The Irish Prison System

A legal research report by Trinity FLAC

Free Legal Advice Centre

fighting for social justice.

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Introduction

Every aspect of a person's life is affected by spending time in prison. It is unsurprising, then, that the literature on the rights and welfare of prisoners is vast and varied, and that a state is understood to owe many different duties to the people it puts in prison. In practice, the delivery of those duties may be far from perfect. From international bodies to NGOs to academic commentators, many have identified today's prisons as inhumane, uninhabitable, or simply ineffective. Unfortunately, the problems faced by prisoners are as important to confront as they are easy to ignore. They are a group with no electoral power, no media prominence, no social visibility, and are very often from marginalised or minority backgrounds. In 2003 America, Angela Davis was led to believe that "the prison has become a black hole into which the detritus of contemporary capitalism is deposited."

In attempting to measure how applicable that quote is to 2018 Ireland, this report will examine how the integrity and well-being of prisoners is balanced against financial or administrative concerns. While its analysis is primarily legal, the report shall also consider the cultural and political realities that helped to shape law and policy.

The issues discussed in this report are inextricably linked, and it is difficult to confront one without challenging the others, as well. Solitary confinement (section four) can restrict visitation (section five), and the presence of the former or absence of the latter can lead to poor health. Health services (section two) are over-exhausted by overcrowding and poor sanitation (section three). All of these issues impact the prisoner's ability to reintegrate into society after release (section six). Their integration into society is further impeded by the fact that it is society's most disadvantaged, isolated and scorned who can be found in prison in the first place (section one). A state cannot confront one of these problems alone. A holistic, radical approach is necessary if any change is to be made at all.

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Trinity FLAC Irish Prison System Legal Research Report

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1: The People in Irish Prisons

As of March 2018, there are 3,846 people in Irish prisons.[1] The number of prisoners in custody rose by more than 16% between 2006 and 2016.[2] Although 2016 saw a 12.2% decrease in total committals from 2015,[3] prisons are still overcrowded. Many sections of the population are particularly vulnerable to the prison-related dangers discussed in the following sections. These vulnerabilities may arise from health issues or drug use, poverty and a lack of education, or membership of a marginalised class. This section shall provide case studies for some of these groups, but others which are not discussed, such as people with disabilities and migrants, also face significant and specific issues in prison. This section shall examine the following topics:

- poverty and social exclusion among people in prison,
- the situation of Irish Travellers in prison,
- the situation of women in prison,
- the situation of LGBT people in prison, and
- the situation of older people in prison.

Poverty and Social Exclusion Among People in Prison

Economic disadvantage and social isolation have been directly linked to the likelihood of imprisonment in Ireland, and the criminal law is applied unevenly against different socio-economic groups.[4]

In 2007, four in ten children in custodial remand had a learning difficulty[5] and in 2008 20% of prisoners enrolled in Mountjoy Prison's school facility were illiterate, with 30%

[1] Facts and figures' (*Irish Penal Reform Trust*, 2018) < http://www.iprt.ie/prison-facts-2> accessed 12 March 2018
[2] Irish Prison Service, *Annual Report 2016*
[3] ibid
[4] The Irish Penal Reform Trust, 'The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor' (2012)
[5] Sarah Anderson and Gay Graham, 'The custodial remand system for juveniles in Ireland: The empirical evidence' (2006) 54 Administration, 50

only able to write their own names.[6] Prisoners also experience high rates of homelessness both prior to and after incarceration.[7] The Irish Penal Reform Trust gives us the following information on prison demographics:[8]

- The majority of Irish prisoners have never sat a State exam and over half left school before the age of 15.
- Prisoners in Ireland are 25 times more likely to come from (and return to) a seriously deprived area.
- In 2011, over 70% of prisoners were unemployed on committal and a similar percentage self-report as not having any particular trade or occupation.

As discussed in the final section, economic disadvantage is exacerbated by time in prison. This creates a cycle of worsening poverty and reoffending. Evidence from all over the world, as well as Ireland, shows that the high rates of incarceration of working class people is not simply the result of higher rates of criminal activity, but more extreme and unforgiving treatment of those people by the criminal justice system.[9]

The Situation of Irish Travellers in Prison

The Irish Traveller community makes up only 0.6% of the Irish population, but accounts for 10% of the male and 22% of the female prison population.[10] Over 50% of the prisoners' in Castlerea prison are from the Irish Traveller community.[11]

This over-incarceration could be caused by both prejudice in the criminal justice system, as well as the social exclusion and disadvantage faced by the Traveller community in

[6] Irish Penal Reform Trust, 'Facts & Figures,' <http://www.iprt.ie/prison-facts-2> accessed 20 February 2018
[7] M Seymour and L Costello, 'A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody' (2005) 2 Irish Probation Journal 52
[8] http://www.iprt.ie/prison-facts-2 retrieved 20/11/2017
[9] The Irish Penal Reform Trust, 'The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor' (2012)
[10] Kitty Holland, 'Disproportionate Number of Travellers in Prison Population' *The Irish Times* (20 October 2017)
[11] ibid

general, which, as discussed above, makes any group more likely to spend time in prison. The Traveller community has an 80% unemployment rate[12] and a suicide rate of six times that of the settled community, a statistic which does not include deaths caused by drug or alcohol misuse, which causes nearly half of male Traveller's deaths.[13] In 2016, the Oireachtas Committee on Housing and Homelessness was told that one in five Travellers lacked proper accommodation.[14] On an international and domestic level, they have been recognised as facing extreme marginalisation, state neglect, and active prejudice,[15] and with regards most facets and institutions of society more robust government supports and protections for the Travelling community have been called for. Instead, they have been disproportionately sent to prison.

The Health Research Board has done research on Traveller prisoners. They have found that Travellers experience significant racist treatment in prison, and 26.1% of them were diagnosed with a mental illness, with 64.7% of those being women.[16]

The Situation of Women in Prison

Women are a small minority of the prison population in Ireland, consisting of about 3.8% of the overall total.[17] In recent years the number of female incarcerations has experienced an upward trend and continues to rise,[18] increasing from 155 in 1999 to

[12] Kitty Holland, 'Traveller youth and high unemployment highlighted in census' *The Irish Times* (12 October 2017)
[13] All Ireland Traveller Health Study Team (AITHS Team) (2010) All Ireland Traveller Health Study: Summary of Findings. Dublin: School of Public Health, Physiotherapy and Population Science, University College Dublin.
[14] Elaine Edwards, 'Nearly one-fifth of Travellers 'lack proper accommodation,'' *The Irish Times* (19 May 2016)
[15] Houses of the Oireachtas, Seanad Éireann, Seanad Public Consultation Committee, 'Report of Ireland's Compliance with the International Covenant on Civil and Political Rights with Observations and Recommendations to the United Nations Human Rights Committee and to the Irish Government,' (2014) Dublin: Stationery Office
[16]Conn MacGabhnann *Voices Unheard: A Study of Irish Travellers in Prison* (Irish Chaplaincy in Britain 2011)
[17] 'Women in Detention' (*Irish Penal Reform Trust*, 2018) <http://www.iprt.ie/women-offenders> accessed 11 March 2018
[18] Jessica Green, 'Women and imprisonment in Ireland 1922-2007' [2013] Wagadu: A Journal of Transnational Women's and Gender Studies 54

3,411 in 2015.[19] The average daily number of female prisoners in custody rose by more than 29% in the ten years between 2006 and 2016.[20]

In 2017 there was a disproportionate number of female prison committals for non-violent offences in comparison with males.[21] According to expert Dr Christina Quinlan, in 2015, 89.9% of female committals (2,667) were because of failure to pay court-ordered fines.[22] This figure saw a huge increase from 2007, where there were only 163 female committals for fine defaults.[23]

There are only two female prisons in Ireland: the Dóchas Centre, which can accommodate 105 women, and the female wing of the Limerick Centre, which can accommodate 28 women. With the daily female prison population in Ireland in 2015 averaging 153, this well exceeds the 133 available spaces.[24] Despite the small number of women in prison, there being only two prisons available has significant negative impacts on them, and Ireland's failure to properly facilitate women in prison may amount to discrimination under the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW).[25]

Overcrowding, discussed in detail in the third section of this report, creates a number of risks for prisoners regarding their safety, health, and access to services. The Dóchas female prison experienced the highest number of assaults on staff in 2016, making it the most dangerous prison facility for officers in Ireland. There were 26 prisoner-on-staff assaults in the centre in 2016, in comparison with only five prisoner-on-staff assaults in

[19] 'Ireland's unequal treatment of women in the criminal justice system raised with the UN in IPRT' (*Irish Penal Reform Trust*, 2018) <http://www.iprt.ie/contents/3069> accessed 13 March 2018
[20] Facts and figures' (*Irish Penal Reform Trust*, 2018) < http://www.iprt.ie/prison-facts-2> accessed 12 March 2018
[21] 'Ireland's unequal treatment of women in the criminal justice system raised with the UN in IPRT' (*Irish Penal Reform Trust*, 2018) <http://www.iprt.ie/contents/3069> accessed 13 March 2018
[22] Christina Quinlan, 'Women in prison: the need for radical reform' (*The Irish Independent,* 14 March 2017)
[23] Ibid
[24] Ibid
[25] Ireland's unequal treatment of women in the criminal justice system raised with the UN in IPRT' (*Irish Penal Reform Trust*, 2018)

Portlaoise, the only maximum security prison in Ireland, in the same year.[26] It must be noted however that 19 of these incidents were carried out by three particularly troublesome prisoners, two of whom have since been moved to alternative facilities.[27]

Women in prison are also 20% more likely than men in prison to have used heroin,[28] and both female prisons are in the top three Irish prisons with the highest rate of drug use.[29]

In Irish prisons, women on remand are not detained separately from convicted women due to overcrowding and lack of facilities for women. The Prison Rules 2007 provide that unconvicted prisoners 'insofar as practicable and subject to the maintenance of good order and safe and secure custody, be accommodated in areas that are separate from those in which convicted prisoners are accommodated.'[30]

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders state that, as far as possible, women prisoners must be placed in prisons or rehabilitation centres near their homes and communities, with the view that this would better accommodate their caregiving responsibilities.[31] Research discussed in the fifth section of this report demonstrates that regular visitation is increasingly unlikely the farther away a prison is. Regular visitation has a massive impact on a prisoner's mental health, behaviour, and readjustment to society upon release, as well as being linked to lower rates of depression among female prisoners in particular. The Council of Europe has said that states should ensure that mothers in custody are placed in prisons which are a reasonable travelling time distance from their

[26] Gordon Deegan, 'The Dóchas female prison experienced the highest number of assaults by convicts on officers last year' *The Journal* (17 July 2017)
[27] ibid
[28] Dr Anne Drummond and Dr Mary Codd, 'The prevalence of drug use, including intravenous drug use and blood-borne viruses among the Irish Prisoner Population' (2014) National Advisory Committee on Drugs and Alcohol
[29] ibid
[30] Mary Rogan, *Prison Law* (Bloomsbury Professional 2014) para 8.03
[31] The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (December 2010)

homes and families.[32] As there are only two female prisons in Ireland, sentenced women or women on remand will very often be far away from their families during their detention.

