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Cisheteronormativity and the Court: A Queer Criminological Approach

Robert Sewell, Ti Lamusse, and Fiona Hutton*

Abstract
This article explores the experiences of takatāpui/LGBTQ+/queer people within Aotearoa/New Zealand's courts, as defendants, victims and lawyers. Within this qualitative study, participants share stories filled with various challenges, including fears about engaging with the justice system, how gender and sexuality can affect a court case, and what support is available to takatāpui/LGBTQ+/queer people accessing justice. Underpinned by a queer criminological perspective, this article interrogates the latent, structural nature of cisheteronormativity as a form of harm, with particular consideration of its implications for access to justice in Aotearoa/New Zealand. Collectively, the findings of this study underscore the challenges faced by takatāpui/LGBTQ+/queer people when navigating the criminal justice system, particularly within the District Court of New Zealand.

Keywords: cisheteronormativity; access to justice; queer criminology; gender and sexuality; Aotearoa/New Zealand criminal justice system

Introduction

The Aotearoa/New Zealand criminal justice system is a primary mechanism through which state power is experienced on these islands. For some members of marginalised or oppressed groups, the criminal justice system has been a source of imprisonment, impoverishment and incarceration. However, despite it being nearly 40 years since the Homosexual Law Reform Bill was passed, there has been limited investigation of takatāpui/LGBTQI+/queer people's experiences of the criminal justice system in Aotearoa/New Zealand. Where that research exists, it is largely in the context of a wider investigation into the lives of takatāpui/LGBTQI+/queer people more broadly (Veale et al., 2019), or where takatāpui/LGBTQI+/queer experiences are an additional demographic for analysis (Mackenzie & Dickson, 2024; New Zealand Crime and Victims Survey (NZCVS) Project Team, 2023). This existing research has provided invaluable insights into experiences of Police discrimination and mistreatment (Mackenzie & Dickson, 2024; Veale et al., 2019), as well as higher rates of victimisation experienced by takatāpui/LGBTQI+/queer people (Dickson, 2017; New Zealand Crime and Victims Survey (NZCVS) Project Team, 2023).

Queer criminology is a subdiscipline that produces criminological research and theory that puts queer people's experiences at the centre, challenges cisheteropatriarchal power relations, and deconstructs existing criminal justice discourses and practices (Ball, 2014, 2016; Buist & Lenning, 2022; Dwyer, 2022; Lamble et al., 2020). However, there is a scarcity of research that primarily investigates

* **Robert Sewell** is a recent Master of Arts student at Te Herenga Waka|Victoria University of Wellington. He has experience as a deputy registrar of the District Court and providing policy advice for the Courts, with a particular concern for LGBTQ+ issues within the justice system and equitable access to justice in New Zealand.
Ti Lamusse (he/they) is a lecturer in Criminology at Te Herenga Waka|Victoria University of Wellington. Ti's research investigates experiences of the New Zealand criminal justice system and alternatives to prisons.
Corresponding author: ti.lamusse@vuw.ac.nz
Fiona Hutton is an associate professor at the Institute of Criminology, Te Herenga Waka|Victoria University of Wellington. She is the author of *Risky Pleasures? Club Cultures and Feminine Identities* (2006) and the editor of *Cultures of Intoxication: Key Issues and Debates* (2020). Her current research explores how diverse intoxication practices are responded to.

takatāpui/LGBTQI+/queer experiences of the criminal justice system in Aotearoa/New Zealand (Dwyer, 2022; Lamusse, 2023). As a result, this article draws on more-developed feminist criminological thought (Jordan, 2008, 2023), as well as research into queer experiences of the courtroom from abroad (Mogul et al., 2012). Queer criminology provides a useful theoretical underpinning and methodological approach for the present research. First, the prioritisation of queer and trans experiences, in this study, allows for deeper insight into these lived experiences. This approach contrasts with other criminological research which simply adds Rainbow people to a larger demographic 'soup' (Dwyer, 2022). Second, these experiences provide insight into the role of cisheteronormativity, as a form of social harm worthy of investigation in and of itself (Lamusse, 2023).

Adjusting Cohen's (1997, p. 440) definition of heteronormativity, *cisheteronormativity* could be defined as those localised practices and those centralised institutions that legitimise and privilege heterosexuality and heterosexual relationships, as well as a binary gender system rooted in biological assumptions, as fundamental and 'natural' within society. Instead of focusing solely on the experiences of marginalisation and discrimination of the participants, a queer criminological approach also takes aim at the power structures that create these experiences (Lamble et al., 2020), including the intersecting and mutually constitutive structures of settler colonialism, capitalism, patriarchy, ableism and racism. As such, this article interrogates cisheteronormativity as a form of harm with particular consideration of its implications for access to justice. In this way, this article adopts a *zemiological perspective*, expanding beyond traditional criminological concerns with 'crime' to a conceptualisation of social harm (Hillyard & Tombs, 2007).

This article will explore both interpersonal and structural cisheteronormativity within the courtroom and the cisheteronormative bind of how gender and sexuality are represented within that context. First, the methods are outlined, including the analytical framework and issues around reflexivity. The themes identified through this process are then explored in the remainder of this article. Second, the ways in which the participants' identities affected their court experiences, through gendered charges, gender and sexuality evidence and their ability to access justice are explored. Third, the article examines how gender and sexuality can influence court proceedings and justice outcomes in more implicit ways, such as through pronoun usage and presentation of takatāpui/LGBTQI+/queer identities. Fourth, the legal profession is critically analysed as a means of providing support for people accessing justice in the Aotearoa/New Zealand criminal justice system and suggests lawyers and judges may be causing harm to the people they are supposedly meant to protect. Finally, the article briefly demonstrates the cisheteronormative expectations placed on a Rainbow defendant, who was required to take part in a programme run by a homo/transphobic organisation.

