Access to justice for children and young people in Aotearoa New Zealand

Working paper No.10 – Intersectionality

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Context

This working paper forms part of an overall research project exploring the extent to which children and young people are able to access to justice in Aotearoa New Zealand. The findings of the research study are presented in three parts:

Part One contains my analysis of data from key informant interviews with adults with expertise in the justice system and/or working with particular groups of children and young people, as well as from a survey of children and young people aged 14 to 24.

Part Two discusses the meaning of access to justice and other related concepts such as legal empowerment as well as the specific meaning of access to justice for children and child-friendly justice. It then discusses the justice problems experienced by children and young people generally, as well as common barriers to accessing justice. The analysis in this report is based on my review of the research and literature in New Zealand and overseas as well as analysis of information obtained from the government and Crown entities.

This report is supported by a series of ten working papers discussing the justice problems and barriers to accessing justice experienced by particular groups of children and young people and is broken up into a series of reports relating to groups identified as likely to experience differing justice problems or barriers to access. These working papers are:

1. Children and young people in care or with care experience;
2. Disabled and neurodiverse children and young people;
3. Tamariki and rangatahi Māori;
4. Pacific children and young people;
5. Rainbow and takatāpui children and young people;
6. Girls and young women;
7. Boys and young men;
8. Poverty and socio-economic disadvantage;
9. Trauma; and
10. Intersectionality.

Part Three explores possible solutions or ways to close the justice gap for children and young people in Aotearoa New Zealand. This part of the study is also supported by a series of working papers in relation to possible solutions. At the time of writing these working papers consider the following topics with additional working papers likely to follow:

11. Strategic litigation;
12. Legal service delivery, non-lawyer services, and integrated services;
13. Data, evidence and measuring change;
14. Technology;
15. Training for professionals;
16. Legal education and continuing professional development for lawyers and judges; and
17. Law-related education for children and young people.

These reports and working papers are available at: https://www.cypaccesstojusticenz.com/

Introduction

Intersectionality is not just about the intersection of different aspects of a person's identity, "rather it is how power creates identities and identities create (or deny) power".[1] As Noam Peleg explains:[2]

> *Kimberlé Crenshaw's theory of intersectionality suggests that social categorisations – such as race, ethnicity, religion, class, gender, sexuality and, I would add, age – are inherently interconnected, mutually constituted, and converging, thereby creating interdependent systems of disadvantage and discrimination. In her work, Crenshaw demonstrates how the law can be blind to categories of difference, which results in subjugating marginalised and disempowered women to oppressive structures of power. Similar arguments can be made about children, whose experiences in relation to their development should be understood in light of their various overlapping and intersecting social positions and the opportunity structures that are available to them.*

In the following sections I discuss some of the research and literature in Aotearoa New Zealand and overseas in relation to the connection between intersectional marginalisation and the experience of justice problems and barriers to accessing justice.

Justice problems

The intersection of different aspects of young people's identities can be connected to their experience of justice problems in a range of ways. For example, research and literature overseas identifies increased school disciplinary disparities for students with multiple marginalised identities. This includes the intersection of race and gender & sexuality with both youth of colour and LGBTQ students being significantly more likely to experience punitive disciplinary measures in school.[3] Another study found disparities at the intersections of race, gender and disability status:[4]

> *[T]he most disturbing disparities reflect the disparate impact of suspensions on children who fall into more than one category. For example, when we look at racial and gender disparities at any grade level, the highest suspension rates typically are for Black males, followed by Black females and/or Latino males. However, the highest rates are found among secondary students with disabilities, which we further disaggregate by race and gender (see figure 4). Specifically, Black males are at the highest risk for suspension (33.8%), followed by Latino males (23.2%). Surprisingly, Black females with disabilities are suspended at higher rates (22.5%) than White males with disabilities at both the elementary and secondary level (figure 4).*

Roy et al's report *Negotiating multiple identities* drawing from the Youth'19 dataset describes a series of ways intersecting identities can be linked to increased experiences of discrimination:

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[1] Joy, E. (2019). "You cannot take it with you": Reflections on intersectionality and social work. *Aotearoa New Zealand Social Work*, 31(1), 42-48 at 43.

[2] Peleg, N. (2019). *The Child's Right to Development*. Cambridge University Press at 203-204.

[3] Green, M. (2017). LGBTQ Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance. *Aleph, UCLA Undergraduate Research Journal for the Humanities and Social Sciences*, 14(0), 37-54 at 42.