There are currently two open prisons for men, which can act as 'step-down' facilities or detention centres for low-risk prisoners.[33] There is no similar facility for female prisoners, despite the fact that the vast majority of them are classified as low-risk. Both the Dóchas Centre and the female wing in Limerick prison operate as closed, medium security prisons. The lack of an open prison makes it harder for them to reintegrate into their communities and society as a whole upon release. This could contribute to the high recidivism rate among women prisoners: the 2007-2012 Probation Service Recidivism Study found that 46.2% of women released from prison in Ireland reoffended within 3 years.[34] It is also worth noting that women leaving prison in Ireland are 4.6 times more likely to struggle accessing accommodation after their release than men,[35] and international research indicates that they also face particular issues in seeking employment.[36] In general, women who have spent time in prison tend to experience harsher societal condemnation than men.[37] Despite these serious and specific issues they face, women in prison often continue to be invisible in policy and public discussion.

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[32] Mary Rogan, *Prison Law* (Bloomsbury Professional 2014) para 8.13

[33] Cathal McMahon, 'Inside a women's prison: my daughter thinks I'm away doing a hairdressing course' (*The Irish Independent,* 14 May 2017)

[34] Irish Prison Service, *Joint Probation Service- Irish Prison Service Strategy 2014-2016: An effective response to women who offend*

[35] Cathal McMahon, 'Inside a women's prison: my daughter thinks I'm away doing a hairdressing course' *The Irish Independent* (14 May 2017)

[36] See e.g., Janna Verbruggen, 'Effects of Unemployment, Conviction and Incarceration on Employment: A Longitudinal Study on the Employment Prospects of Disadvantaged Youths' (2016) 54 British Journal of Criminology 729

[37] See e.g., Dawn Jeglum Bartusch and Ross L Matsueda, 'Gender, Reflected Appraisals, and Labelling: A Cross-Group Test of Interactionist Theory of Delinquency' (1996) 75 Social Forces 145; Frances Heidensohn and Marisa Silvestri, 'Gender and crime,' in Mike Maguire, Rod Morgan, and Robert Reiner (eds.) *The Oxford Handbook of Criminology* (5th ed, Oxford University Press, 2012)

The Situation of LGBT People in Prisons

Outside of prison, LGBT people in Ireland report high rates of discrimination and victimisation on grounds of sexuality or gender.[38] There is not a lot of data on LGBT people in Irish prisons, and none on the rates of their incarceration. Data measuring of that sort has been criticized as crude or insensitive,[39] but in countries where it is used massive over-incarceration of the LGBT community has been exposed. For example, in America, 40% of women in prison are lesbian or bisexual.[40] In an Irish context, the Inspector of Prisons did remark in 2014 that sexual orientation leads to higher risk of abuse.[41]

The Irish Prison Service currently has no policies relating to protections for LGBT prisoners or policies that deal with their concerns and needs. This is in spite of the international research indicating the specific and severe risks for LGBT people posed by imprisonment, such as interpersonal and institutional discrimination, abuse, sexual violence, lack of appropriate healthcare, and neglect.[42] In 2016, the Irish Penal Reform Trust carried out the first, and as of yet only, research into the experiences of LGBT people in Irish prisons.[43] They identified a lack of concern or support for these prisoners, and a pronounced vulnerability to abuse. They also found that the transgender prison population face particularly extreme discrimination and suffer from hyper-visibility, while their concerns and needs are ignored. For example, the prison service allocate prisoners to prisons based on the gender identified on their birth certificate or their genitalia, which directly contravenes the Gender Recognition Act 2015. They may also

[38] European Union Agency for Fundamental Rights, 'EU LGBT Survey. European Union Lesbian, Gay, Bisexual and Transgender Survey' (2013)
[39] Peter Dunn, 'Slipping off the equalities agenda? Work with LGBT prisoners.' (2013) 206 Prison Service Journal
[40]Ilan Meyer, 'Incarceration rates and traits of sexual minorities in the United States national inmate survey 2011-2012,' (2017) 107 American Journal of Public Health 267
[41] Inspector of Prisons, 'Office of the Inspector of Prisons Annual Report 2013,' (2014)
[42] United Nations Office on Drugs and Crime, 'Handbook on Prisoners with Special Needs' (2009)
[43] Dr Nicola Carr, Dr Siobhán McAlister and Dr Tanya Serisier, 'Out on the Inside' (2016) Irish Penal Reform Trust

need specialised healthcare, such as hormone replacement therapy, which is not accounted for in prison.

The Situation of Older People in Prison

Age Action has identified 'widespread ageism' in Ireland, which facilitates stereotypes of the 'passivity, dependency, and inevitable decline' of older people.[44] Deprivation and poverty have been noted trends in Irish older populations for decades.[45] In 2014, 20% of older people in Ireland lived in deprivation.[46] Social isolation and no familial ties are also serious problems for older people, with potentially serious consequences.[47]

Older people are one of the fastest growing demographics in prison.[48] In Ireland, the rate of prisoners over the age of 50 has risen from 4.2% in 2007 to 9.6% in 2016.[49] Many of these people also face accelerated ageing, meaning they appear up to ten years older than they actually are, a noted phenomena in Irish prisons.[50]

In writings from other jurisdictions and international bodies, older people in prison have been identified as facing significant risk with regards virtually all of the issues discussed in the following sections of this report. The Irish Penal Reform Trust believes these issues are reflected in the Irish prison system as well.[51] Older people in prison have a great need for adequate and robust health services, due to high rates of both mental and physical health issues.[52] While no Irish research on this exists, in other jurisdictions

[44] Age Action, 'Annual Report 2016' (2017)
[45] see e.g. Richard Layte, Tony Fahey and Chris Whelan, 'Income, Deprivation and Well-Being Among Older Irish People,' (1999) National Council on Ageing and Older People
[46] Michelle Hennessy, 'One in five older Irish people live in deprivation' *The Journal* (30 Sep 2014)
[47] Tony Fahey, Bertrand Maitre, Brian Nolan and Christopher T. Whelan, 'A Social Portrait of Older People in Ireland' (2007) Economic and Social Research Institute; Sorcha Pollak, 'Ageing Irish population 'leading to greater isolation of over-65s'' *The Irish Times* (21 Nov 2017)
[48] Mary Davoren, Mary Fitzpatrick, Fintan Caddow, Martin Caddow, Conor O'Neill, Helen O'Neill, and Harry G. Kennedy 'Older men and older women remand prisoners: mental illness, physical illness, offending patterns and needs.' (2014) 27 International Psychogeriatrics, 747
[49] The Irish Prison Service, Statistics
[50] Azrini Wahidin, 'Ageing Behind Bars, with Particular Reference to Older Women prisoners in Prison,' (2011) 8 Irish Probation Service 109
[51] Joanna Joyce and Dr Tina Maschi, ''In Here Time Stands Still: The Rights and Needs of Older People in Prison' (2016) Irish Penal Reform Trust
[52] ibid

the infrastructure and physical design of prisons has been found wholly unsuitable for older people, especially those with mobility issues,[53] which is likely to exacerbate their need for adequate healthcare.

Contact with the outside world is important for all prisoners, but older people in prison are unlikely to receive regular visits. This is at least partially attributable to the fact that many of their friends and loved ones would also be older, and therefore travelling the long distances often required for prison visits is very difficult.[54]

The isolation this creates is exacerbated by the low rates of engagement with prison services[55] and high rates of bullying and victimisation reported by older people in prison. One Irish study found 38% of older prisoners experience bullying, compared with 12% of younger prisoners. This study also noted that physical and emotional recovery from bullying is more difficult for older people.[56]

The low engagement with services is also worrying given the issues older people face in re-adjusting to and reintegrating into society after release, with half of them in fact becoming homeless.[57] The services that do exist to help prisoners upon release, such as accommodation or employment assistance, are not always suitable for older prisoners.

[53] Janet Mary Turner 'Improving palliative care for prisoners: the 'both sides of the fence' study.' (2016) 224 Prison Service Journal 42
[54] Prison Reform Trust, 'Doing time: The experiences and needs of older people in prison' (2008)
[55] Jan Alvey, 'Ageing Prisoners in Ireland: Issues for Probation and Social Work,' (2013) 10 Irish Probation Journal, 203
[56] Mary Davoren, Mary Fitzpatrick, Fintan Caddow, Martin Caddow, Conor O'Neill, Helen O'Neill, and Harry G. Kennedy 'Older men and older women remand prisoners: mental illness, physical illness, offending patterns and needs.' (2014) 27 International Psychogeriatrics, 747
[57] Jan Alvey, 'Ageing Prisoners in Ireland: Issues for Probation and Social Work,' (2013) 10 Irish Probation Journal, 203

2: Healthcare in Prison

The fundamental right to health is found in various statutes, international instruments, and declarations, as well as our own Constitution, which has been said to place a premium on human dignity.[1] Ireland has recognised this right through both legislation and case law. However, the provision of the right to health in practice has been less than perfect. As it is a socio-economic right requiring the spending of state money, it is more difficult to vindicate, especially through the courts. This is very evident in the prison system, whose population is particularly vulnerable to having their rights overlooked[2] and living in conditions, as discussed in the third and fourth section, conducive to ill-health. There is also a particularly high rate of pre-existing mental illness and psychological disorders among the prison population.[3] This section will examine the following topics:

- European law and the ECtHR on healthcare in prison,
- the Irish courts on healthcare in prison,
- Irish legislation on healthcare in prison,
- drug dependency and use in prison,
- treatment of drug dependency and use in prison,
- the alternative approaches of drug decriminalisation and needle exchanges, and
- mental health services and psychiatric care in prison.

European Law and The ECtHR on Healthcare in Prison

The European Prison Rules lay down specific and compulsory regulations regarding healthcare in prisons. In Part III, it states that "prison authorities shall safeguard the health of all prisoners in their care."[4] However, in 2013, the European Prison

[1] Alan Eustace, 'Bunreacht Behind Bars: The Irish Prison System in its Constitutional Context' (2018) 21 Trinity College Law Review 89
[2] Judge Michael Reilly, Inspector of Prisons, *Healthcare in Irish Prisons Report,* (Department of Justice and Equality, 21st February 2017)
[3] Dr Valerie Bresnihan 'Out of Mind, Out of Sight Solitary Confinement of Mentally Ill Prisoners' (2001) Irish Penal Reform Trust
[4] European Prison Rules, r 39

Observatory carried out two studies providing an overview of prison conditions in Europe.[5] According to both studies, the European Prison Rules are not widely respected by the Member States.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have issued guidelines on overcrowding and general standards in order to protect the health of prisoners, among other things, as well as specifying guidelines on healthcare.[6] The CPT in their General Report offered guidelines on access to a doctor, standards of care, patient consent and confidentiality, preventative health care, extra care for particularly vulnerable prisoners, and professional independence and competence.

