

“LGBT Prisoners: An issue in need of reform”

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The Irish public recently voted in a referendum to allow for same-sex marriage. The progressive granting of rights to the Lesbian, Gay, Bisexual and Transgender (LGBT) community,¹ means that the LGBT population should increase in size as it becomes more acceptable to be openly LGBT. Importantly, the proportion of prisoners who identify as LGBT will correspondingly increase. This paper will examine, from a socio-legal perspective, the challenges that lie ahead for the ill fitted Irish prison system, and propose practical solutions. While LGBT prisoners have been largely ignored in Irish and English academia,² US literature confirms LGBT prisoners have unique experiences in prison.³

Incidence

Very few Irish prisoners are openly LGBT,⁴ although their presence has been officially recognised since 2002.⁵ There is no reason to suggest that the Irish figures are radically different from UK figures and the working assumption is that between 2% (given that 2.7% of the general Irish population identifying as homosexual or bisexual⁶) and 5% of Irish prisoners are LGBT.⁷

Internationally, LGBT people are disproportionately incarcerated,⁸ but why might this be the case in Ireland? The relatively recent criminalization of homosexuality⁹ is indicative of

¹ Such as civil partnership (Glen, ‘Over 2,600 people enter into Civil Partnerships in Ireland by the end of 2013’ <<http://www.glen.ie/news-post.aspx?contentid=27109>>, adoption rights, anti-discrimination in the areas of employment (S 5 Unfair Dismissals (Amendment) Act 1993; S 6(2) Employment Equality Act 1998) and consumers from same (S 3(2) Equal Status Act 2000).

² Peter Dunn, ‘Slipping off the equalities agenda? Work with LGBT prisoners’ 2013 *Prison Service Journal* 206, 3.

³ Timothy Murphy, *Reader's Guide to Lesbian and Gay Studies* (Routledge, 2013), 649.

⁴ *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334; Cat McIlroy, *Transphobia in Ireland: Research Report* (2009, Transgender Equality Network Ireland), 14.

⁵ Irish Prisons Inspectorate, *Portlaoise Prison 2002*. (Department of Justice, 2002).

⁶ ESRI, *The Irish Study of Sexual Health and Relationships* (2006 the Crisis Pregnancy Agency and the Department of Health and Children), 126.

⁷ Dunn (n 2) 7.

⁸ Regina Kunzel, *Criminal intimacy: Prison and the Uneven History of Modern American Sexuality*. (2010, The University of Chicago Press); Beth Richie, ‘Queering anti-prison work African-American lesbians in the juvenile justice system’ in *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (2005 Taylor and Francis).

⁹ Under the Offences Against the Person Act 1861 and S 11 of the Criminal Law (Amendment) Act 1885.

the traditional attitudes of Irish society to LGBT citizens. The targeting of the LGBT community by the police has been found in other jurisdictions as a major reason for the increased penalization of LGBT individuals.¹⁰ Certain negative socio-economic trends, such as social isolation,¹¹ mental health,¹² substance abuse,¹³ discrimination,¹⁴ and poverty¹⁵ are associated with both the LGBT community but also criminality,¹⁶ and contribute to the likely disproportionate representation of LGBT individuals in prison.

Unique issues

Homophobia

Homophobia tends to be exacerbated in an carceral setting, particularly in the hyper-masculine culture of male prisons,¹⁷ and is evident in *Connolly v Governor of Wheatfield Prison*.¹⁸ Connolly was threatened and raped by a fellow prisoner.¹⁹ McClenaghan describes Irish prison as ‘hostile and homophobic’.²⁰ In the UK, physical homophobic abuse has reached an ‘endemic’ level.²¹ The roots of this homophobia lie in an uninformed

¹⁰ Make the Road New York, *Transgressive Policing Police Abuse Of LGBT Communities Of Color In Jackson Heights* (2012, Make the Road New York); Gavin Engelbrecht, ‘North-East police force denies it is targeting gay men in DNA swoop’ *The Northern Echo* Thursday 17th January 2013. It has been reported (albeit in another context of victimhood) that there is a mistrust between Irish LGBT people and the Gardaí. Conor Coughlan, *LGBT Hate Crime Report: Stop Hate Crimes In Ireland Campaign* (2006, Glen) 41.