Methods

This article is a component of an MA thesis in Criminology (Sewell, 2023), conducted by the first author, with supervision from the second and third authors. The aim of the study was to explore the experiences of takatāpui/LGBTQI+/queer people in the District Court of New Zealand. Data collection involved nine semi-structured qualitative interviews, with three victims, two defendants, three lawyers and a key informant from an advocacy organisation for non-binary and trans people. All the participants self-identified as takatāpui/LGBTQI+/queer or had represented takatāpui/LGBTQI+/queer people as defence lawyers. Participants were recruited through physical posters in the Burnett Foundation and Christchurch City Libraries and via social media posts by Rainbow service and criminal justice organisations, including Canterbury-Westland Law Society, People Against Prisons Aotearoa and Gender Minorities Aotearoa. After recruitment, each interview (approximately one hour each) was conducted online using Google Meet due to geographical distances. These interviews were then transcribed and coded manually and using the transcription software Descript to ensure accuracy.

The data were analysed using *reflexive thematic analysis* (RTA). There are six phases of RTA: familiarisation; inductive coding; generating initial themes; reviewing and developing themes; refining, defining and naming themes; and writing up (Braun & Clarke, 2021). These phases were followed, with particular attention to the necessity of reflexivity in generating codes and themes. The headings of this article reflect key themes constructed through the RTA process: gender and sexuality—evidence and influence; presentation of gender and sexuality in the courtroom; cisheteropatriarchy in the legal profession; Man Up and cisheteronormative expectations for queer defendants.

Research on people who identify as a gender or sexual minority may be considered 'high risk', and so particular care was taken to ensure the researchers were aware of the care required when researching takatāpui/LGBTQI+/queer experiences. The research adopted "duty ethics of principles" to ensure that "honesty, justice and respect" were held at the forefront of all intents (Edwards & Mauthner, 2002, p. 20). In the context of ethics, justice is an ongoing process of care based on ethical values of "reconciliation, reciprocity, diversity and responsibility" (Edwards & Mauthner, 2002, p. 23). To properly understand the participants' ability to access justice, this study took a level of care to ensure it treated the experiences shared justly. Effective research should involve partnership with marginalised communities, prioritising accountability, transparency and cultural sensitivity to enhance trust and relevance (Mortimer et al., 2023). Researchers must recognise the potential for misinterpretation or misrepresentation of their findings and strive to ensure their work does not perpetuate harm or negative stereotypes (Mortimer et al., 2023). As a result, the primary researcher sought advice and training from InsideOUT.[34] InsideOUT also provided guidance on wording of recruitment posters. The research was supervised, and this article co-written, by a queer criminologist. Further methodological underpinnings and exploration of this study are provided elsewhere (Sewell, 2023).

Gender and sexuality: Evidence and influence

The takatāpui/LGBTQI+/queer participants in this study faced challenges when accessing justice through the courts. For example, some participants had fears around accessing justice while others had those fears realised, as their gender or sexuality influenced the outcome of their proceedings. Charlie,[35] a non-binary, bisexual, sexual-violence survivor, had heard "horror stories" of people's prior experiences. Those second-hand experiences made them reluctant to share their identity with the Court:

> I never overtly said that I was—that I'm bisexual. I never mentioned that. I think because I didn't think that it was relevant. But also, because I'd heard horror stories of things being used. (Charlie)

When asked what they precisely feared would happen had they disclosed their sexuality to the Court, Charlie answered, "I think it's just like having to prove that it's valid." For other participants in this study,[36] their gender and sexuality were used as a weapon to demonise them or discredit their experiences. For those people, Charlie's fear about the horror stories of the weaponisation of gender and sexuality were a lived reality, as detailed further below.

Sophia, an experienced lawyer, represented a genderfluid and pansexual defendant, Jamie. Sophia represented Jamie through the Family Court for dissolution of marriage and care of children, and the Criminal Court, arising out of one instance of family violence. As their lawyer, Sophia recalled how opposing counsel raised Jamie's sexuality during Family Court proceedings. The lawyer for Jamie's ex-

[34] InsideOUT is "a national charity providing education, resources, consultation and support for anything concerning rainbow and takatāpui communities" (InsideOUT, n.d.).
[35] All participant names mentioned in this article are pseudonyms to protect the participants' privacy and identities.
[36] See Felicity and Sophia's client Jamie's experiences on the following page.

partner submitted Jamie's genderfluidity and pansexuality as a reason to restrict Jamie's contact with their children. The opposing counsel claimed that Jamie was not actually genderfluid and pansexual, but that their identity and sexuality was merely a "by-product of the fact that [Jamie was] molested as a child". Sophia claims Jaime felt stigmatised by this experience. Sophia believes this stigmatisation led to Jamie's hesitancy to engage in the Criminal Court, when charged by the Police for an assault on their ex-partner.