The European Court of Human Rights (the ECtHR) has often found that states denying medical services to prisoners with physical illnesses violates Article 3 of the European Convention of Human Rights (the Convention), which guarantees the protection against torture and inhuman and degrading treatment.[7] States have also been found in violation of Article 3 for not properly facilitating prisoners with disabilities.[8] The ECtHR further vindicates the right to health in relation to the mental health of prisoners.[9]

In *Keenan v United Kingdom,* the ECtHR demonstrated a rather broad understanding of adequate medical treatment.[10] Here, the applicant's son suffered from paranoid schizophrenia, and was repeatedly taken out of the medical treatment centre and introduced into the general population, his mental health worsening with each transfer. He eventually took his own life. The ECtHR found that the state had breached Article 3. They were unconvinced by the UK's argument that psychiatric attention would not have

[5] *Prison in Europe: overview and trends*, Alessandro Maculan, Daniela Ronco, Francesca Vianello (EPO, September 2013) and *From national practices to European guidelines: interesting initiatives in prisons management*, Marie Crétenot (EPO, December 2013)
[6] *3rd General Report of the CPT,* CPT/Inf (93) 12, para 30-77
[7] see *Mouisel v. France* (2004) 38 EHRR 34; *Dorneanu v. Romania* (2017) ECtHR 362
[8] *Vincent v. France* App No 6253/03 (ECtHR, 24th October 2006)
[9] *Kudla v. Poland* (2002) 35 EHRR 11
[10] (2001) 10 BHRC 319

helped the prisoner, and further identified a positive duty to protect such prisoners from self-harm, which has clear socio-economic implications.

In *Akkoc v Turkey*,[11] the ECtHR detailed their expectations of medical examinations of prisoners. This included a qualified practitioner, thorough notes of the examination, and inquiring with the prisoner about the causes of their injuries. In this case, they found that the medical examination which had occurred to be inadequate.

In *Kucheruk v Ukraine*,[12] the unnecessary restraint of a prisoner with chronic schizophrenia, as well as the failure to provide him with medical care, breached his Article 3 rights. The ECtHR were critical of the prison's failure to consult with psychiatrists about the practice. They stated that states must account for the particular vulnerability of mentally ill prisoners and the possible resulting inability to complain effectively about their treatment.

The Irish Courts on Healthcare in Prison

The Irish judiciary has delineated the limits of prisoners' right to healthcare. In *Kinsella v Governor of Mountjoy Prison,* it was held that the right to bodily integrity, from which the Constitutional right to health is derived, encompasses psychological well-being.[13]

Under *The State (C) v Frawley,*[14] a prisoner's right to health ought to be protected as well as reasonably possible in the circumstances. Protecting the rights of prisoners in general is significantly less likely to be 'reasonably possible' than protecting the rights of non-incarcerated citizens. Rogan outlines the limitations placed on prisoners' rights in *Murray v Ireland*,[15] stating that "a court must assess if the vindication of a claimed right would be practical and also consider the burden placed on the prison authorities in the

[11] (2002) EHRR 553
[12] (2011) 52 EHRR 28
[13] [2012] 1 IR 467
[14] [1976] IR 365
[15] [1985] IR 532

vindication of the right claimed and if vindication would be proportionate to the right asserted."[16]

Regarding the limitations on the right to health in particular, *McMenamin v Governor of Wheatfield Prison* found that a prisoner could not choose his medical treatment, such as demanding a specific medication or medical specialist.[17] Hanna J also noted in this case that prisons are not under a duty to provide the best medical treatment available. In *The State (C) v Frawley* the applicant submitted that the only suitable long-term psychiatric treatment was a specialised psychiatric unit which did not exist at the time in Ireland. The High Court refused to release the applicant, or to build such a unit. Beyond issues of reasonableness, the request caused tension with the separation of powers, as finding in favour of the plaintiff would require the court to make a decision on the allocation of state resources, which they felt should be reserved for the government. This was further discussed in *Clarke v HSE*.[18]

In this case, Birmingham J found that the mentally ill applicant's wish for a more extensive range of health services was 'very understandable', and would be 'widely supported.' However, the judge went on to comment that the applicant's wish raises issues regarding the allocation of resources, and is therefore 'one that must be pursued in the political arena.'[19] As health is a socio-economic right, and generally requires positive action rather than inaction on behalf of the state, this means prisoner litigants may face significant obstacles in vindicating their rights through the courts.

The English case of *Knight v Home Office* suggests that the standard of care provided for a mentally ill prisoner in a prison hospital is not as high as the standard that might be provided in a psychiatric hospital outside of prison.[20] As psychiatric hospitals and prisons have different primary functions, the court felt their respective duty of cares had

[16] Mary Rogan, *Prison Law* (Bloomsbury Professional, 2014)
[17] [2008] IEHC 184
[18] [2014] IEHC 419
[19] ibid
[20] [1990] 3 All ER 237

to be 'tailored to the act and function to be performed.'[21] This has been similarly expressed in the American case of *Harris v Thigpen*, in which Fay J stated that it is not constitutionally required that mental health services in prisons be 'perfect, the best obtainable, or even very good.'[22] Given the aforementioned vulnerability of the prison population, this mindset poses significant risk to them. While Irish courts have often been more sensitive and respectful in their discussion of the rights of prisoners, they have also been assessed as having 'yet to entirely shake off the lingering sentiments of a less enlightened age.'[23]

Irish Legislation on Healthcare in Prison

Irish prisoners' right to health is primarily guaranteed through the Prison Rules 2007. These state that "each prisoner shall be entitled, while in prison, to the provision of healthcare of a preventative, curative and rehabilitative nature…that is, the least, of the same or a similar standard as that available to persons outside of prison who are the holders of a medical card."[24]

Section 11 requires each prisoner to be "examined separately by a doctor on the day of his or her admission to a prison for the purpose of the diagnosis of any physical or mental illness[...]." Section 10 includes an obligation for the Governor to inform the prison healthcare professionals of a prisoners' request for medical attention.[25] While a general requirement for healthcare is therefore established, what this entails in practice is left up to the Minister for Justice and Equality. The Minister must arrange for the provision of primary health services, and psychiatric services may be provided for as 'he or she considers appropriate'. This would suggest that the Minister is not bound to provide any sufficient psychiatric care to prisoners.

[21] ibid
[22] (1991) 941 F 2d 1495
[23] Alan Eustace, 'Bunreacht Behind Bars: The Irish Prison System in its Constitutional Context' (2018) 21 Trinity College Law Review 89
[24] Prison Rules 2007, r 33
[25] Prison Rules 2007, r 102

The Prison Rules provisions on healthcare have been accused of being out of date, and providing no effective framework for a prison healthcare system.[26]

Drug Dependency and Use in Prison

Prison populations generally display a disproportionately high level of drug use. A 2014 study on Irish prisons conducted by the National Advisory Committee on Drugs and Alcohol (NACDA) found that prior to commencing their sentence, nine out of ten prisoners had used cannabis at some point, seven out of ten prisoners had used cocaine at least once, four out of ten male prisoners had previously used heroin and six out of ten female prisoners had previously used heroin.[27] Also according to the NACDA study, 43% of prisoners who used heroin had first started using it while in prison.[28] Prisoners are highly likely to come from disadvantaged communities characterised by high unemployment, low education levels, poor housing and family breakdown.[29] People enduring significant hardship may turn to drugs and alcohol as a coping mechanism, and given the illegality of drugs and the connection between criminal behaviour and drug use, it is not surprising that many prisoners have a drug dependency.[30]

Treatment of Drug Dependency and Use in Prisons

The Irish Prison Service (IPS) has outlined their two-prong approach to minimising the influence of drugs in prison: firstly, eliminating the supply of drugs into prison through security measures such as CCTV, canine units, and general surveillance; secondly, reducing the demand for drugs by educating and rehabilitating prisoners throughout their time in custody.[31]

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[26] Paul Anthony McDermott, *Prison Law* (Round Hall Sweet & Maxwell, 2000) 322
[27] Dr Anne Drummond and Dr Mary Codd, 'The prevalence of drug use, including intravenous drug use and blood-borne viruses among the Irish Prisoner Population' (2014) National Advisory Committee on Drugs and Alcohol
[28] ibid
[29] Judge Michael Reilly, Inspector of Prisons, *Healthcare in Irish Prisons Report,* (Department of Justice and Equality, 21st February 2017)
[30] ibid
[31] Irish Prison Service, *Keeping Drugs Out of Prisons Drugs Policy & Strategy*

Prisoners should be encouraged to establish a responsible relationship with drugs through counselling and education services, and those suffering with drug related health issues should be offered all available care and support.[32] The IPS have reported that there is a growing number of people entering prisons already on methadone maintenance programmes who wish to continue them while in prison.[33] Approximately a quarter of prisoners need methadone maintenance and of the inmates who needed it, 70% were able to access it.[34] Prisoners also have access to counselling services which seek to educate and rehabilitate inmates struggling with use. Engagement with these services is very high, with more than nine out of ten prisoners seeking support from an addiction counsellor if they were able to do so in their prison, and eight out of ten prisoners taking part in Narcotics Anonymous or Alcoholics Anonymous meetings if available.[35] This demonstrates a great demand, but it is not always met.

Drug-free wings in prisons are one way in which prisoners can show their compliance with the zero-tolerance policy to drugs, as well as participating in both mandatory and voluntary drug tests. Inmates who do not use drugs will be given additional privileges such as improved diets, and additional letters, phone calls or visits.[36] However, the NACDA's study found that only 40% of prisoners who needed/wanted to be on a drug-free wing actually had access to one. In addition to this, only two out of ten prisoners received a detox from benzodiazepines upon request.[37] For those who want total detoxications in Mountjoy Prison, there are only nine beds available in their medical unit on eight-week rotations for the entire prison population.[38]

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[32] ibid
[33] ibid
[34] Judge Michael Reilly, Inspector of Prisons, *Healthcare in Irish Prisons Report,* (Department of Justice and Equality, 21st February 2017)
[35] ibid
[36] Irish Prison Service, *Keeping Drugs Out of Prisons Drugs Policy & Strategy*
[37] Dr Anne Drummond and Dr Mary Codd, 'The prevalence of drug use, including intravenous drug use and blood-borne viruses among the Irish Prisoner Population' (2014) National Advisory Committee on Drugs and Alcohol
[38] ibid

Alternative Approaches: Drug Decriminalisation and Needle Exchanges

In 2001, Portugal became the first country to declare that possession of drugs intended for personal use would no longer be criminal behaviour. Instead, the person in possession could be directed to seek medical intervention. As a result of this, Portugal has seen a reduction in the number of overdoses, cases of HIV, as well as an overall reduction of drug use among adults.[39] The Irish government is currently planning to adopt such a model,[40] the benefits of which would be twofold for the prison system. It would have the direct benefit of reducing the number of people with drug-related issues in prisons, and the indirect benefit of combating prison overcrowding, which, as discussed in the next section, causes many health risks.