¹¹ Mayock and others, *Supporting LGBT Lives: A Study Of The Mental Health And Well-Being Of Lesbian, Gay, Bisexual And Transgender People*, (2009, GLEN and BeLonG To Youth Service), 30.

¹² 25% of Irish LGBT people have engaged in self-harm. Mayock, and others (n 11) 30.

¹³ Mayock, and others (n 11) 82; HG Kennedy, and others, *Mental Illness in Irish Prisoners: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners*. (2005, National Forensic Mental Health Service), 84; K. Sarma, *Drug use amongst lesbian, gay, bisexual and transgender young adults in Ireland*. (2007, BeLonG To), 22, 25, 38, and 34.

¹⁴ Conor Mc Guckin, and others, *Homophobic Bullying in Irish Workplaces* (University of Ulster, 2000); Mick Quinlan, *The Health Needs of Gay and Bisexual Men* (2004, National Conference Men’s Health); 82% of teachers in Ireland are aware homophobic bullying in Irish schools James Norman, *A Survey Of Teachers On Homophobic Bullying In Irish Second Level Schools*. (DCU, 2004). See also, Michael Barron and Simon Bradford, ‘Corporeal Controls: Violence, Bodies, and Young Gay Men’s Identities’. 39 (2007) *Youth Society*, 244; Combat Poverty Agency, *Poverty Lesbians And Gay Men* (Combat Poverty Agency, 1995), 14.

¹⁵ GLEN/Nexus, *Poverty-lesbians and gay men: The economic and social effects of discrimination*. (1995, Combat Poverty Agency).

¹⁶ Irish Penal Reform Trust, *The Vicious Circle of Social Exclusion and Crime* (2012, IPRT); Ivana Bacik and Michael O’Connell, *Crime and poverty in Ireland* (1998, Round Hall Sweet and Maxwell).

¹⁷ James Samuel Logan, *Good Punishment? Christian Moral Practice and U.S. Imprisonment* (2008, Wm. B. Eerdmans Publishing Co), 34.

¹⁸ (n 4).

¹⁹ (n 4) paras 4 and 9.

²⁰ Brendí McClenaghan, ‘Letter from a Gay Republican: H-Block 5’ in Íde O’Carroll and Eoin Collins (eds.) *Lesbian and Gay Visions of Ireland : Towards the Twenty-first Century* (1995 Cassells) pp. 122-130, 127.

²¹ Ken Hanson, ‘Prison and Homosexuality’, *insidetime* January 2007 ; Green, R (on the application of) v *Secretary of State for Justice* [2013] EWHC 3491, para 42.

view of other prisoners on what homosexuality is²² but also stems from outside prison walls.²³

Health

HIV/AIDS and other STDs are prevalent amongst LGBT prisoners²⁴ given the opportunity to have sex. Similarly, while prisoners²⁵ and LGBT people²⁶ separately experience disproportionate mental health issues, LGBT prisoners are acutely at risk through the merging of two vulnerable statuses into one identity.²⁷ Transgender prisoners also have specialized health and other needs. In terms of the provision of hormonal treatment and sex reassignment Australia represents international best practice and persists with hormone treatment that has been started before entering prison but refrains from allowing transgender prisoners to start new treatment while in prison.²⁸ Australia progressively allow prisoners to undergo such medical surgery at the expense of the prison. Canada has a similar policy following a Canadian Human Rights Tribunal decision. *Kavanagh v. Canada (Attorney General)*,²⁹ whereas the US prohibits such surgery.³⁰ Internationally, housing decisions are strongly determined by the genital status of the prisoner at the time of committal.³¹ More appropriately, the UK and Australia locate prisoners according to their gender under the law.³² The greatest challenge is where the prisoner is at a transitional stage between the two gender extremes.

²² Hanson (n 21).