[4] Losen, D. J., Hodson, C., Keith, M. A., Morrison, K., & Belway, S. (2015). *Are we closing the school discipline gap?* Center for Civil Rights Remedies at The Civil Rights Project at 5-6.

- Māori Rainbow individuals experience of the systemic inequities of racial discrimination and colonisation can be compounded by discrimination related to gender and sexual identities and orientations;[5]
- Pacific Rainbow peoples have higher rates of suicide attempts and self-harm "with proposed drivers including lack of acceptance, homophobia, transphobia, discrimination, shame, bullying, violence, and rejection by others";[6] and
- Gender diverse people with disabilities also experience levels of discrimination and violence over and above those without disabilities.[7]

Other research and literature also discusses how intersectional marginalisation can operate to both increase the risk of victimisation, and reduce the appropriateness of responses to victimisation. For example, LGBTQ youth of colour "are disproportionately likely to be exposed to multiple forms of violence (i.e., interpersonal, structural, institutional)" and harassment.[8] Thiara and Roy also explain how gender and race of victim and offender can intersect in cases of sexual violence as well as the response to it with significant implications for justice:[9]

> *Minoritised women from particular contexts and communities are more likely to be criminalised, viewed as complicit in violence towards them and thus less likely to be considered 'victims' of sexual violence….Research on criminal justice outcomes in sexual violence cases shows that white suspects are significantly more likely to avoid further investigation, especially if a victim is from a minoritised group, whilst offenders are more likely to be prosecuted if they are from a minoritised group.*

Research studies in Australia, the United Kingdom and the United States also raise concerns about intersecting vulnerabilities in the criminal justice system due to age, race (including Indigeneity), ethnicity, disability, socio-economic status, and gender.[10] As Bridge explains:[11]

> *While young adult women in contact with the criminal justice system have many common experiences, these are mediated by each individual's social context. The intersections of race, ethnicity, faith, migration status, sexuality, gender identity, dis/ability and socio-economic status are all factors that inform young adult women's experiences and further marginalise those facing multiple disadvantage.*

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[5] Roy, R., Greaves, L. M., Peiris-John, R., Clark, T., Fenaughty, J., Sutcliffe, K., Barnett, D., Hawthorne, V., Tiatia-Seath, J., & Fleming, T. (2021). *Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people*. The Youth19 Research Group, The University of Auckland & Victoria University of Wellington.

[6] Ibid at 15.

[7] Ibid at 16.

[8] Keene, L. (2019) Neighbourhood / Community. In K. J. Conron & B. D. M. Wilson (Eds.), *LGBTQ Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems: A Research Agenda*. The Williams Institute at 28.

[9] Thiara, R. & Roy, S. (2020). *Reclaiming Voice: Minoritised Women and Sexual Violence Key Findings*. Imkaan; The University of Warwick at 6-7.

[10] Hughes, D., Colvin, E., & Bartkowiak-Théron, I. (2021). Police and Vulnerability in Bail Decisions. *International Journal for Crime, Justice and Social Democracy*, 10(3), 122-138 at 127; Russell, E. K., Carlton, B., & Tyson, D. (2021). 'It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage. *International Journal for Crime, Justice and Social Democracy*, 11(3), 107-121 at 108; Bridge, M. (2021). *'I wanted to be heard': Young women in the criminal justice system at risk of violence, abuse and exploitation*. Agenda Alliance for Woman & Girls at Risk and Alliance for Youth Justice at 36; Washington State Supreme Court Gender and Justice Commission. (2021). *2021: How gender and race affect justice now*. Washington Courts Administrative Office of the Courts.

[11] Bridge, *'I wanted to be heard': Young women in the criminal justice system at risk of violence, abuse and exploitation* at 36.

Baidawi et al make a similar point in their research report for the Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability on the criminalisation of disabled children in the child protection system:[12]

> *[I]t is important to look at multiple factors at the same time (to use an "intersectional lens") to understand why culturally and racially diverse children with disability in child protection systems are more likely to be criminalised. An intersectional lens best helps us to understand the impact of compounding factors on the likelihood of criminalisation of culturally and racially diverse children with disability in child protection systems, including:*
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> • *The cultural views and beliefs around disability held across Aboriginal and Torres Strait Islander and other racially and culturally diverse communities, which might be different to those of disability and mental health services, child protection services, and other service providers;*
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> • *The unique barriers to accessing service, and the different service system experiences, of people from different cultural and racial backgrounds. This includes different experiences of having contact with child protection, justice and education systems, or trying to access disability, mental and behavioural health services;*
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> • *The impact of broader factors such as past and ongoing experiences of colonisation, trauma, racism, and discrimination - on the experiences of culturally and racially diverse children with disability and their families involved in child protection systems; and*
>
> • *The value of culturally-led and culturally-appropriate programs to provide culturally safe and accessible services for Aboriginal and/or Torres Strait Islander and CALD children with disability and their families in child protection systems.*