In 1992, Switzerland became the first country to introduce a needle and syringe exchange programme in their prisons. Since then, twelve other nations in Europe and Asia have followed suit and have seen the overwhelming positive results that such a programme can bring. Needle sharing either stopped completely or decreased dramatically, and no new cases of HIV were reported. The programme also did not increase the number of people injecting drugs and there were no instances of syringes being used as weapons, as had been feared it might.[41]

Such an approach could be effective in Ireland. Currently, the level of blood-borne viruses (BBVs) such as Hepatitis B, Hepatitis C and HIV is significantly higher among the prison population than of the general population.[42] NACDA's study found that one out of every three-hundred prisoners had Hepatitis B, two out of every one-hundred prisoners had HIV, and thirteen out of one-hundred prisoners had Hepatitis C.[43] The rates of Hepatitis B within Irish prisons are notably low in comparison to other countries,

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[39] Drug Policy Alliance, 'Drug Decriminalisation in Portugal: A Health-Centred Approach' (2015)
[40] Kitty Holland, 'Legislation to decriminalise drugs could come in early 2019,' *The Irish Times* (30 November 2017)
[41] (n1)
[42]National Advisory Committee on Drugs and Alcohol*, Study on the prevalence of drug use, including intravenous drug use, and blood-borne viruses among the Irish prisoner population* (April 2014)
[43] Dr Anne Drummond and Dr Mary Codd, 'The prevalence of drug use, including intravenous drug use and blood-borne viruses among the Irish Prisoner Population' (2014) National Advisory Committee on Drugs and Alcohol

due to vaccinations against it being offered to prisoners with a sentence exceeding eight months.[44]

Mental Health Services and Psychiatric Care in Prison

The Irish Penal Reform Trust (IPRT) estimates that as many as 40 per cent of the Irish prison population may be suffering from some form of psychiatric or psychological illness or disturbance.[45] The over-representation of people with mental disorders in the prison system is attributed to a number of factors, including overcrowding in psychiatric hospitals, mentally ill people's behaviour being seen as disorderly, and high rates of drug and alcohol misuse among those with mental illnesses.[46]

The court diversion service allows for mentally ill prisoners suspected of committing an offence to be transferred to a psychiatric facility. High support units have also been set up in several prisons, which give the necessary support and attention to prisoners with mental health issues. In 2016, the jury in an inquest for a prisoner who committed suicide found that such units should be established in every prison.[47]

The IPRT found that solitary confinement (discussed in detail in the fourth section) is used as a regular substitute for medical care in Irish prisons, and that 78 percent of prisoners confined in padded cells are mentally ill.[48] Such confinement exacerbates mental health conditions, 'makes sick people sicker', and is in no way suitable for the treatment of these conditions.[49] According to a 1999 report by the Department of Justice and Equality, mentally ill prisoners were usually held in cladded cells while awaiting

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[44]Shane Allwright, Fiona Bradley and others, '*Prevalence of antibodies to hepatitis B, hepatitis C, and HIV and risk factors in Irish prisoners: results of a national cross sectional survey*' [2000] BMJ 2000;321:78

[45] Dr Valerie Bresnihan 'Out of Mind, Out of Sight Solitary Confinement of Mentally Ill Prisoners' (2001) Irish Penal Reform Trust

[46] World Health Organization 'The World Health Report 2001 – Mental Health: New Understanding, New Hope' (2001) http://www.who.int/whr/2001/en/whr01_en.pdf?ua=1 accessed 11 March 2018 103

[47] Barry Roche, 'High support units should be in all prisons, jury says' *The Irish Times* (24 September 2016)

[48] Dr Valerie Bresnihan 'Out of Mind, Out of Sight Solitary Confinement of Mentally Ill Prisoners' (2001) Irish Penal Reform Trust 5

[49] Dr Valerie Bresnihan 'Out of Mind, Out of Sight Solitary Confinement of Mentally Ill Prisoners' (2001) Irish Penal Reform Trust

transfer to the Central Mental Hospital for several days, because the hospital was suffering from an 'apparent shortage of beds'.[50] This was found to be 'unacceptable' by the reporters.[51] In 2015, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT), found similar issues in Irish prisons and said the government needs to take further steps to ensure the availability of beds in psychiatric care facilities for acutely mentally ill prisoners.[52]

It is also possible that the lack of adequate psychiatric care may be due to a punitive rather than rehabilitative approach to the penal system. In *Harris v Thigpen*, an American case on the provision of psychiatric care in prison, Fay J said: 'Nobody promised them a rose garden…They have been convicted of a crime, and there is nothing in the Constitution which forbids their being penalised as a result of that conviction.'[53] While this may reflect a different cultural outlook, such an approach could potentially hold sway in Ireland and fuel the insufficient funding and inadequacy of mental healthcare in Irish prisons. It is also irreconcilable with the philosophy of the IPRT, who believe that a person having their liberty taken away is punishment enough, and therefore no further punitive measures ought to be implemented by prisons.

Conclusion

This section therefore makes the following key findings:

- While ECtHR jurisprudence on health services in prison is relatively far reaching, the Irish courts have taken a considerably more restrained approach.
- Irish legislation on prison healthcare is not particularly specific, allowing details to be decided by the Minster. It makes no guarantees for the provision of psychiatric or mental treatment.

[50] Department of Justice and Equality, *Report of the National Steering Group on Deaths in Prisons* (1999)
[51] ibid.
[52] CPT, 'Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)' (Strasbourg, 2015)
[53] (1991) 941 F 2d 1495

- Drug use and dependency in prisons is very high and when treatment or counselling services are made available there is great engagement with them.
- Other countries have decriminalised drugs and/or introduced needle exchange programmes to combat prison drug use and dependency.
- There is a high rate of mental illness and psychiatric disorders among the prison population, but in many ways the treatment they receive is inadequate.

3: Overcrowding and Sanitation

There is no standard definition for 'overcrowding.'[1] The prison system in England and Wales describes it as above the level of "certified normal accommodation" or "uncrowded capacity," assessed on a cell by cell basis.[2] Ireland has no similar guidelines. In an article on the Irish prison system, Kevin Warner stated that overcrowding occurs "when numbers rise to the point where accommodation or services and regimes or prisoner safety are compromised," and that this was the definition the then Inspector of Prisons was working under as well.[3] It appears, then, that overcrowding is not a set standard but determined in relation to other factors, such as availability of services.

On a national and international level, overcrowded prisons have been perceived as a threat to the health and safety of prisoners. In fact, Ian O'Donnell of UCD believes all of the problems facing the Irish prison system stem from overcrowding.[4] In a report in 2014, the United Nations was "concerned" with the prevalence of overcrowding and lack of in-cell sanitation facilities in Irish prisons.[5] This section shall examine:

- the dangers of overcrowding,
- overcrowding under the European Convention of Human Rights,
- overcrowding in Ireland both in terms of over capacity and doubling up,
- legislation and policy combating overcrowding,
- infrastructure improvements combating overcrowding,
- slopping out in Ireland,
- slopping out under European law, and
- the Irish courts on slopping out in two key cases.

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[1] Hans-Joerg Albrecht, 'Prison Overcrowding-- Finding Effective Solutions' (2012) Max Planck Institute for Foreign and International Criminal Law, 4 https://www.mpicc.de/shared/data/pdf/research_in_brief_43_-_albrecht_prisonvercrowding.pdf accessed on 10 March 2018

[2] The Prison Service (2001) Prison Service Order 1900, Certified Prisoner Accommodation

[3] Kevin Warner, 'Regimes in Irish prisons: 'Inhumane' and 'degrading': An analysis and the outline of a solution' (2014) 14 Irish Journal of Applied Social Studies 3, 16

[4] Connor Lally, 'Why our jails fail' The Irish Times (19 Jan 2013)

[5] Https://www.ihrec.ie/app/uploads/download/pdf/un_hrc_concluding_observations_on_ireland_and_iccpr_24_july_2014.pdf

Dangers of Overcrowding

In 2014, the UN High Commissioner for Human Rights said that overcrowding could pose a significant risk to many human rights of the prisoner, including: "[the r]ight to liberty and security, right to freedom from torture and other inhuman or degrading treatment or punishment, right to health, right to food, water and sanitation, right to education and rehabilitation, right to freedom of religion or belief, right to privacy, family life and rights of family members, and the right to equality and non-discrimination."[6] Overcrowding has been linked to increased levels of sexual violence against prisoners, as well.[7]

Overcrowding also puts a huge strain on resources, and the frustration, tension, and lack of oversight resulting can lead to increased levels of violence.[8] These resources range from staff presence to lack of access to educational services and medical treatment, such as drug and alcohol treatment. The strain on health services created by overcrowding is two-fold: more people are dependent on the health services than they were designed to accommodate, and these people are more susceptible to disease and injury, and therefore more likely to require attention. In England, it was found that:

> "the pressure of prison numbers and the resulting overcrowding and increased movement of prisoners [are] fundamental problems facing the Prison Service and factors that are contributing to high levels of deaths in Prison Service custody."[9]

[6]United Nations High Commissioner for Human Rights, 'Human rights implications of overincarceration and overcrowding' (2015)
[7] Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman, and Jane A. Siegel, 'Sexual Violence Inside Prisons: Rates of Victimization' (2006) 83 Journal of Urban Health, 835
[8] Criminal Justice Alliance, 'Crowded Out? The Impact of Prison Overcrowding on Rehabilitation' (2012)
[9] Joint Committee on Human Rights, Third Report of the 2004-2005 Session.

Overcrowding Under the European Convention on Human Rights

Ireland became party to the European Convention on Human Rights (the Convention) in 1953, and adopted it into domestic law through the European Convention on Human Rights Act 2003.

Article 3 of the Convention prohibits torture and inhuman or degrading treatment. In a number of cases, the European Court of Human Rights (the ECtHR) has found prison overcrowding qualifies as the latter category.

In *AA v Greece,*[10] the treatment of an asylum seeker detained in Greece was considered degrading and therefore in breach of Article 3. Overcrowding was one of the features of his detainment that lead the ECtHR to this decision. It is further possible that other persuasive features, such as disease and lack of services, were exacerbated or caused by the overcrowding, and therefore overcrowding also indirectly led to a breach of Article 3. *MSS v Belgium and Greece*[11] found that the prisoner's detention in an "overcrowded place, in appalling conditions of hygiene and cleanliness" amounted to degrading treatment.[12] These cases demonstrate how overcrowding is rarely an isolated issue, but connected with other degrading and dangerous circumstances. In *Melnick v Ukraine*,[13] the ECtHR found the prisoner's unhygienic conditions "raises concerns […] given the acutely overcrowded accommodation."

It is worth noting that in both of these cases, as well as much of the other ECtHR case law on prison conditions, the treatment was particularly heinous, featuring for example access to sanitation only at the discretion of the guards, virtual or actual absence of any health service, and unhygienic sleeping or eating facilities. This may indicate a high standard for breaches of Article 3 regarding overcrowding. Case law on Article 3 in general demands 'a minimum level of severity,'[14] though this level changes as cultural expectations and norms do.[15] Punitive or protective

[10] No 12186/08,(ECtHR, 22 July 2010) 57
[11] No 30696/09 (ECtHR 21 January 2011)
[12] Ibid
[13] (App no 72286/2001) ECHR 28 March 2006
[14] Ireland v United Kingdom [1980] 2 EHRR 25
[15] Selmouni v France (2000) 29 EHRR 403

considerations in prison cases specifically may justify the treatment,[16] and the prisoner's circumstances must 'go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.'[17]

Overcrowding in Ireland

The problem of overcrowding in Irish prisons is two-fold: overcapacity of prisons and overcrowding of individual cells. Regarding the first issue, several Irish prisons are operating above the Inspector of Prisons' recommended capacity. Regarding the second issue, a significant number of prisoners stay in cells with one or more other individuals.

