dehumanising, and conveys a message that gender-diverse individuals are of a lesser social standing.⁶⁷

Deadnaming is the act of referring to someone who is transgender with the name that they used before transitioning.⁶⁸ This practice is both harmful and offensive, as it acts to erase an individual's identity.⁶⁹ Even individual acts of deadnaming can inflict immense psychological harm.⁷⁰ Misgendering and deadnaming are both practices which fail to maintain the dignity of offenders and are not mana-enhancing.

An Australian study has identified that gender-diverse individuals experience misgendering and mistreatment in courtrooms, with three out of five participants reporting that they felt they were treated disrespectfully.⁷¹

B Misgendering in Aotearoa

Over recent years there have been several instances of courts misgendering gender-diverse individuals and addressing them by their deadnames. *R v Blom*, *R v Beaumont* and *Department of Corrections v Parsons* (which was a decision concerning an application by Department of Corrections for an extended supervision order, rather than a sentencing matter) are examples of cases where there has been poor recognition of an offender's gender identity.⁷²

In *R v Blom*, the Court referred to the transgender offender as “Mr Hakeke” on 14 occasions, despite the Judge acknowledging that she was transgender.⁷³

In *Department of Corrections v Parsons* Nation J discussed how the offender wished to start the transitioning process to be a transgender woman, but the judgment referred to her with he/him pronouns, and used “Mr”.⁷⁴

In *R v Beaumont*, Dunningham J acknowledged that the offender identified as female, and used the name Rose Beaumont, however her Honour

67 At 2265, 2268 and 2273.

68 Stephen Turton “Deadnaming as disformative utterance: the redefinition of trans womanhood on Urban Dictionary” (2021) 15(1) *Gend Lang* 42 at 43.

69 At 46.

70 At 59.

71 Mitchell, above n 16, at 5.

72 *Blom*, above n 50; *Beaumont*, above n 55; and *Department of Corrections v Parsons* [2017] NZHC 229.

73 *Blom*, above n 50, at [27].

74 *Parsons*, above n 71, at [23]. Many gender diverse individuals have different pronoun and name preferences that are not necessarily able to be inferred by their stage in their transition. This case note has had to rely on what the courts have said about the defendants to determine preferences, which may not be clearly set out in a judgment. Therefore, it is possible here that the defendant used he/him pronouns, and the Court was not misgendering them.

still sentenced the offender with her deadname, which appeared on three separate occasions throughout the judgment.⁷⁵

In addition to misgendering, the Court has, at times, unnecessarily emphasised the offender's gender identity. In *Rudolph v R*, the Court of Appeal employed she/her pronouns for the appellant.⁷⁶ At the third footnote, with no relevance to any particular point (except perhaps to explain the judgment's approach to pronouns), the Court stated that "although the appellant was born male, we refer to her using feminine pronouns as she identifies as transgender".⁷⁷ Without further information, it seems unnecessary to say that the appellant was born male, and the reference to the appellant's transgender identity at that point in the decision was perfunctory. To the extent the Court's comment was to address the apparent inconsistency between the case name and the pronouns in the judgment, this example emphasises the need for preferred names to be determined by those filing proceedings – as explored later in this case note.

There are, however, some examples of better practice. In *Pohutuhutu v R*, Winkelmann, Wylie and Whata JJ of the Court of Appeal correctly used she/her pronouns for a transgender offender.⁷⁸ At footnote 26, it was stated that "Ms Pohutuhutu is a transgender female".⁷⁹ The purpose of this footnote was not to needlessly draw attention to Ms Pohutuhutu's identity, but to provide clarity for a point in the submissions regarding her wishes to remain in a separate prison.

Indeed, in more recent decisions, there appears to be at least more consistent awareness of the issue. In the 2020 case of *R v Winter*, Ms Winter's deadname was still given in the intitling, but her name (Ashley) was also provided in brackets. She was also referred to as Ms Winter throughout the judgment by Brewer J.⁸⁰ Also, in *Cossey*, the Court of Appeal used the correct pronouns and honorifics for Mx Cossey.⁸¹

The above cases demonstrate an inconsistency in approach to adopting the appropriate pronouns and names for transgender offenders in court. To the

75 *Beaumont*, above n 55, at [1], [23], [24].

76 *Rudolph CA*, above n 61.

77 At 3.

78 *Pohutuhutu v R* [2017] NZCA 501.

79 At fn 26.

80 *R v Winter*, above n 53.

81 *Cossey CA*, above n 2.

extent the cases referred to show misgendering, that is of particular concern. Being deadnamed by powerful figures such as judges in the intimidating environment of a courtroom (and recorded permanently in a judgment) could be damaging for offenders.⁸² In addition, misgendering from significant institutional actors such as judges can also serve as an invitation for others to do the same.⁸³ Changes are required to create a system that is mana-enhancing and upholds the dignity of offenders.

C Resolving issues in misgendering

While this case note has focused primarily on the wording that has been employed by the judiciary in judgments, all parties play a part in ensuring correct names and pronouns are used, and the dignity of gender-diverse peoples appearing before the court is maintained. This includes defence counsel, prosecutors, Police, the Department of Corrections and court administration.

It is of the utmost importance, therefore, that the individual's views are represented. Practically speaking, the responsibility lies with counsel (both prosecution and defence) in the first instance to make enquiries to establish the name, pronouns and honorifics of the individual, and to convey those matters to the Court. It may well be the case that some individuals wish for their deadname to be used for whatever reason, or may be ambivalent towards pronouns and honorifics. Others may find the experience of being misgendered upsetting. In any case, to ensure clarity and maintain the dignity and mana of the individual, the enquiry should be made at an early stage. Gender-diverse participants in an Australian study have called for formal and procedural changes to the legal system which enable the correct use of people's names and pronouns.⁸⁴

To streamline the above, consideration should be given by the prosecution (when filing charging documents) to seeking this information from the individual concerned at an early stage of the criminal proceedings. The position could then be confirmed in formal court documentation, through the inclusion of gender identity as a requirement under the particulars of the defendant which must be specified in charging documents pursuant to s 16 of the Criminal Procedure Act 2011. Court administration could separately ensure individuals are able to advise how they wish to be addressed, including

⁸² Recognising there may be a diversity of perspectives on this topic, as noted in the next section.

⁸³ McNamarah, above n 12, at 2320.

⁸⁴ Mitchell, above n 16, at 7.

name, pronouns and honorifics. This information could then be distributed to all involved, including the prosecution, defence counsel and the judge.

Finally, as noted earlier, the above case law suggests a clear need for further training in the legal profession. To embed the proper acknowledgment of gender-diverse peoples, consideration may also be given to amending the Guidelines for Judicial Conduct to set out the importance of addressing individuals in their preferred manner.⁸⁵

VI CONCLUSION

Transgender individuals can experience immense harms in prisons. They face higher levels of violence, sexual assault, social exclusion, bullying and are subjected to harmful misgendering.

Cossey v R represents a missed opportunity by the Court of Appeal to clarify the law regarding the relevance of, and weight to be given to, gender identity as a mitigating factor at sentencing. The courts should not regard gender-diverse identities as akin to a medical issue and should instead consider the unique circumstances which result in transgender inmates being especially vulnerable in prison. Changes must occur, such as through the consideration of a presumption in favour of a discount for gender-diverse individuals, and through new processes to address the misgendering of individuals appearing before the court.

85 Guidelines for Judicial Conduct 2019.