²³ Submission NAT (2013) quoted in Commission on Sex in Prison (n 10) 6; Dr. Éamonn O'Moore, consultant in public health with Offender Health, speaking during the Commission on Sex in Prison's Seminar on Sexual Health in Prisons, 4.

http://www.commissiononsexinprison.org/fileadmin/howard_league/user/pdf/Commission_on_Sex_in_Prison/_minutes_of_the_seminar_on_sexual_health_01.pdf; ESRI (n 6) 124.

²⁴ The one Irish court case of an LGBT prisoner was HIV positive. *Connolly*, (n 4) para 4.

²⁵ 16% of Irish prisoners were found to be experiencing a mental health illness. HG Kennedy, and others, (n 13) 84.

²⁶ 86% of Irish LGBT respondents experienced mental health problems during their life. Mayock, and others (n 11) 35 and 85.

²⁷ McClenaghan (n 20) 127.

²⁸ R. Mann, 'The treatment of transgender prisoners, not just an American problem. A comparative analysis of American, Australian, and Canadian prison policies't. (2006) *Law and Sexuality Review*, 91 (15), 92-134. 2001.

²⁹ CanLII 8496 (CHRT) 41 CHRR 119.

³⁰ Mann, *ibid*, 84.

³¹ M Petersen, and others., 'Transsexuals within the prison system: An international survey of correctional services policies' (1996) *Behavioral Sciences and the Law*, 14, 219-229.

³² Prison Service Instruction 2011/07, The care and management of transsexual prisoners; Mann (n 29).

Sex

While sex is not explicitly banned under Irish prison rules, it is possible that the prohibition on ‘indecent gestures’ may be construed³³ as covering consenting sexual activity.³⁴ Anecdotally in Ireland, prisoners are often separated if sexual contact occurs.³⁵ Consequently, prisoners are likely to keep sexual relationships secret from prison authorities³⁶ with risks of unsafe sexual practices.³⁷

In the U,S prison rape has been described as a problem of ‘near universality’³⁸ and an ‘inevitable secondary effect of incarceration’³⁹ Non-consensual sex can often be more motivated by dominance than sexuality.⁴⁰ LGBT prisoners as a vulnerable group⁴¹ become objects of power. In the US, rape of homosexual prisoners has been (paradoxically) used by male prisoners, who identify as heterosexual,⁴² to reinforce heterosexual norms.⁴³ Prison rape and sexual abuse are probably not as engrained in Ireland compared to US but is increasingly problematic, yet underreported. The *Connolly* case provides evidence of a ‘violent rape by a cellmate’.⁴⁴ A number of recent Irish media reports have described sexual assaults on Irish prisoners by other prisoners⁴⁵ and by prison staff.⁴⁶ On a separate point,

³³ As previously was the case in the UK before the removal of that phrase from the prison rules. Commission on Sex in Prison, *Consensual sex among men in prison: Briefing paper 1* (2013, Howard League for Penal Reform), 3.

³⁴ Schedule 1 Breaches Of Prison Discipline (30), S.I. No. 252/2007 - Prison Rules, 2007.

³⁵ Anecdotal interviews conducted during the author’s visit to the prison.

³⁶ Submission NAT (2013) quoted in Commission on Sex in Prison (n 10) 3; Commission on Sex in Prison, (n 31) 3 and 4; Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*. (2001, Human Rights Watch).

³⁷ Prison Reform Trust and National Aids Trust *HIV and Hepatitis in UK prisons: addressing prisoners’ healthcare needs*. (2005, Prison Reform Trust and the National AIDS Trust). Submission by NAT (2013) quoted in Commission on Sex in Prison (n 35) 3; World Health Organization, UNAIDS and United Nations Office on Drugs and Crime (2007) *Effectiveness of Interventions to Manage HIV in Prisons: Provision of Condoms and Other Measures to Decrease Sexual Transmission*. (2007, World Health Organization.); Commission on Sex in Prison (n 35) 4.

³⁸ Gilligan J 2000 *Violence: reflections on our deadliest epidemic*, 165

³⁹ Ian O’Donnell ‘Prison Rape in Context’ (2004) *British Journal of Criminology*, 44 :241-255, 241.

⁴⁰ O’Donnell (n 36) 243.