> [Jamie], in particular, had a lot of very strong views [about pleading not guilty to the family violence charges] and was very hesitant and very opposed to engaging in the court system. [Jamie was] quite distraught about the fact [their sexuality was] played out in the Family Court. (Sophia)

Calton et al. (2016, p. 590) discuss how the intersection of stigma and sexuality can have an increased effect on queer sexual-violence survivors as the "shame, embarrassment, and guilt surrounding [sexual-violence survivors] may be compounded by LGBTQ stigma, making it even harder to seek safety and support". For Jamie, rather than being able to access justice as their true self, their previous experiences of victimisation were used to discredit and stigmatise their identity. To have their victimisation potentially weaponised against them demonstrates the alienating and stigmatising practices of courts for gender diverse people.

Another of Sophia's clients, Chris, who is non-binary, was charged with 'male' assaults 'female', even though the 'assault on a person in a family relationship' charge was available and more applicable.[37] After charging Chris, with 'male assaults female,' the Police prosecutor challenged Chris' gender during pre-trial discussions:

> There was a comment made as to whether or not [Chris' gender identity] was just a bit of a cop-out, [because Chris] "still looked male, so why on earth would they be running the argument that they weren't". Like, [the prosecutor was implying] "Are you just trying to say that they are non-binary so you can try and get a lesser charge?" (Sophia)

Charlie's (non-binary victim-survivor) fears about having to validate their identity were similar to the experience of Sophia's client Chris in court. As the complainant was their ex-partner, Chris should have been charged with assault on a person in a family relationship. However, because the Police charged Chris as a man, gender would inevitably become relevant if the matter progressed to trial.

Sophia believed that as a 'male-presenting' non-binary defendant in a small-town family violence case, Chris's gender identity might distract entirely from the relationship, clouding the perception of their culpability of the assault.

> [If Chris] had elected for a jury trial [for the male assaults female charge] ... then having to have that discussion around the fact that [Chris was] born male, and they may appear to you as the stereotypical appearance of a male, but that is not how they identify, [gender identity] was going to be a whole other issue that we were going to have to address if that went to trial. (Sophia)

In this case, Chris's gender identity never overtly affected their case before the Court, as Sophia said, "Thankfully, it didn't progress to [trial]."[38] Because of the Police's misgendered charging decision, and the subsequent role of Chris's gender identity in a potential trial, Chris expressed a desire to disengage with the court process and plead guilty. In this case, the fear of gender identity becoming a factor at trial, rather than

[37] As there is a gender-neutral charge available, with the same penalty, charging Chris with the gendered charge was unnecessary.
[38] Chris's assault allegations were eventually resolved on the assault on a person in a family relationship charge to which they entered a guilty plea.

an actual acceptance of culpability, shaped its outcome. Consequently, the decision to misgender Chris in the charging process limited Chris's ability to access justice in the courts.

Accessing justice as a victim can also be difficult for takatāpui/LGBTQI+/queer people (D'Cruz, 2023; Dickson, 2017). Felicity is a trans woman who was sexually violated by an associate shortly after returning from gender-affirmation surgery abroad. She gave evidence as a sexual-violence survivor in a jury trial, and like Sophia's client Jamie, Felicity experienced being 'outed' in court. The prosecutors gave Felicity the option to out herself to the Court or risk the defence outing her:

> The prosecutor basically said, "Look, there are two ways we can do this." Either we don't mention [my gender] and [I] just get sprung the questions in open court or, before the cross, [the prosecutor] can basically ask me questions and just put it out there. And that essentially nullifies the argument, and [the defence] didn't bring it up. [The prosecutor] was right. [The defence] didn't bring it up in cross at all, which is fine, but it's kind of like, why? And in what way is [my gender] relevant at all? (Felicity)

On advice from the prosecutor, Felicity shared her identity as a trans woman with the Court. It is difficult to ascertain if there was any real benefit to Felicity in the prosecutor raising it in the first place. Felicity suspected that "[the defendant] was arguing that he was curious about being with 'a trans' or something". If true, it suggests that the hyper-eroticised nature of trans-women's bodies (Reback et al., 2016) serves as a justification for their objectification and victimisation, in the mind of the perpetrator or their counsel.

For Felicity, although her gender identity was not an immediate issue in the trial, the defence chose to focus on her sexuality. Felicity reported being "badgered" on the witness stand for several hours about her relationship or desire for a relationship with the defendant (a man). She had earlier identified herself to the Court as a lesbian:

> I said that I identified as lesbian.[39] Um, but [the defence] kept trying to suggest I had had a relationship or even wanted a sexual relationship with [the defendant]. And I think at one point I actually turned to the jury and said, "I'm not sure what part of lesbian they don't understand." … It fundamentally precludes that I would have any interest in this [man]. (Felicity)

Felicity was forced to prove and validate her sexuality in the same ways that Charlie feared. Not only having to say that she was a lesbian at court, but to have that ignored, was incredibly "traumatising" for her. The defence team questioned Felicity about her relationship with the defendant for nearly a full day. A relationship that she continuously insisted went against her sexuality:

> The same question over and over and over. [The defence lawyers were] trying to establish whether I was in a relationship with [the defendant] and which I kept pointing out a) [I] wasn't, but b), even if I was, that … wouldn't mean anything. (Felicity)

As Felicity mentions, regardless of whether a victim is in a relationship with a defendant, sexual contact without consent is still a crime (Crimes Act 1961, ss 128–128A). Instead, Felicity's sexuality appears to have been invalidated in order to justify or excuse her victimisation—suggesting that she actually wanted to be sexually violated. This is not an experience unique to queer victims, and has been documented by feminist criminologists in relation to women's experiences in courts as victims of sexual violence (Jordan, 2023).