Overcapacity in Ireland

The total number of prisoners in custody as of 1st March 2018 stood at 3,846, and the 'bed capacity' was 4,158.[18] However, the latter figure is often achieved by the 'doubling up' of prisoners in cells designed for single occupancy.[19] This obscures the true capacity of some prisons. Other commentators have observed that published figures may be rendered further inaccurate by their failure to account for the impact of closure of prison wings for long periods for refurbishment, or the frequent closure of workshops, schools and libraries due to staff shortages.[20]

Also on 1st March 2018, the Dóchas Centre was operating at 118% capacity.[21] While it is designed to accommodate 105 women, numbers regularly exceed 120. The Dóchas Centre Visiting Committee Report 2015 notes the knock on effects associated with this. For example, five women had to be accommodated in the recreation room of one house and all shared a small shower room with a toilet,

[16] Van der Ven v The Netherlands [2003] ECRR 62
[17] T and V v The United Kingdom [1999] 30 EHRR 12
[18] Irish Prison Service, Daily Prisoner Population Statistics, (Thursday 1st March 2018) https://www.irishprisons.ie/information-centre/statistics-information/2015-daily-prisoner-population/2018-prison-populations/ accessed 2 March 2018
[19] Irish Penal Reform Trust Briefing 2011
[20] Dóchas Centre Visiting Committee Report 2015 http://www.justice.ie/en/JELR/D%C3%B3chas_VC_Annual_Report_2015.pdf/Files/D%C3%B3chas_VC_Annual_Report_2015.pdf
[21] n24

compromising their privacy and hygiene.[22] This report also notes the ineffectiveness of previous efforts of prison management to combat overcrowding, and how this indicates a worsening of other problems associated with overcrowding such as illegal drug use.

On the same date, the Limerick men's prison was at 114% capacity, and the Limerick women's prison was at 138%. Castlerea prison was at 103%. A number of other prisons were also operating close to full recommended capacity.[23]

In 2016, efforts to relieve overcrowding at Limerick Prison, such as moving prisoners to other prisons, courts, or hospitals for treatment, had the consequence of 'acute' staff shortages, putting pressure on services such as education.[24]

The National Development Plan 2018-2027 acknowledges that predicted increased growth of the general Irish population will place additional demands on prison infrastructure, and unless we see major reformation, this will likely only exacerbate the issue of overcrowding.[25]

Doubling-up

The most recent statistics from 2017 indicate that 101 prisoners were accommodated in cells holding four or more people; 270 were accommodated in cells holding three people; and 1,918 were accommodated in cells holding two people.[26] The problems of inadequate prison sanitation and overcrowding are closely interlinked. The practice of 'doubling-up' has meant that 1,539 prisoners are required to use the toilet in the presence of another prisoner.

The prevailing attitude appears to be that this is not an issue. The High Court has held that a prisoner's right to privacy may be compromised for the sake of security.[27]

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[22] Dóchas Centre Visiting Committee Report 2015 http://www.justice.ie/en/JELR/D%C3%B3chas_VC_Annual_Report_2015.pdf/Files/D%C3%B3chas_VC_Annual_Report_2015.pdf

[23] n24

[24] Limerick Prison Visiting Committee Annual Report 2016 http://www.justice.ie/en/JELR/Limerick_Prison_VC_Annual_Report_2016.pdf/Files/Limerick_Prison_VC_Annual_Report_2016.pdf

[25] National Development Plan 2018-2027 (2018) p 94

[26] https://www.irishprisons.ie/wp-content/uploads/documents_pdf/October-2017-In-Cell.pdf

[27] State (Richardson) v Governor of Mountjoy [1980] ILRM 82

Despite numerous recommendations that single-cell occupancy was best practice, the newly constructed Cork prison was designed for double occupancy. It also runs against European Prison Rules which state that double-occupancy should only be used in exceptional circumstances.[28]

Legislation and Policy Combating Overcrowding

While the Irish prison population has exploded by 400% between the 1970s and 2011,[29] since 2011 it has seen a slow but steady decline.[30] In that period, the Irish government enacted two key pieces of legislation with the aim of lowering the incarceration of people involved in minor crimes: the Fines (Payment and Recovery) Act 2014 (the 2014 Act) and the Criminal Justice (Community Service) (Amendment) Act 2011 (the 2011 Act).

The 2014 Act aimed to reduce the amount of people imprisoned on offenses relating to the non payment of a fine. It allows for judges to take into account the financial circumstances of a person being convicted of a fine, and for fines to be paid in instalments.[31] There has since been a significant reduction of people incarcerated for fines, a 15% drop between 2014 and 2016.[32] This is largely beneficial as incarceration for non-payment of fines is costly. It absorbs criminal justice resources and generates no compensatory income, as when the committal to prison takes place the unpaid fine is discharged.[33] The 2014 Act provides community service orders as an alternative to prison sentences, but some commentators say that those convicted may favour the relatively brief imprisonment over community service, which would undermine the purpose of the Act.[34]

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[28] Rule 18.5, European Prison Rules (June 2006)
[29] Irish Penal Reform Trust, 'Facts & Figures' http://www.iprt.ie/prison-facts-2 accessed 13 March 2018
[30] Jimmy Martin, 'Prisoner Population and Trends: discussion paper' Department of Justice and Equality (2016); Minister Flanagan, Opening Address at Law Society Annual Human Rights Conference 2017 https://merrionstreet.ie/en/News-Room/Speeches/Opening_address_by_Minister_Flanagan_at_Law_Society_Annual_Human_Rights_Conference_2017.html accessed 28 February 2018
[31] Fines Act 2014 S 5, 6
[32] Irish Prison Service (IPS) in figures released to the Irish times
[33] Ian O'Donnell "Ireland's Shrinking prison population" (2017) Irish criminal Law journal 27(3)
[34] ibid

The 2011 Act also allows for judges to consider community service orders for crimes that could otherwise warrant up to 12 months incarceration. While this was largely welcomed, the IPRT urged that it should be exclusively used in cases where the offender would otherwise receive a prison or other custodial sentence. Otherwise it risked bringing more people into contact with the criminal justice system.[35]

In 2011, the Irish Prison Service and the Probation Service introduced the Community Return Programme. This allows for prisoners who have completed half of a sentence of one to eight years to be released and take up unpaid community work. This is also intended to reduce the prison population, as well as helping with community reintegration upon release, as discussed in the final section of this report.

Infrastructure Improvements Combating Overcrowding

Aside from preventative measures targeting the incarceration rate, the State has also commenced some renovations of prison facilities and infrastructure to better accommodate those who are incarcerated. For example, the refurbishment of Mountjoy in 2016 ended all cases of "slopping out" in the prison and provided for in cell sanitation away from the presence of others in the male unit. Other facilities, such as a gym aimed at relieving the stress of inmates, were also established.

A major refurbishment is planned for Limerick prison, one of the two Irish prisons which still requires slopping out. Two old wings of the prison will be renovated and an additional block accommodating 150 people will be constructed. There are also more tentative plans to replace Portlaoise Prison, the other prison which requires slopping out, with a high security prison.[36]

A new prison was also constructed to service the Munster area in 2016. This prison was made to replace the older prison in Cork dating back to the 1820s, which had attracted much criticism for its inadequate and inhumane conditions. The new prison

[35] IPRT Briefing on Overcrowding in Irish Prisons (2011) http://www.iprt.ie/files/IPRT_Briefing_on_Overcrowding_Oct_2011.pdf
[36] Irish Prison Service, Strategic Plan 2016- 2018

was described as state of the art, with first class sanitation recreation and visiting facilities.[37]

However, there is longstanding evidence that building more prisons does not manage prison population or overcrowding, and may in fact lead to higher rates of incarceration.[38] It was on these grounds that IPRT successfully opposed the suggested construction of Thornton Hall super-prison.[39] For this reason, new prisons ought to only be built to replace older inadequate facilities, and not to expand upon them.

Overall, Ireland has certainly seen improvements in prison overcrowding. The number of prisoners slopping out is now only 60, down from 1,003 in 2010.[40] The overall committal rate per 100,000 population has dropped from 96 in 2011 to 78 in 2016.[41] This recent trend could lead to cautious optimism, but as Ian O'Donnell has noted, these reductions may not be entirely the result of the states policy and may have came as a result of other factors, such as increased leniency on behalf of judges[42] or economic recovery from the recession of 2008.

Slopping Out in Ireland

The practice of slopping out has long been subject to extensive domestic and international criticism. It is harmful to prisoners' physical and mental health. It is associated with heightened risk of infection, as well as harming the prisoners' dignity. A key aim of the Irish Prison Service Strategic Plan 2016–2018 was to eliminate the practice through the modernisation of prison facilities and infrastructure.[43] Strong progress has been made in this regard with in-cell sanitation facilities now the norm.

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[37]Eoin English, "New era dawns for Cork's new €42m state of the art prison facility" The Irish Examiner (January 22nd 2016)
[38] e.g., Criminal Justice Alliance, 'Crowded Out? The Impact of Prison Overcrowding on Rehabilitation' (2012); IPRT, 'Position on Prison Building Policy - Thornton Hall' (2008)
[39] IPRT, 'Case Study 1: Thornton Hall super-prison' http://www.iprt.ie/contents/2501 accessed 13 March 2018
[40]Irish penal reform trust. Census Prison Population July 2017 – Cell occupancy – In-Cell Sanitation
[41] World Prison Brief, ≤*http://www.prisonstudies.org/*>; [accessed 4 May 2017]. Irish Prison Service annual report for 2016.
[42] Ian O'Donnell "Ireland's Shrinking Prison Population" (2017) Irish Criminal Law Journal 27(3)
[43] Irish Prison Service Strategic Plan 2016–2018
http://www.irishprisons.ie/wp-content/uploads/documents_pdf/12631-IPS-annualreport-2016_Web.pdf

The most recent statistics from 2017, however, reveal that 61 prisoners, or 2% of the prison population, are still required to urinate and defecate in a 'chamber pot.'[44] While this is certainly much more satisfactory than 28% in 2010,[45] the pace at which the remaining necessary refurbishments are taking place is regrettable.

Despite this reduction in slopping out, approximately 44% of prisoners are still required to use the toilet in the presence of another prisoner.[46] The IRPT, who has campaigned for the elimination of slopping out since 1994, notes that progress must be maintained in the elimination of slopping out in its entirety across Irish prisons by 2020, a commitment the State made, as well as reducing the number of prisoners "required to use the toilet in the presence of another."[47]

The situation at the Limerick facility is still critical. In 2009 the cell sanitation situation was described as a matter of "priority and urgency," yet little progress has been made.[48] Under the government's Capital Investment Plan 2016-2021, new male accommodation consisting of 193 cells and female accommodation consisting of 50 cells and 8 transition units was planned for 2019. However, construction is yet to commence with the project still in the tender stage, and completion has been pushed back to 2020.