⁴¹ The Commission on Sex in Prison Seminar on Coercive Sex in Prisons, 3.

http://www.commissiononsexinprison.org/fileadmin/howard_league/user/pdf/Commission_on_Sex_in_Prison/final_minutes_of_seminar_on_coercive_sex.pdf

⁴² Claudia Cahalane, ‘Unlocking equal rights’, *The Guardian* (31 October 2005).

⁴³ While the penetrator of rape is not considered homosexual the victims are forced to feel feminized and weak, and are often forced to be both a sexual and domestic slave to the rapist. O’Donnell (n 36) 243 and 244.

⁴⁴ (n 4) para 4.

⁴⁵ *Cormac O’Keefe*, ‘Authorities investigate sex assault in jail’

<http://www.irishexaminer.com/ireland/authorities-investigate-sex-assault-in-jail-226495.html>; Emma McMenamy ‘Gang sex attack on inmate St Patrick’s’ Mar 25, 2013, <http://www.irishmirror.ie/incoming/gardai-investigating-suspected-gang-sex-1784111> }

Loneragan believes the culture of sexual abuse is of particular concern in the women's prison,⁴⁷ which does not follow the international trend that would suggest male prisons are more notorious for rapes and sexual abuse.⁴⁸

Future policy recommendations

The Irish Prison Service should develop a comprehensive LGBT policy (including gathering data) to deal with present and future LGBT prisoners. This should cover the promotion of safe sex and drug use.⁴⁹ In terms of a LGBT friendly culture, an LGBT liaison officer could work with an LGBT elected prisoner representative.⁵⁰ Prison officers also need to be made aware that they may have a greater duty to protect LGBT prisoners as vulnerable prisoners under the European Convention of Human Rights jurisprudence following *Rodic v Bosnia*.⁵¹ While an obvious effective prohibition of homophobia needs to be ensured on the part of prison officers,⁵² if staff overlook homophobia from other prisoners⁵³ the staff may be complicit in such victimization.⁵⁴ To discourage homophobia generally,⁵⁵ all prisoners should be educated and LGBT prisoners protected.⁵⁶ The LGBT

⁴⁶ Anne Sheridan, 'Investigation underway into alleged sexual assaults by Limerick prison officers', 2 August 2013 <<http://www.limerickleader.ie/news/local-news/investigat-ion-underway-into-alleged-sexual-assaults-by-limerick-prison-officers-1-5416217>>

⁴⁷ <http://www.independent.ie/irish-news/doubling-up-in-prisons-creating-culture-of-sex-abuse-warns-former-mountjoy-governor-30242066.html>

⁴⁸ Ottis M 'A Perversion Not Commonly Noted' (1913) *Journal Of Abnormal Psychology* which has been confirmed a century later. Greer K 'The Changing Nature Of Interpersonal Relationships In Women's Prisons' (2000) *The Prison Journal*.

⁴⁹ Commission on Sex in Prison (n 10) 1. The provision of condoms has proven effective in Canada and has also been recommended by an Irish 1999 study funded by the Department of Justice on HIV and Hep. C in prisons; Dunn (n 2) 7; and by certain factions within the UK prison service as far back as 1995. {*R v Secretary Of State For Home Secretary Of State For Home Department Ex Parte Glen Fielding Department Ex Parte Glen Fielding* [1999] EWHC Admin 641 para 10.}

⁵⁰ Dunn (n 2) 10.

⁵¹ European Court of Human Rights, May 27, 2008.

⁵² Which has proved problematic in the UK. Hanson (n 19).

⁵³ Dunn (n 2) 7.

⁵⁴ *ibid* 10.