Felicity's experience is not unique and does not merely reflect the experience of gender diverse people. Instead, in a formal justice system that prioritises the institutional interests of its professional

[39] Since her court appearances, Felicity has come out as bisexual, but at the time of these events, she fully identified as a lesbian and told the court as much.

components (Christie, 1977), formalism can lead to court proceedings that embrace conflict, strategic use of facts, and repeated questions to find inconsistencies in witnesses' and defendants' stories (Crenshaw et al., 2019, p. 781). For non-professional participants in this process, the adversarial and intimidating nature of the courtroom appears to be based on "the assumption that this hostile, tense, adversary context aids the truth-seeking process" (Crenshaw et al., 2019, p. 781). This may not always be the case. In the case of child witnesses, Klemfuss et al. (2014) found that participants can engage in court more wholly and productively when presented with a warm, supportive and sensitive environment. For the multiply marginalised victims of sexual violence, it is difficult to see how the formal system of justice can offer much beyond the reproduction of cisheteropatriarchal values, for the strategic purposes of its professional class.

Presentation of gender and sexuality in the courtroom

Alongside gender and sexuality evidence, how a person presents themselves, physically, in a courtroom can directly affect the outcome of their case, whether they are a defendant or a victim (Bartlett, 1994; Mahajan, 2007; Wiley, 1995). One of the core elements of non-binary or transgender presentation is the use of pronouns (Sevelius et al., 2020). Andrew (heterosexual lawyer), at his first appearance representing a transgender client, Ella, for aggravated assault, requested correct name and pronoun usage from the Court and prosecutors.

> Everyone's been perfectly fine to call her [Ella]. There's been no pushback—there's been no snide insulting or offensive remarks or anything like that. (Andrew)

Most of the participants in this study agree that the Court has improved in recent years regarding pronoun usage. However, correcting incorrect pronouns is a relatively simple issue to address, as using incorrect pronouns represents semantic or surface-level expressions of cisheteronormativity.

Latent, structural expressions of cisheteronormativity were present throughout the participants' experiences, profoundly affecting their treatment and experience while accessing justice. Many defendants' first interaction with the court is with duty lawyers,[40] immediately before their first appearance. Mogul et al. (2012) demonstrate, in the American context, how a homo- or transphobic lawyer can be seriously detrimental to defendants and their access to justice. Emma, an experienced lawyer and a queer person herself, has worked as a duty lawyer and witnessed how other counsels refer to potential clients behind their backs. Specifically, Emma says one of the most obvious ways that duty lawyers use to tell if a client is takatāpui/LGBTQI+/queer is if the defendant brings their partner. When asked if she had seen duty lawyers mistreating takatāpui/LGBTQI+/queer clients, Emma responded:

> Only when they bring their partners. And that's something that I think defendants that have had a little bit of experience in the courts know not to do. … [T]hat's when you get negative comments from lawyers off to the side like "I'm not seeing [that client]." (Emma)

For any person, their partner is potentially their strongest support, and a heterosexual person may be able to have that partner present without adverse outcomes. Unfortunately, in Emma's experience, some duty lawyers are not willing to provide the same level of support to takatāpui/LGBTQI+/queer people.

Mistreatment by duty lawyers at first appearance is something Sam, a "queer/lesbian" person, experienced firsthand. When she was arrested for the occupation of a building during a protest, Sam was dressed how she would on any given day, which she described as "visibly queer" and "loud and proud". After being arrested, Sam appeared in Court dressed in the same clothing:

[40] According to the Ministry of Justice (2021), "Duty lawyers give free legal help to people who have been charged with an offence and don't have a lawyer."

> I went there looking the way I ordinarily looked—just on a day-to-day basis—and quickly realised that was a bit of a mistake, because it meant that I wasn't being taken seriously. (Sam)

For Sam, her physical appearance meant her duty lawyer, the judge, as well as other parties in the court did not recognise her as legitimate. Takatāpui/LGBTQI+/queer defendants and victims may not intentionally dress in a way they feel will disrespect the court,[41] but judges may assess their appearance against unspoken dress standards for non-professional court participants.

Although there is some effort to minimise ethnicity and sexual discrimination in the courtroom, "the broader underlying issue of physical appearance discrimination is largely ignored" (Wiley, 1995, p. 218). The expectations of a courtroom dress code is often rationalised, by the court's professional class, through a desire for formality in procedure and aesthetics (Mahajan, 2007). However, as argued by Bartlett (1994), dress codes are never value- or community-neutral. Instead they reflect existing cultural norms, particularly of the largely White professional middle class overseeing court procedures (Bartlett, 1994). Although a defendant or victim may appear to be dressed 'inappropriately' in the court context (not in formal wear), they may be dressed appropriately in their community or cultural context. Where access to justice is assumed to be an inalienable right, people should be able to present as their true selves. However, as the participants' stories in this study show, how queerness manifests in physical appearance may affect their treatment or the outcome of their case.

In Sam's experience, the duty lawyer was dismissive and did not take her as seriously as her co-defendants:

> I was probably the only person who looked that way ["loud and proud"]. I was maybe taken a bit less seriously [than] some of my co-accused. I think largely just because of my appearance and looking quite weird. (Sam)

Sam's feelings of being treated differently, for presenting her sexuality and queerness through her outfit choice, demonstrate a form of cisheteronormative stigmatisation of non-normative appearance in the courtroom. This stigmatisation may have led to Sam describing herself as "looking quite weird" after recalling this incident, when previously she had used the words "loud and proud". It may have prevented Sam from accessing justice through her duty lawyer.