Other research in the United States found that "Black, Indigenous, and other women of color suffer more from unequal treatment and outcomes than white women"[13] with the Washington State Supreme Court Gender and Justice Commission concluding that the "historic marginalization and under-resourcing of Black, Indigenous, and communities of color in Washington and the rest of the nation play a role in juvenile justice involvement and outcomes."[14] A series of studies in the United States and Canada also identify LGBTQ youth of colour as an intersectionally marginalised group that is disproportionally likely to become involved in the criminal justice system,[15] with the most significant determinant in the criminalisation of LGBTQ youth of colour being their proximity to poverty.[16]

A recent study in the United States by Young & Billings investigated how identities and experiences intersect with civil justice problems both on their own, and at the confluence of

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[12] Baidawi, S., Ball, R., Newitt, R., Turnbull, L., Kembhavi-Tam, G., Avery, S., & Sheehan, R. (2023) *Research Report: Care criminalisation of children with disability in child protection systems*. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability at 7.

[13] Washington State Supreme Court Gender and Justice Commission, *2021: How gender and race affect justice now* at 6.

[14] Ibid at 430.

[15] Green, LGBTQ Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance. *Aleph* at 42; Keene, Neighbourhood / Community at 27-28; Bergman, J. (2020). Intersectionality: A Means for Addressing the Needs of Children with Mental Health Issues who are Engaged with the Family Law and Criminal Justice Systems? *Windsor Yearbook of Access to Justice*, 36, 115-137.

[16] Green, LGBTQ Youth of Color in the School-to-Prison Pipeline: Freedom, Liberation, and Resistance at 42.

multiple identities.[17] They found that income and race were the biggest predictors of civil legal need with low-income people of color at greater risk for justice problems, experiencing more problems, and more severe consequences than middle- and high-income white people.[18] However, they also found that other characteristics mattered as well and in addition to race and income.

They also found considerable variations between groups with both low-risk sub-groups in high-risk groups, and high-risk sub-groups in low-risk groups. For example:[19]

> *Consider a straight, childless, middle-income white man who has not experienced either type of trauma we investigated. He has a 19% predicted probability of experiencing a debt problem in the past year, which is lower than most other groups (Figure 5). But consider another white middle-income person—a queer woman who has a child and was arrested once in the past. For this white middle-income person, the predicted probability is not 19%; it's 50%.*

They conclude that this type of analysis is important because a detailed understanding of which people face which justiciable problems can help design and target justice interventions to help the people who need it the most.[20]

Barriers

Intersectionally marginalised children and young people also experience additional barriers to accessing justice, most principally that systems and processes simply are not designed to meet their need as LGBTIQ Legal Service in Australia explains "LGBTIQ people who exist at the intersection of race, class, sexuality and/or gender diversity experience life and legal issues in unique ways" and are more likely to experience inequities or barriers because systems are designed for those in the dominant groups.[21]

Moreover, when specialist services do exist, they generally only consider one aspect of identity as Roy et al explain:[22]

> *Each aspect of our identity can shape how the world treats us, how others see us, and how we see ourselves. Our lives are not determined by our identities, but many aspects of identity affect how we belong and connect, our life experiences, the opportunities afforded us and challenges we face. When we seek to understand and empower groups of people, we often consider just one aspect of identity. For example, services might be for 'disabled people', without considering aspects of age, ethnicity, sex, sexuality, gender and so on.*

The problem with this type of division of services is that it "forces people to highlight one identity at the expense of another (or others), and fails to consider that, for most people, such self-

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[17] Young, K. M., & Billings, K. R. (2023). An Intersectional Examination of U.S. Civil Justice Problems. *Utah Law Review*, 3, 487-543 at 490. Unfortunately for my own research, while the study did consider the age as a factor, the sample was limited to adults.

[18] Ibid at 521.

[19] Ibid at 520-521.

[20] Ibid at 538.

[21] LGBTIQ Legal Service. (2020). *LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program*. St Kilda Legal Service; Thorne Harbour Health at 18.