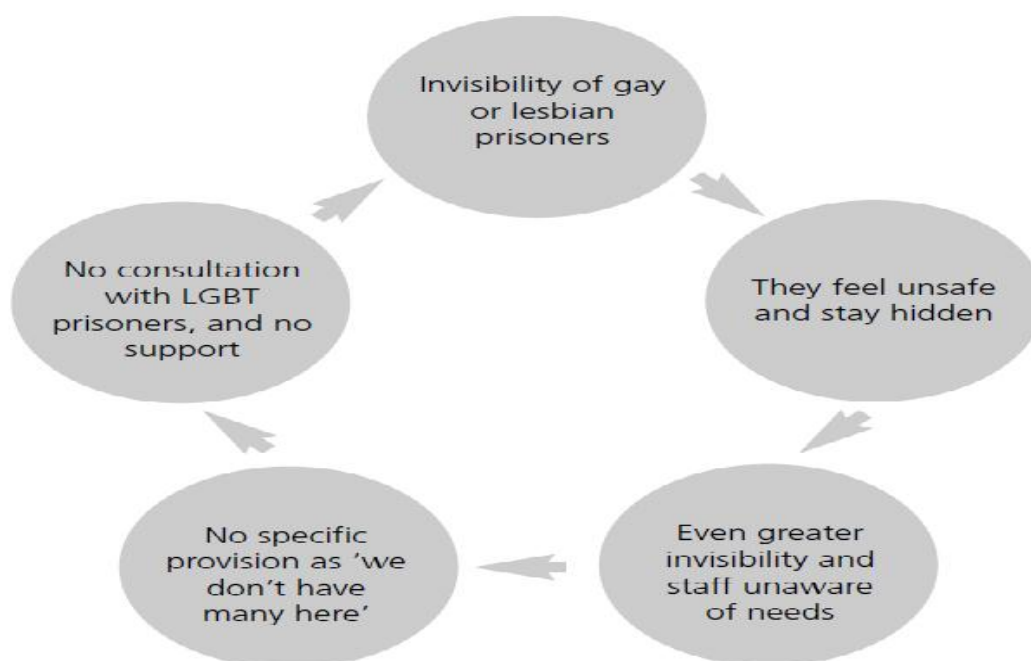
⁵⁵ *ibid* 7.

⁵⁶ *Green, R (on the application of) v Secretary of State for Justice* (n 21) para 18; *Connolly v Governor of Wheatfield Prison* (n 4). Wortley R 2002 *Situational Prison Control*, 108 - 114.

policy should also deal with promoting LGBT culture.⁵⁷ Furthermore, training of staff on LGBT issues should commence as a priority.⁵⁸

In terms of monitoring, currently the IPS are engaged in a cyclical process whereby the extent LGBT prisoners remain hidden. Their unknown presence then acts as a justification for the failure to develop the policies. Dunn describes this as the cycle of invisibility⁵⁹, and it is represented graphically in Figure 1.

Figure 1: the cycle of invisibility.



To conclude, the recommendations outlined above need to be considered and debated as a matter of priority. As Irish society becomes more liberal and tolerant; so too must our prison system. LGBT prisoners should not experience harsher prison conditions by virtue of their sexual orientation. Furthermore, do the issues raised (disproportionate numbers of LGBT prisoners, homophobia, isolation, health problems and rape) mean that LGBT

⁵⁷ LGBT prisoner support groups should be promoted. Dunn (n 2) 7; McClenaghan (n 20) 126; National Prison Radio, 'Boy George Back Behind Bars' *insidetime* August 2011. Information should be provided on LGBT groups outside of prison. Dunn (n 2) 7; McClenaghan (n 20) 127. Equal treatment regarding homosexual publications should be ensured. For example in the UK 'sexually explicit gay magazine *Boyz* has often been barred, whereas straight men are allowed equally explicit material.' McClenaghan (n 20) 126. - Civil partnership and same-sex marriages should be facilitated, as well as the maintenance of outside LGBT relationships. UK LGBT prisoners are now allowed by the prison service to 'embrace, hug and kiss their partners' during visiting time. Cahalane (n 108).

⁵⁸ The UK already has such training. Dr Éamonn O'Moore, (n 23), 4; Dunn (n 2) 10; Nat submission quoted in Commission on Sex in Prison (35) 6.

⁵⁹ Dunn (n 2) 6.

prisoners experience harsher punishment?⁶⁰ This paper as such poses deeper fundamental questions ripe for further research in terms of fairness and proportionality of punishment.

⁶⁰ Human Rights Watch, *No Escape: Male Rape in United States Prisons* (2001); UN ONDC, *Handbook on Prisoners with special needs* (2009, UN)