> I remember the [duty] lawyer being quite dismissive of my contributions and looking more towards the 'straight guys' I was co-accused with. I remember the other co-accused, who was also a woman, was also being dismissed—the lawyer was taking the guys much more seriously. (Sam)

Sam's final point highlights that this may not have been solely queerphobic but also mysogynistic, as the lawyer took only the "straight guys" seriously. The stigma attached to Sam, as a queer person, and the stigmatisation she perceived, as a woman, further impacted her access to justice. Sam's appearance directly influenced the quality of her legal representation and, therefore, her voice in the courtroom.

Rather than being treated differently due to their appearance, some participants were told to appear in a cisheteronormative way. Charlie, a non-binary sexual-violence survivor, appeared at their attacker's sentencing to read their Victim Impact Statement.[42] The detective in charge of Charlie's case advised them to dress in a "feminine" way to gain favour from the judge. At the time, Charlie was in the "discovering

[41] For many queer/LGBTQI+ people, their choice of dress is a political choice of rejecting hegemonic standards of decorum and dress (Nelson, 2020). Therefore, when queer/LGBTQI+ people dress 'queer', they may be doing so in an attempt to subvert cisheteronormativity (Nelson, 2020).

[42] The purpose of a Victim Impact Statement is to tell the Court and the perpetrator how the crime has personally affected the victim and to enable the court to better understand the victim's perspective on the offending (Manaaki Tāngata | Victim Support, n.d.).

phase" of understanding their gender identity.[43] In retrospect, this advice from the detective had a "traumatising effect":

> When it came to the sentencing hearing, it wasn't "You have to dress this way, this way, this way" in how you present yourself, but the detective was very much like: "So there's certain things that you probably shouldn't wear because it gives off the wrong vibe." (Charlie)

Charlie initially expressed concerns, throughout the research interview, about stereotypes around their sexuality leaking into the case. Cabatingan (2018) argues that clothes allow these social artefacts, such as cisheteronormative femininity, to seep into the courtroom. In this way, the Police advised Charlie to present in a particularly feminine manner to induce different (ostensibly more helpful) stereotypes within the judge.

> I felt like I had to dress in pink with a bow in my hair to seem like the perfect victim and that kind of stuff, which I found quite strange. So, I wore pink, like baby pink, a pink floral shirt, and a pink bow in my hair, which I never would've worn otherwise. (Charlie)

The "perfect victim" (Charlie), or in Christie's (1986, p. 18) conceptualisation, the "ideal victim", is a "person or a category of individuals who —when hit by crime —most readily are given the complete and legitimate status of being a victim". From Charlie's perspective, when the detective asked them to dress in a feminine way, they were told they needed to dress differently to achieve legitimacy as a victim. In Charlie's words, dressing that way was to "almost paint [the defendant] in this dark cloud way. And then I'm this light pink bubble or something." Charlie felt like they were presenting an inauthentic version of themselves. The Police tried to portray both Charlie and the defendant in ways that may not have demonstrated the true dynamic of the relationship between attacker and survivor. This experience diminished Charlie's identity and their "legitimate status" (Christie, 1986) as a sexual-violence survivor.

Jordan's (2008) study of New Zealand rape survivors reported that participants felt dependent on the Police, as professionals, to guide them through court proceedings. The study also found that for people who fit the stereotype of the 'perfect victim', the Police provide adequate support (Jordan, 2008). The Police, in Charlie's case, may have been attempting to present a perfect victim to the judge. Christie (1977) describes "professional thieves", being lawyers who steal the conflict from victims and defendants and replace it with a conflict that suits their interests. In Charlie's case, the prosecutors placed higher priority in securing a higher sentence for the defendant than in Charlie's ability to authentically present themselves in Court. In order to achieve an outcome in the interests of the prosecutors, the needs of the victim, and their embodied identity, became secondary.

For takatāpui/LGBTQI+/queer people entering the courtroom, how to present oneself requires ongoing consideration. Charlie (non-binary victim-survivor) and Sam (queer/lesbian defendant) shared opposing views, regarding the advice they would give other takatāpui/LGBTQI+/queer people on how to dress when accessing justice. When viewed in parallel, these provide a unique insight into the lose-lose situation they faced. Sam, who appeared as a "loud and proud" queer defendant, spoke about how she would advise other defendants to dress cisheteronormatively:

> I would hate to say this, but I think the way that the court system, [because of] the people representing you, a lawyer or a judge—my advice would be that they try to look 'straight'. And that's advice that I would absolutely hate to give. But if you want to be taken seriously and respected, it seems, in some cases, it is necessary. (Sam)

[43] Charlie now identifies as bisexual and non-binary. At the time of the sentencing, they identified as bisexual and questioning gender. As discussed previously, Charlie did not share either of these facts with the Court or the Police as they feared it would distract from the case.

For Sam, although the advice goes against what she believes in, she contends it is still needed under the current system to help ensure fair treatment and prevent stigmatisation. Charlie, unlike Sam, appeared as a victim and was told to present in an inauthentic way by the Police. They took a different approach to the advice Sam gave:

> I would take a different stance than what the detective did. I would definitely say just to be yourself, because sexuality and gender identity should not be inhibitors to accessing justice. People are people. (Charlie)

Both Charlie and Sam experienced stigmatisation due to their gender identity and the way they chose to present it in court: Sam, as a defendant, experienced mistreatment due to her perceived 'failure' to dress in an 'appropriate' manner, whereas Charlie's experience, as a sexual-violence survivor, was being asked to dress as the ideal victim. Sam was mistreated for her appearance, so her advice to others was to appear heteronormative and cisgendered to avoid the same experience. This advice contrasts with Charlie's, who appeared inauthentically and wished others would present as their true selves.