Ireland's only high-security prison, Portlaoise, is also one of the oldest, built in 1830. On average, 42 prisoners in Portlaoise Prison are still required to slop-out. However, all prisoners are in single-cell accommodation,[49] meaning their right to privacy is likely protected and they may find it difficult or even impossible to challenge the regime of slopping out in the courts, as discussed below. The 1980 case of *The State (Richardson) v Governor of Mountjoy Prison*[50] found that no order needed to be made against the prison as they were willing to alter the regime being challenged. However, the regime being challenged was not necessarily slopping out itself but rather the

[44] 2017 October Census on In-Cell Sanitation and Cell Occupancy
[45] 2010 October Census on In-Cell Sanitation and Cell Occupancy
[46] 2017 October Census on In-Cell Sanitation and Cell Occupancy
[47] Irish Penal Reform Trust, "High Court Judgement on Slopping out" (14 September 2017) <http://www.iprt.ie/contents/3191>
[48] Limerick Prison Visiting Committee, Annual Report 2009
[49] n20
[50] [1980] ILRM 82

procedure surrounding it, which involved no access to hot water, insufficient privacy, and contamination of the sink the prisoners used to wash themselves with human waste. In evidence, the solution suggested was providing hot water and separating the area for slopping out from the area for washing, rather than eliminating slopping out itself.

Slopping Out Under European Law

The Council of Europe European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment have set standards for prison accommodation which state that:

> "Each cell should possess a toilet and a washbasin as a minimum. In multiple-occupancy cells the sanitary facilities should be fully partitioned (i.e. up to the ceiling). In those few prisons where no in-cell sanitary facilities are available, the authorities must ensure that prisoners have ready access to the toilet whenever needed. Today, no prisoner in Europe should be obliged to "slop out", a practice that is degrading both for the prisoners and for the staff members who have to supervise such a procedure."[51]

Slopping out is generally not considered to breach the Convention in and of itself,[52] though a 2011 case of the ECtHR seems to suggest that they may in future be willing to find a breach of Article 3 where slopping out is required in a single cell.[53] Currently, in conjunction with other poor conditions slopping out can be an influential factor in the ECtHR deciding that there has been a breach of Article 3,[54] and is seen as a breach of privacy if required in front of other prisoners. This reasoning has largely been reflected in Irish jurisprudence.

[51] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Living Space per prisoner in prison establishments: CPT standards' Council of Europe, CPT/Inf (2015) 44

[52] *Malechkov v Bulgaria* App no. 57830/00 (ECtHR, 28 June 2007)

[53] *Radkov v Bulgaria* (No. 2) App no. 18382/05 (ECtHR, 10 February 2011)

[54] *Peers v Greece* App no. 28524/95 (ECtHR, 19 April 2001)

Irish Courts on Slopping Out: Two Key Cases

In the 2010 case of *Mulligan v Governor of Portlaoise Prison*, the plaintiff sought to challenge slopping out, a lack of in-cell sanitation, and general unhygienic conditions.[55] The fact that the prison hadn't act maliciously or punitively, and hadn't intentionally breached Mr. Mulligan's rights under the Convention or the Constitution, was seen as protecting them from liability, a logic that has been described as common in constitutional challenges taken by prisoners.[56] For example, in *The State (C) v Frawley,* Finlay P stated that: "I must construe the entire concept of torture, inhuman and degrading treatment and punishment as being not only evil in its consequences but evil in its purpose as well,"[57] a judgment which was positively considered in *Mulligan*. MacMenamin J further held that as finding against the prison would require a reallocation of state resources, which falls under the remit of the Government, the courts should be slow to intervene. While the conditions being challenged were accepted as sub par, the prison having ameliorating features such as single cells and adequate services was seen to balance this out. The slopping out not occurring in the presence of another prisoner was particularly persuasive in the court not finding a breach of the plaintiff's rights. This further demonstrates the link between overcrowding and slopping out.

The apparent requirement for malice in a prison authority's decisions proved a significant obstacle in prisoner litigation. However, this appeared to be discarded by implication in *Kinsella v Governor of Mountjoy Prison*.[58] Here, while the court was certain that the prison authority had not acted in bad faith, Mr. Kinsella's constitutional rights were nevertheless found to have been breached.

In 2016 Mr Simpson, a former prisoner, took a case challenging slopping out to the High Court.[59] The judgement, delivered by White J, held that the constitutional right to privacy of the plaintiff had been breached. However, the damages sought by the

[55] [2010] IEHC 269
[56] Dr Mary Rogan, 'Prisoner's Rights and the Separation of Powers: Comparing Approaches in Ireland, Scotland, England and Wales' (2012) Public Law 7
[57] [1976] IR 365, p 374
[58] [2011] IEHC 235
[59] Simpson v Governor of Mountjoy Prison [2017] IEHC 561

plaintiff were not awarded, as the High Court believed he had offered "untruthful and exaggerated evidence" about his treatment.[60] White J rejected the plaintiff's claim that the treatment he received qualified as inhuman and degrading. Mr. Simpson also argued that the practise of slopping out in the context of shared cell occupancy amounted to a breach of his right to dignity and respect for his private life as guaranteed by Article 40.3.1 and 40.3.2 of the Irish Constitution and Article 8 of the Convention. Mr. Simpson claimed that from enduring the slopping out regime, and having to do so while doubling up, he began to experience feelings unworthiness and that his mental health suffered.

While Mr. Simpson's claims of a breach of the ECHR was unsuccessful, his constitutional right to privacy was found to have been violated. Eustace believes that the criticism of Mr. Simpson's conditions by the court indicates 'that the reality of prison life has long fallen short of the vision of prison demanded by the Constitution.' [61] The refusal to award damages, however, is thought to have implications for an estimated 1,200 other slopping out cases coming down the pipeline.[62]

Conclusion

This section makes the following key findings:

- Overcrowding creates severe risks for prisoners such as violence, ill health, and lack of service availability.
- The Irish government has made significant efforts to end prison overcapacity and its associated problems, but it may be too soon to assess their effectiveness.
- Overcrowding is a prevalent and live issue amongst Irish prisons with seemingly no valid attempts being made to address this issue; the newly built Cork prison for example contains cells designed for doubling up.

[60] Ibid, para 457.
[61] Alan Eustace, 'Bunreacht Behind Bars: The Irish Prison System in its Constitutional Context' (2018) 21 Trinity College Law Review 89
[62] Mary Carolan, 'Man Denied €1 million costs in case over prison slopping out regime' *The Irish Times* (Dublin, 16 November 2017)

- There is a direct connection between overcrowding and poor sanitation, most notably slopping out.
- In a report in 2014, the United Nations was “concerned” with the prevalence of overcrowding and lack of in-cell sanitation facilities in Irish Prisons.
- The number of prisoners subjected to the slopping out regime in Ireland has dramatically decreased since 2010 and is hoped to be completely eliminated in the next two years.
- The ECtHR has found slopping out an influential factor in finding a breach of Article 3 when accompanied with other poor conditions of detainment, though one case potentially indicates a future willingness to find a breach of Article 3 by virtue of slopping out alone.
- The Irish courts have ruled that the slopping out regime is a breach of the constitutional right to privacy when in the presence of other prisoners, and prison authorities are apparently no longer required to have had malicious or punitive intentions for a breach of a prisoner’s constitutional rights to be found.

4: Solitary Confinement

Despite the widespread criticism that solitary confinement practices have received, it is commonly implemented in some form in nearly every prison system in the world. The Irish Penal Reform Trust (IPRT) has long called for its abolition in Ireland, and believes people in prison should have a minimum of eight hours outside their cell.[1] This section shall examine the the practice with regard to the following issues:

- the use of solitary confinement in Ireland,
- the psychological impact of solitary confinement,
- justifications for solitary confinement,
- the Mandela Rules on solitary confinement,
- the European Court of Human Rights on solitary confinement,
- the Irish courts on solitary confinement,
- Irish legislation on solitary confinement, and
- alternatives to solitary confinement.

The Use of Solitary Confinement in Ireland

Prisoners in solitary confinement or restricted regimes are confined within their prison cell from a minimum of 19 hours to a maximum of 23 hours. The Irish Prison Service (IPS) consolidates and collects a census of prisoners held within a restricted regime in Ireland, the latest in October 2017.[2] According to the reports:

- there has been an increase in prisoners held within restricted regimes from 415 in July 2017 to 428 in October 2017.
- 385 prisoners are held pursuant to rule 63.
- 27 prisoners held pursuant to rule 62.
- 419 prisoners are held from 19 hours in a cell to 22 hours.
- five prisoners are held for 22 hours in a cell, and

[1] Colin Gleeson, 'Report calls for end to solitary confinement in prisons' *The Irish Times* (2 Feb 2018)
[2] Census of Restricted Regime Prisoners October 2017 (Irish Prison Service 2017) <www.irishprisons.ie/wp-content/uploads/documents_pdf/October-2017-Restriction.pdf> accessed 8 March 2018

- four prisoners are held for 23 hours in a cell.

Most Irish prisoners in solitary confinement are there on a voluntary basis.[3] These prisoners were placed in solitary confinement under prison rule 36. This rule exists in order to protect vulnerable prisoners. It can be used at a prisoner's request, or when a governor deems it necessary to protect them from other prisoners who are likely to cause them significant harm. At the beginning of 2018, 11 prisoners were on 22 or 23 hour lock-ups on foot of this rule.[4]

Reports in Mountjoy found that up to one in four inmates in Mountjoy prison are in solitary confinement due to threats of gang violence.[5] It is used to protect witnesses as a form of 'protective custody.'[6] Many prisoners who end up in solitary confinement have mental health issues.[7]

This means that those in solitary confinement are generally already vulnerable persons. Having regard to the psychological impacts of solitary confinement, it could be argued that those who are the most vulnerable are being doubly punished, and this is putting them more at risk.