[22] Roy et al., *Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people* at 2.

partitioning is not possible nor helpful".[23] Various consequences are identified in the literature. Roy et al note that "those with intersectional identities may have to navigate several spaces to find support and resources, and are often excluded as a result (Roberston, 2020)."[24] Keene describes these challenges for LGBTQ youth of colour:[25]

> *Some research has specifically observed the criminalization of LGBTQ YOC within LGBTQ contexts—the racialized policing strategies organized to discriminate against LGBTQ YOC, largely in White middle and upper-middle class 'homonormative' LGBTQ communities—and this may both reduce LGBTQ youth of color access to LGBTQ community-based support and resources… Without access to resources and support, trajectories of risk may remain in motion, including housing instability, criminalization, school drop-out/push-out, unemployment, substance use, and engaging in sex work or survival sex, that appear to influence well-being well into young adulthood (Nolan, 2006; Van Leeuwen et al., 2006).*

Mayes sets out a series of four scenarios demonstrating what he describes as the "mission-critical nature of considering intersections and providing reasoned responses to lived experiences":[26]

> *First, an LGBTQ child with a physical disability is placed in a family foster home that is physically accessible; however, the family foster home does not have the resources to address the needs arising from the child's sexual orientation or gender identity. Second, an LGBTQ child is set to be placed in an adoptive home of the child's same race based on the child's close identification with her heritage; 146 however, the prospective adoptive family holds heterosexist views. Third, a gay youth is battered by his boyfriend; however, local resources for targets of intimate partner violence, including teen dating violence, 14 are only available to women. Fourth, a social worker seeks services for an LGBTQ youth in poverty from an LGBTQ community center; however, all of the services focus on the needs and interests of LGBTQ youth of affluence.*

> *At the end of the day, which of these four children's needs are met and which needs go unmet? Who answers this question? Fundamentally, why is this even a permissible question to ask?*

A list of Family Violence and Sexual Violence Service Gaps developed by Te Puna Aonui identified the need for "better support for those with intersecting identities who encounter the justice system, e.g. LGBTQIA+, C&YP, tamariki and rangatahi, tangata whenua, disabled people, Pacific people, ethnic communities".[27]

Another key barrier is the lack of disaggregated data, or data that allows comparison across multiple aspects of people's identities. For example, during this research project I wanted to explore how different aspects of children and young people's identities affected their experiences of justice problems and barriers. However, when there was demographic data

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[23] Joy, "You cannot take it with you": Reflections on intersectionality and social work at 46-47.

[24] Roy et al., *Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people* at 11.

[25] Keene, Neighbourhood / Community at 28-29.

[26] Mayes, T.A. (2016). Understanding Intersectionality between the Law, Gender, Sexuality and Children, *Children's Legal Rights Journal*, 36(2), 90-106 at 105.

[27] Te Puna Aonui. (2023). *List of Family Violence and Sexual Violence Service Gaps*. https://tepunaaonui.govt.nz/assets/Other-Agencies/FVSV-gaps-list-for-public-consultation_March-2023.pdf at 5.

available, it generally only allowed for comparison across one or two demographic variables. This issue has also been raised in other jurisdictions, for example Vafa explains: [28]

> *There are systems that disaggregate data by race and ethnicity, but because race and ethnicity is often considered its own category, and gender a separate category, there are not meaningful examinations of the intersection of race and gender. Failing to examine youth justice involvement from an intersectional lens will prevent any clear understanding of how to interrupt the disproportionate rate of Black girls' involvement in the juvenile justice system.*

A notable exception is the data from the Youth19 study where the research team undertook analysis across multiple variables resulting in their report *Negotiating Multiple Identities*[29] and produced a series of research briefs exploring different intersections.[30] I see considerable value in undertaking this sort of analysis in the context of justice problems.

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[28] Vafa, Y., Ferrer, E., Kaleem, M., Hopkins, C., & Feldhake, E. (2018). *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System*. Rights4Girls & the Georgetown Juvenile Justice Initiative at 38.
[29] Roy et al, *Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people*
[30] For example, King-Finau, T., Archer, D., Fenaughty, J., Sutcliffe, K., Clark, T., & Fleming, T. (2022). *The health and wellbeing of takatāpui and rainbow young people who have been involved with Oranga Tamariki*. The Youth19 Research Group, The University of Auckland & Victoria University of Wellington which reports the differing rates at which rainbow and takatāpui children and young people of differing ethnicities were involved with Oranga Tamariki.

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