When accessing justice through the courts, takatāpui/LGBTQI+/queer people can, thus, face a lose-lose situation. They can either conform their appearance to what the courts deem appropriate and seek justice inauthentically, or appear as their authentic selves but risk being punished or stigmatised. In such a way, they are caught in a court-induced cisheteronormative bind, where they need to either deny their true selves or risk discrimination and stigmatisation.

Cisheteropatriarchy in the legal profession

As defendants pass through the court system, their lawyer is often their only continuous support. Approximately 40% of defendants in Aotearoa/New Zealand are represented through the partially funded Legal Aid system (New Zealand Ministry of Justice, 2023). Rā, a trans community leader interviewed for this study, spoke on the financial difficulties faced by trans people, primarily due to their housing and employment challenges. These difficulties can make them more dependent on Legal Aid and other free legal services, such as Community Law and duty lawyers. Emma, as a duty lawyer, recognises the importance of her role, as "lawyers are the person that the defendant will spend the most time with and will be the most respected by". She wishes all lawyers were able "to support the person, whether the judge does or not". Emma highlights that, during the court experience, the lawyer is usually the only party the defendant will see inside and outside the courtroom. To some extent, the lawyer is the only person a defendant can genuinely rely on in court.

A bigoted lawyer could have a significant negative impact on a defendant and later influence that person's ability to access justice. Emma discusses various instances in which she has seen misgendering, dead-naming or incorrect pronoun usage by lawyers:[44]

> Your lawyer, who's supposed to be supporting you, showing you that they don't accept you or don't accept how you live is soul destroying. And I've had clients come to me, and they had asked the lawyer to use 'they'. The lawyer refused, not just by continuing what they were saying, [the lawyer] literally refused verbally to call them they. To have the person you're supposed to trust to get you through this criminal process yell at you and absolutely refuse to call you they is … I can't even imagine. (Emma)

Something as simple as respecting a their pronouns can have a profound effect on the person's comfort and safety in an unknown or unfamiliar environment (Sevelius et al., 2020). As Emma believes, the lawyer

[44] As noted earlier, some of the participants in this study said that gender recognition and pronoun usage has improved in recent years. Emma's experience demonstrates that this has not been universal.

is the most important person to a defendant in terms of formal support. When a lawyer does not use their client's correct pronouns or name, they are disrespecting and dehumanising their client, and effectively abandoning them to access justice with no meaningful support.

In the 1980s, a Family Court judge referred to Bob, a gay man, as a "sexual deviant", due to his sexuality, during his divorce proceedings. As someone who has, more recently, come to the attention of the criminal justice system, Bob now has two lawyers retained, one of whom he knows to be gay:

> So, there's a gay one. [Names person] is my straight-up lawyer. Hell, he's a hard bastard, but I trust him. I trust him. (Bob)

Having a lawyer who understands his sexuality and experience is reassuring for Bob, which may stem from his previous experience in the Family Court. Like Bob, other participants reported uncertainty about whether the lawyer would support or understand their queerness. In Sam's (queer defendant) experience, "It can be a bit of a lottery with [Legal Aid lawyers]. You're more guaranteed fair treatment if you are choosing your own lawyer." The ability to choose your Legal Aid lawyer is only available to those facing a charge with a penalty of more than 10 years' imprisonment (New Zealand Ministry of Justice, 2024). The uncertainty of not being able to choose a lawyer resulted in some participants opting out of the Legal Aid process, or "lottery" as Sam describes it, which limits their access to justice.

The firm that employs Sophia as a lawyer is not currently doing Legal Aid assignments. However, Sophia's client Jamie (genderfluid and pansexual defendant) was previously under Legal Aid and decided to use Sophia and her firm privately, despite the increased cost. Jamie chose to opt out of the Legal Aid process due to mistreatment by the assigned lawyer:

> [Jamie] was initially legally aided and referred to a Legal Aid lawyer in [small town]. And [the Legal Aid lawyer's] treatment of them was so abhorrent that [Jamie's] family trust became involved and, instead, decided to disburse the family trust to pay for a private lawyer. [Jamie] completely opted out of the Legal Aid process and, essentially, received part of their inheritance early so that they could get appropriate legal representation. (Sophia)

The isolation of Sophia's small town compounds the difficulty of finding a queer-supportive lawyer. Consequently, with the randomly allocated Legal Aid system, it can be too risky to leave it to chance. Jamie, and their family, felt they had to pay for private legal counsel, to ensure they would have legal representation without discrimination. Where cisheteronormativity creates barriers to accessing Legal Aid, it places a financial burden on the person accessing justice.