Psychological Impact of Solitary Confinement

Regardless of the rationale for their being put there, prisoners in solitary confinement are faced with periods of considerably reduced social contact, basic cell-conditions, and have restricted access to aspects of the wider prison regime that could assist in their rehabilitation.[8]

Haney argues that the prison environment innately poses the risk of exacerbating existing psychological vulnerabilities; in solitary confinement, prisoners are subjected

[3] Niall McCracken, 'Dozens of Irish prisoners held in solitary confinement' *The Irish Times* (Dublin, 24 October 2016)
[4] ibid
[5] Sarah Burns, 'Mountjoy prisoners seek solitary confinement for protection' *The Irish Times* (Dublin, 17 January 2018)
[6] ibid
[7] Agnieszka Martynowicz and Linda Moore, 'Behind the Doors: Solitary Confinement in the Irish Penal System' (Irish Penal Reform Trust 2018)
[8] Sharon Shalev, 'Solitary Confinement as a Prison Health Issue' in World Health Organisation, *Prisons and Health* (World Health Organisation 2014)

to even greater psychological stress.[9] Research by Grassian identifies several psychiatric symptoms that have been observed in prisoners and are linked to experience in solitary confinement. These include: hyper-sensitivity to external stimuli; perceptual distortions and hallucinations; panic attacks; memory and attentional difficulties; intrusive obsessive thoughts; paranoia; and diminished impulse control.[10] Grassian comments that many prisoners are very likely to suffer permanent effects. His research argues that, although the above symptoms on their own are often observed in other psychiatric disorders, when taken in combination they present a unique syndrome with a clear trajectory over time.[11] Similarly, Haney likens the effects of solitary confinement to post-traumatic stress disorder or the psychological trauma observed in torture victims.[12]

In early 2018, the IPRT published a report about the regiment of restricted regimes in Ireland.[13] The report provided the psychological and physiological effects of an extended period within solitary confinement. Symptoms evident in prisoners put in restricted regimes included sleep deprivation, hallucinations, self-harm, and increased levels of violence and aggression.[14] Physiological symptoms included heart palpitations, fatigue, eyesight deterioration, and gastrointestinal problems. The report found that restricted regimes proved to be wholly inadequate and insufficient and may cause greater personal harm than the risks presented by the prisoner being allowed in the general population.[15]

For prisoners suffering from pre-existing mental illness, prison provides the complete antithesis of the therapeutic environment and social supports that they need.[16] Solitary

[9] Craig Haney, '"Mental Illness" and Penal Confinement: Some Observations on Mental Illness and Prison Pain' (2017) 19(3) Punishment & Society 310
[10] Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 Washington University Journal of Law & Policy 327 ibid
[11] ibid
[12] Craig Haney, 'Mental Health Issues in Long-Term Solitary and "Supermax" Confinement' (2003) 49(1) Crime and Delinquency 124
[13] Agnieszka Martynowicz and Linda Moore, 'Behind the Doors: Solitary Confinement in the Irish Penal System' (Irish Penal Reform Trust 2018)
[14] ibid 16.
[15] ibid 18.
[16] Craig Haney, '"Mental Illness" and Penal Confinement: Some Observations on Mental Illness and Prison Pain' (2017) 19(3) Punishment & Society 310

confinement is particularly likely to exacerbate existing conditions.[17] This is an important consideration as the prevalence of mental illness among the prison population is disproportionately larger than that of the wider population. IPRT has noted that, in Ireland, pressure on national psychiatric facilities means that very often Irish prisoners with severe psychiatric conditions have no alternative but to remain housed in prisons because Irish hospitals lack sufficient space to offer treatment.[18] While they advocate for an abolition of solitary confinement in general, the IPRT believe that, if nothing else, there should be a ban on placing prisoners with psychiatric conditions in such conditions.

Above all else, Haney stresses that meaningful social contact is critically important for psychological stability because it maintains one's sense of social identity and social reality. The regime of solitary confinement fundamentally removes the social context necessary to evaluate the reasonableness of one's own thoughts, behaviour, and emotional states, to the extent that enduring solitary confinement essentially erodes one's self of self.[19] In reflecting on his personal experiences of solitary confinement in a US prison, Betts states that academic commentary and legal analysis do little to capture the true detrimental extent of the experience, and that these voices are all too often absent from the discussion. Of his own experience he comments, '[e]ach day, I lost a little bit of what made me want to be free… I almost disappeared.'[20]

Justifications for Solitary Confinement

Research by Shalev proposes that isolating a prisoner from the general prison population can be rationalised by one of four motivations:

- Protection.
- Prevention.

[17] Craig Haney, 'Mental Health Issues in Long-Term Solitary and "Supermax" Confinement' (2003) 49(1) Crime and Delinquency 124
[18] Agnieszka Martynowicz and Linda Moore, 'Behind the Doors: Solitary Confinement in the Irish Penal System' (Irish Penal Reform Trust 2018)
[19] Craig Haney, '"Mental Illness" and Penal Confinement: Some Observations on Mental Illness and Prison Pain' (2017) 19(3) Punishment & Society 310
[20] Reginald Dwayne Betts, 'Only Once I Thought About Suicide' (2015) 125 Yale Law Journal Forum 222, 228

- Punishment.
- Administrative.

Importantly, Shalev remarks that distinguishing or categorising the motivations behind this practice is something of an artificial distinction, in that all forms of solitary confinement ultimately result in the prisoner experiencing 22 hours per day in isolation.[21] With that said, the motivations described above are recognised official justifications that are supported by internal prison rules and regulations, and are implemented through the exercise of practitioner discretion and professional judgement. As such, they form a system of classification that is internationally understood by both practitioners and academics.

Protection

Solitary confinement can be used for the purposes of protection when prisoners at risk of self-harm, at risk of being harmed by others, or considered to be violently disruptive are placed in long-term units that are purposely designed for their isolation from the general population.[22] Prisoners can request to be placed in isolation for their own protection, or this decision may be made on behalf of the prisoner by the prison administration. Regarding prisoners placed under solitary confinement for reasons of protection, a 2011 report by the European Committee for the Prevention of Torture and Degrading Treatment (CPT), following inspections of Irish prisons, stated that 'additional measures should be taken to provide them with appropriate conditions and treatment, access to activities, education courses, and sport.'[23] They noted that while states are obliged to ensure the safety of its prisoners, that social interaction and access to rehabilitative components of the prison regime should be maintained as much as possible.

[21] Sharon Shalev, 'Solitary Confinement: The View from Europe' (2015) 4(1) Canadian Journal of Human Rights 143
[22] Daniel Mears, 'Supermax Prisons: The Policy and the Evidence' (2013) 12(4) Criminology and Public Policy 681
[23] Council of Europe, 'Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' <https://rm.coe.int/1680696c98> accessed on 6 March 2018

Prevention

Solitary confinement is used as a means of prevention by keeping persons on remand segregated from the wider prison population. This is common practice in many jurisdictions, particularly in Scandinavia, and its rationale is to prevent collusion between suspects or to prevent their intimidation.[24] Despite the reputation that Scandinavian prisons have earned as a model of excellence in terms of progressive and humane prison practices, the practice of using solitary confinement for its pre-trial detainees continues to be extensively used in Norway, Sweden, and Denmark. Smith comments that this continued practice has attracted much criticism from the CPT during its visits to Scandinavian prisons, as they maintain that solitary confinement should only be used in exceptional circumstances. The use of pre-trial detention with limited social contact, in addition to the indeterminate duration of one's period of detention, can have detrimental effects on health and psychological well-being.[25] Smith states that the practice arguably maintains this atmosphere of undue psychological pressure in order to elicit confessions from its detainees in exchange for being released from a solitary regime.

Punishment

The most familiar form of solitary confinement to the public is its use as a form of punishment. Shalev notes that the majority of prisons have dedicated facilities for punitive isolation, and it is a rarity that a prison would have no such provisions.[26] Morris notes that this use of solitary is often used as a disciplinary measure with the intention of deterring future misconduct. His research argues that if penal policy is to continue to support the use of solitary confinement as a means to deter misconduct – violent or otherwise – that it should be supported by empirical evidence that demonstrates that the practice is effective and therefore justified. However, in his

[24] Sharon Shalev, 'Solitary Confinement: The View from Europe' (2015) 4(1) Canadian Journal of Human Rights 143
[25] Peter Scharff Smith, 'A Critical Look at Scandinavian Exceptionalism: Welfare State Theories, Penal Populism, and Prison Conditions in Denmark and Scandinavia' in Thomas Ugelvik and Jane Dullum (eds.) *Penal Exceptionalism? Nordic Prison Policy and Practice* (Routledge 2012)
[26] Sharon Shalev, 'Solitary Confinement: The View from Europe' (2015) 4(1) Canadian Journal of Human Rights 143.

examination of seventy US prisoners who experienced short-term punitive solitary confinement, Morris found no correlation between the use of solitary and either increasing or decreasing violent behaviour in the prison environment.[27]

Administrative

The final motivation for solitary confinement is administrative. This refers to the use of dedicated units for housing prisoners that are deemed to be high risk. The determination of risk is based upon the nature of the prisoner's crime, past displays of violent behaviour, or association with violent prisoners. In the United States, the use of administrative segregation is an extremely common practice in prison regimes and is regarded as a means of efficiently 'managing' prisoners.[28] Administrative segregation is also used in Europe, albeit on a much smaller scale. In the Irish context, prisoners can be segregated from the general population under Rule 62 of the Prison Rules if they are considered to be violent and disruptive.[29] Jeffreys notes that in contrast to the use of punitive solitary confinement, prisoners who are labelled violent or disruptive can face solitary confinement for an indefinite period of time. The decision of placing a prisoner in administrative segregation is determined by prison officials, and is subject to due process which the prisoner can appeal.[30] However, Shalev observes that in practice, these obligations are not always upheld.[31]

The Mandela Rules on Solitary Confinement

The United Nations Minimum Standard for the Treatment of Prisoners,[32] otherwise known as the 'Mandela Rules', are guidelines that have been adopted by the United Nations which have been ratified by member states. Specifically, rule 43 deals with

[27] Robert G. Morris, 'Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates' 32(1) Journal of Quantitative Criminology 1.
[28] Malcom Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30(4) Criminology 449
[29] Prison Rules 2007, r 62
[30] Derek Jeffreys, 'Segregation and Supermax Confinement' in Yvonne Jewkes, Jamie Bennett, and Ben Crewe (eds.) *Handbook on Prisons* (Routledge 2016)
[31] Sharon Shalev, 'Solitary Confinement: The View from Europe' (2015) 4(1) Canadian Journal of Human Rights 143
[32] UNGA, 'United Nations Minimum Standard for the Treatment of Prisoners' (17 December 2015) UN-Doc A/Res/70/175

solitary confinement, defined as the confinement of a prisoner to more than 22 hours in a cell. Among other things, it prohibits a prisoner from being held:

- in solitary confinement for an indefinite period.
- in solitary confinement for a prolonged period.
- in a dark or constantly lit cell.
- in solitary confinement as a punitive measure.

Rule 45 states that the use of solitary confinement ‘shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority.’

The IPRT recommend full compliance and integration of the Mandela Rules within Irish penal legislation. In June 2017, the Prison Rules were amended and Section 27(1) now entitles all prisoners to at least two hours of 'out-of-cell' time, including time with other people. This ensures compliance with the Mandela Rules definition of solitary confinement. However, many commentators would consider only two out-of-cell hours grossly inadequate.

It is not clearly defined as to what 'meaningful human contact' implies, whether this can be extended towards friends and family or whether it is restricted to other prisoners. There is also no minimum length of time that qualifies as 'meaningful human contact'.

The Irish prison system still does not fully comply with the Mandela Rules. For instance, solitary confinement can still be used as a punitive measure, can exceed two weeks, and no class of prisoner, such as those with mental illnesses, is exempt.