Rā, who works for a non-binary and trans advocacy organisation, contends that takatāpui/LGBTQI+/queer people often experience financial hardship, due to difficulty finding suitable work, accommodation and other necessities, which can also all be factors leading to appearing in court (as evidenced by Veale et al., 2019). Without having sufficient disposable income, private legal fees for most people, as in Jamie's case, are not feasible. Consequently, Legal Aid and Community Law are essential avenues for supporting takatāpui/LGBTQI+/queer defendants through the court process:

> It's really likely [that] trans people [will] have no money, and so that's one of the reasons [they cannot employ private counsel]. But we have worked with Community Law quite a bit. (Rā)

The community organisation Rā works with has developed a relationship with the local Community Law office to help refer trans people needing representation. Rā elaborates on the challenges faced in finding a suitable lawyer for a trans defendant, especially if they require a niche area of law or live outside one of the main centres:

> [There are challenges for] trans people who are asylum seekers and those kinds of things. Because you need to find a lawyer who understands [your identity]. [But you also] need a specific type of immigration lawyer. And there are not that many of them. Who out of the bloody six in the country [actually] knows about trans stuff? I don't want to say none of them because that would be a bit implicating of everyone. (Rā)

Rā implies that the small number of lawyers working in some specialised areas of law makes finding a trans-inclusive specialist even more difficult. The pool of lawyers who understand trans issues is limited. Finding appropriate representation can be especially difficult when that need overlaps with complex or specialised legal requirements. Fortunately, Sophia's client Jamie could afford to opt out of the Legal Aid system to prevent further mistreatment—but unfortunately, not every person has the same access to resources. Thus, the material implications of cisheteronormativity in the courtroom may be exacerbated for poor or working class defendants.

Emma had an experience with a defendant that echoes the story above, but in a far more worrisome manner. Emma represented a client in the Criminal Court who repeatedly pointed to their criminal history and claimed that they "didn't do that". In Emma's years of experience as a lawyer, she insists that almost every client will say this at some point. However, in this case, Emma discovered her client had only pleaded guilty to those charges so they would not have to continue with their bigoted Legal Aid lawyer:

> I had a client who had an extensive criminal history, and we're going through them one by one, and they were saying, "I didn't do that, I didn't do that, I didn't do that," and you often get people saying that so it's like "Ok." But they said, "In all of those, I pleaded guilty to get out of the system"—because of how they were treated. It was a matter of "I don't trust you to be my lawyer at a trial, so I'm going to plead guilty to get away from you." (Emma)

It is profoundly unjust for a person to plead guilty to a charge to which they are not actually responsible. This particularly undermines access to justice when that guilty plea is due to social harm caused and exacerbated by the justice system itself. In the case of Emma's client, she pleaded guilty under the duress of the legal system to escape from its cisheteronormative oppression. Defendants, like Emma's client, may not have the same resources as Jamie had to employ private counsel when mistreated. Lack of resources may lead to similar decisions to "get away" from these cisheteronormative systems.

At the time of the interview, Emma was doing duty lawyer work but not Legal Aid. Some of her duty clients wished to continue with Emma, due to her understanding of their identity. However, her role as a duty lawyer is to provide on-the-day legal advice and court advocacy; she cannot provide ongoing legal support. This situation can lead to difficult conversations with former clients:

> I am not doing Legal Aid, so telling that person you can't help is really hard. And you can see the disappointment. And often [I] get asked if there's someone you would recommend. [The clients are] not saying out loud "someone who's going to be [non-discriminatory]", but it's that underlying—you know that's what they're asking. (Emma)

For these defendants, Emma's presence and advocacy as a non-bigoted lawyer represents an exception to their previous experience. Unfortunately, given the experiences of other participants in this study, there appears to be no guarantee that they would receive similarly inclusive treatment from the lottery system of Legal Aid.

Some lawyers, like Emma and Sophia, have recognised the social repercussions of speaking out against discrimination within the legal profession, and have been alienated from their colleagues for doing so. Sophia demonstrates the inconsistency in the legal profession's culture across regions in Aotearoa/New Zealand. Practising in a small town, she had a queer colleague who remained closeted to their peers while

working there. That colleague only came out openly in their profession after moving to a major urban centre:

> I have had a colleague, not from this firm, but just a colleague within the bar who did not come out openly about their sexuality for, I think, about five years. Five years of her profession always fielded those discussions, "[Do] you have a boyfriend?" or "[Do] you have a husband?" And it took quite some time. It took her leaving [this town] and relocating to feel comfortable that she could actually come out as lesbian. So, it took her essentially relocating to [a larger city], where there was a more diverse bar for her to feel comfortable. (Sophia)

If lawyers, who hold considerable power and authority within the legal system, do not feel comfortable expressing their gender or sexuality in their profession, it is understandable that their clients, including the participants in this study, have also expressed fears of entrusting their identity to lawyers.

Emma, as a lawyer herself, discusses the relationship between judges and the legal profession and how long it takes for lawyers to be appointed to the bench.

> Someone being a judge after 25 years is early, so it's going to be a very long time before you know the judiciary is caught up. Obviously, I am unaware of what the judiciary goes through in terms of training. But it is desperately needed. (Emma)

She fears any delays in addressing bigotry within the legal profession will be delayed to a greater extent for the judges and contends that without addressing the cisheteropatriarchal culture embedded in judges, the substantive decisions made in the courts may still contain bias. The legal profession is the pool from which judges are appointed, and Emma suggests that any culture change should occur simultaneously in both areas.

However, it appears that considerably more work is needed to achieve that culture change, with multiple participants in this study referring to the "all boys club" of criminal law. One of the most harrowing examples came from Emma, who speaks about feeling excluded from her legal peers due to her gender and sexuality. This was reinforced by her experience at a regional Law Society event, where a senior colleague made a joke that, in criminal law, "as a woman, you're either a slut or a dyke". For Emma, the most concerning part of that interaction was not the joke being made, but the laughter it received. It reinforced to Emma that she was marginalised in her profession. Sophia, another lawyer, describes the casual racism she witnesses in the legal profession. She spoke about a recent graduate lawyer from the Middle East, who had recently joined the bar:

> People refer to him as "the Black one" because he's the only person that isn't Caucasian. (Sophia)

Lawyers, as representatives of the defendant, are one of the few supports offered to people charged with a crime. If lawyers are unable to treat their colleagues with basic respect and decency, it is unclear how they would be able to do so with their clients with considerably less power and expertise. In this sense, the Aotearoa/New Zealand criminal justice system can further harm and marginalise people to whom it is purportedly meant to protect. Legal representation is the primary protection for defendants in the criminal justice system, but as this study shows, the culture of the legal profession, and the system it operates within, may themselves be causing harm. That harm—cisheteronormativity—creates clear barriers to justice for takatāpui/LGBTQI+/queer people in Aotearoa/New Zealand.

Man Up and cisheteronormative expectations for queer defendants

In addition to their experience of accessing justice within the courtroom, some of the participants in this study experienced cisheteronormative expectations during their court cases. Sophia's non-binary client Chris (defendant) was offered diversion for family violence, by the Police. As a condition of that diversion, the Police referred Chris to a gendered violence-prevention programme:

> [Chris has] been referred to Stopping Violence and a programme called Man Up. Don't even get me started on that one. So, we've had discussions. Man Up is no longer on the table. But having to go through Stopping Violence and those programmes, [Chris is] incorporated with the male sessions because [the programmes] don't have non-binary sessions available. (Sophia)

Man Up, a programme run by Destiny Church, has been criticised for its association with the church's leader, Brian Tamaki (Van Beynen, 2019). Tamaki is a vocal opponent of LGBTQI+ rights, including organising the "Enough is Enough" rally against allowing same-sex partners to have civil unions in 2004 (The Press, 2004). In 2024, he encouraged his followers to destroy rainbow-coloured pedestrian crossings (RNZ News, 2024b) and intimidated drag artists into cancelling a planned Rainbow Storytime tour across Aotearoa/New Zealand, after "threats of violence" against the artists (RNZ News, 2024a).

When a non-binary person such as Sophia's client Chris is referred to a Man Up programme by the Court, their gender identity is questioned. Encouraging a non-binary person to 'man up' to prevent violence is to deny them their gender identity. To have that programme operated by a group known for discrimination towards takatāpui/LGBTQI+/queer people could exacerbate participant fears about attending and potentially cause social harm by undermining their safety and mental health. Since 2019, the Department of Corrections banned the Man Up programme from prisons (Walters, 2020, p. 20). However, Sophia's experience with Chris occurred after that time, showing its ongoing use as a programme by other justice institutions, including the New Zealand Police.[45]

Conclusion

The experiences of the participants in this study have demonstrated the importance and urgency of queer criminological research. For too long the stories and struggles of Rainbow communities in Aotearoa/New Zealand have not been adequately heard and addressed. The stories discussed here demonstrate that cisheteronormativity pervades the New Zealand court system and fundamentally shapes takatāpui/LGBTQI+/queer people's experiences of 'justice'. From the use of gender and sexuality as a weapon in court to the cisheteronormative constraints in presenting oneself in court, alongside a non-binary person having to take part in a Man Up programme run by a homophobic and transphobic group, cisheteronormativity shapes LGBTQI+/takatāpui/queer people's experiences of the District Court and creates barriers to access to justice. These experiences are underpinned by a cisheteronormative legal profession, where racism, transphobia and homophobia need to be urgently challenged. Instead of providing justice, the experiences of the participants in this research suggest that the cisheteronormativity of the justice system is harming takatāpui/LGBTQI+/queer people.

As this study is the first of its kind in Aotearoa/New Zealand, there is a need for much further research. This was a relatively small qualitative study on takatāpui/LGBTQI+/queer court experiences as a whole. As a result, there is a need to investigate, in greater detail, some of the findings of this study. This could include further study on the impact of implicit and explicit dress codes in the courts on takatāpui/LGBTQI+/queer peoples, as well as the roles of partners as support throughout the court

[45] Editor's note: Since this article was written, the New Zealand Police have also stopped referring people to Destiny Church's Man Up programme. https://www.rnz.co.nz/news/national/544083/police-stop-referring-people-to-destiny-church-s-man-up-and-legacy-programmes

process. As none of the participants in this study, except for Rā, identified themselves as takatāpui or as a Person of Colour, the ability to provide analysis of the intersectional nature of racism and colonisation on court experiences was limited. Further research may be able to expose some specific experiences of other mutltiply marginalised takatāpui/LGBTQI+/queer people, including how the courtroom and its normative standards affect other intersections of identity, including ethnicity, disability and mental health.

As a part of the emerging queer criminology of Aotearoa, other justice institutions, and takatāpui/LGBTQI+/queer experiences of them, need to be interrogated. There is a need for queer criminology investigation into the judiciary, the Police, the Department of Corrections and the legal profession. This is particularly the case for Police, where conflict between Police and takatāpui/LGBTQI+/queer communities has been politically charged (Lamusse, 2016; Murphy, 2018). Queer criminology also has a role to play in establishing and evaluating alternative justice approaches that could better meet the needs of takatāpui/LGBTQI+/queer people, and Aotearoa/New Zealand as a whole. For those reasons, this study should serve as a rallying call for Aotearoa/New Zealand to critically examine the courts, and whether they fulfil the right to access justice for all New Zealanders—especially for takatāpui/LGBTQI+/queer people. Where they fail to do so, justice transformation is needed.

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