European Law and the ECtHR on Solitary Confinement

Rule 60(5) of the European Prison Rules states that ‘solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.’ The CPT have recommended that the maximum length of time that anyone should be kept in solitary confinement is 14 days.[33]

[33] 'Solitary Confinement of Prisoners' (CPT 2011) <https://rm.coe.int/16806cccc6> accessed 9 March

The ECtHR does not believe solitary confinement to be inherently torturous, inhuman, or degrading as prohibited by Article 3. They may find it justifiable and necessary. For example, in *Ramirez Sanchez v France,* a prisoner challenged his detention in solitary confinement for eight years.[34] In finding that his rights had not been breached, the ECtHR had regard for the visits the prisoner was allowed to receive, the TV and newspapers he had access to, and the security reasons for his isolation.

However, having bona fide reasons for the solitary confinement will not always stop the ECtHR from identifying a rights violation. In *Peers v Greece,* a prisoner's detention solitary confinement was found to breach Article 3, despite the prison authorities not intending to humiliate or punish the prisoner.[35] This echoes the 1978 statement from the then European Commission of Human Rights: "[c]omplete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security."[36]

Furthermore, protective purposes may not justify solitary confinement. In *X v Turkey,* a gay man was placed in solitary confinement to ostensibly protect him from intimidation and bullying of fellow prisoners, but the deleterious effects of this qualified it as inhuman and degrading treatment, therefore breaching Article 3.[37]

Other considerations that may lead the ECtHR to identifying a rights violation include the duration and conditions of the solitary confinement, and in some cases the pre-existing health conditions of the prisoner. In *Ahmad v United Kingdom,*[38] whether solitary confinement qualified as a breach of Article 3 would depend on such factors as the length of stay, the effects on the individual, and the availability of additional supports such as exercise or mental health support.

For example, in *Renolde v France,* a prisoner's solitary confinement, leading to his

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[34] App no. 59450/00 (ECtHR, 4 July 2006)

[35] App no. 28524/95.(ECtHR, 19 April 2001)

[36] *Ensslin, Baader, Raspe v. the Federal Republic of Germany,* App nos. 7572/76, 7586/76, 7587/76 (ECtHR, 8 July 1978)

[37] App no. 24626/09 (ECtHR, 9 October 2012)

[38] App no. 24027/07 (ECtHR, 10 April 2012)

suicide, was found to have breached his rights due to his serious psychiatric illness and his previous suicide attempts. The ECtHR stated that, 'the vulnerability of mentally ill persons calls for special protection. This applies all the more where a prisoner suffering from severe disturbance is placed, as in [this] case, in solitary confinement or a punishment cell for a prolonged period, which will inevitably have an impact on his mental state, and where he has actually attempted to commit suicide shortly beforehand.'[39]

Irish Courts on Solitary Confinement and Restricted Regimes

The Irish courts traditionally allow limitations to be placed on a prisoner's constitutional rights as necessary for the functioning of the prison system.[40] However, in *Mulligan v Governor of Portlaoise Prison,* the High Court stated that any restrictions 'must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is expected in a mature society.'[41]

In *Kinsella v Governor of Mountjoy*, a prisoner challenged his placement in solitary confinement. He was only allowed a six-minute break each day from his padded cell, and suffered from severe sensory deprivation. Hogan J found that the constitutional protection provided within Article 40.3.2 extended beyond the integrity of the human body, to 'the integrity of the human mind and personality.'[42] He therefore identified a violation of Mr. Kinsella's constitutional rights. Importantly, in finding this violation, Hogan J did not give consideration to the fact that the prison authority's intentions in enforcing the solitary confinement had been bona fide. Previously, a prison authority's intentions had to be malicious for their actions to violate a prisoner's rights.[43] The judgment in *Kinsella* has been described as a positive new direction in Irish prison jurisprudence.[44]

Additionally, Hogan J considered the judgement in *Brennan v Governor of Mountjoy*

[39] App no. 5608/05 (ECtHR, 16 October 2008)
[40] *State (McDonagh) v Frawley* [1978] IR 131
[41] [2010] IEHC 269
[42] *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, 8
[43] See e.g. *The State (C) v Frawley* [1976] IR 365, p 374
[44] Dr Mary Rogan, 'Prisoner's Rights and the Separation of Powers: Comparing Approaches in Ireland, Scotland, England and Wales' (2012) Public Law 2

Prison[45] where it was ruled that an intentional violation of a prisoner's rights may be grounds for immediate release of a prisoner due to the protection provided within Article 40.3.2. It is apparent therefore that the Irish courts have been willing to rule that disproportionate restricted regime measures may, with consideration of the circumstances and the physical and mental well-being of the prisoner, be unconstitutional with regards to Article 40.3.2.

Irish Legislation on Solitary Confinement

Prisoners may find themselves placed in solitary confinement or subject to regime restriction for a variety of different reasons. Such instances are governed primarily by the Prison Rules 2007, which sets out the circumstances under which a prisoner may be segregated on the grounds of order (Rule 62), protection in cases of vulnerability (Rule 63) or where the use of a safety observation cell is needed (Rule 64).

Segregation on Grounds of Order

Under Rule 62, a Governor may instruct that a prisoner may not be permitted to participate in structured activities (general or specific), engage in recreation, or associate with other prisoners if they reasonably believe, on the basis of information supplied, that participation would result in a substantial threat to the maintenance of order or safe and secure custody.

Not all prisoners placed in segregation under Rule 62 will be subjected to a 22 or 23-hour lock-up; some may be allocated shared cells or may have access to more open regimes. While there is no limit on the period of such segregation; the Prison Rules require that the time-frame does not exceed that which is necessary to secure order. The Governor must review the segregation, not less than once every seven days, and the prisoner must be informed of the reasons for their initial separation, and for any extension thereafter. A prisoner segregated under Rule 62 must also receive regular visits from a doctor and have access to a chaplain.

[45] [1999] 1 ILRM 190

Segregation for Protection

Under Rule 63, a prisoner may be placed in segregation if it is reasonably likely that the other inmates may cause significant harm to them. Unlike under Rule 62, the request to be separated can be made by the prisoner. Prisoners that are segregated for protection may not necessarily be placed in isolation – they may share a cell with another prisoner and have access to some of the prison regime. There is no limit on the period of such segregation, however, unlike Rule 62, the separation does not need to be regularly reviewed. Since 2012, Governors are merely required to review the circumstances of all prisoners under Rule 63 on a monthly basis. The use of protective solitary confinement in Ireland and alternatives to it is discussed below.

Safety Observation

Under Rule 64, a prisoner may be placed in a safety observation cell (SOC) to prevent them from causing "imminent injury to himself or herself, or others". This period of segregation should generally not exceed 24 hours; however, following consultation with a doctor, the Governor may extend such period to five days. Any extension beyond that time must be approved by the Director General of the Irish Prison Service. The prisoner placed in a SOC must be examined by a doctor and observed by a prison officer at least once every 15 minutes.

Close Supervision

The use of Close Supervision Cells (CSCs) appears to be regulated by policy, rather than the Prison Rules 2007. The cells may be used to manage violent and distressed prisoners for a maximum of 5 days. The extension of each 24-hour period within those days needs to be approved by the Director General of the Irish Prison Service.

Breach of Discipline

Solitary confinement may be used as a punishment. Section 13(1)(c) of the Prisons Act 2007 provides that a prisoner, being found to have committed a breach of discipline, may be confined to a cell (other than an SOC) for a period not exceeding 3 days. Additionally, section 13(1)(d) provides that a prisoner may be held in conditions

similar to that of solitary confinement. For a period not exceeding 60 days, a prisoner may be prohibited from engaging in structured or recreational activities, receiving visits, sending or receiving letters, using money or possessing specific articles.

Minimum out-of-cell time

The Prisons (Amendment) Rules 2017 provides that prisoners now be given a minimum of 2 hours a day out-of-cell time "with an opportunity during that time for meaningful human contact, including, at the discretion of the Governor, contact with other prisoners." "Meaningful human contact" is defined as "interaction between a prisoner and another person of sufficient proximity so as to allow them both to communicate by way of conversation." While this is on its face an improvement, it still leaves a significant amount of discretion to the Governor, making it vulnerable to uncertainty and ineffectiveness.

Alternatives to Solitary Confinement

Deirdre Malone, the executive director of the IPRT, has said that tackling problems of violence in prison should be a key priority to reduce the number of people in solitary confinement, 'there needs now to be a concerted effort [...] to reduce incidents of violence within the system, and to do what we can to support staff and prisoners, and to make prisons safer.'[46] The Mountjoy Visiting Committee has also said that there was no effective policy for handling gang violence.[47] Solitary confinement is only a short term solution.

Some US prisons have created "specialised housing units" which hold vulnerable people together. This can be seen in Washington state and has resulted in safer conditions for both prisoners and staff.[48] In Ireland, the establishment of a protection-only prison is being considered in St. Patrick's Institution in Dublin, where those at risk can be held safely.[49] Other places, such as Colorado, have abolished

[46] Niall McCracken, 'Dozens of Irish prisoners held in solitary confinement' *The Irish Times* (Dublin, 24 October 2016)
[47] Sarah Burns, 'Mountjoy prisoners seek solitary confinement for protection' *The Irish Times* (Dublin, 17 January 2018)
[48] Erin Rhoda, '10 destructive myths about solitary confinement' *Bangor Daily News* (14 May 2015)
[49] 'Prison Service says solitary confinement numbers 'not acceptable'' *RTE News* (22 July 2013)

solitary confinement and instead use therapy or anger management classes to deal with agressions and other offences.[50]

It is also worth noting that as overcrowding, as discussed in section three, worsens violence, reducing the prison population could have the effect of reducing violence, therefore lessening the demand for protective solitary confinement.

Conclusion

The issues with solitary confinement are manifest, and most standards dictate that it should only be enforced as a last resort and never over a long period. However it should be asked, given the extent of the dangers associated with restricted regimes, if a total abolition is not favourable, as has been recommended by the IPRT. In considering this question, this section identifies the following key points:

- Solitary confinement has many grave, long-lasting and potentially life threatening effects on people, but is nevertheless practiced in virtually every jurisdiction.
- Motivations for enforcing solitary confinement can be protective, restrictive, punitive, or administrative, but this does not change the adverse effects it has.
- There is no absolute ban on the practice either in Irish or European courts or legislation, but depending on the surrounding circumstances it may be found to have breached the prisoner's rights.
- Placing children in solitary confinement is particularly harmful.
- There are many alternative methods of tackling the problems solitary confinement is seen as a solution to.

[50] Rich Raemisch, 'Why We Ended Long-Term Solitary Confinement in Colorado' *The New York Times* (12 October 2017)

5: Visitation

Visitation is an incredibly important feature of an individual's time in prison. It helps maintain relations with the outside world, and makes the community reintegration process more manageable upon release. With growing technologies allowing methods of communication other than face to face meetings, protecting a prisoner's right to visitation is more important than ever. In some American prisons video calls are replacing in-person visitation, a move unanimously criticized by human rights commentators.[1] This section shall focus on how European and Irish law conceptualises and facilitates prison visitation, by examining the following topics:

- the importance of visitation,
- the location of prisons,
- children visiting parents in prison,
- visitation under European law,
- the Irish courts on visitation,
- visitation under the prison rules 2007, and
- other means of correspondence available to the prisoner.

Importance of Visitation

If a person is incarcerated, contact must still be maintained with their family and friends. This ensures the wellbeing of all parties during the period of imprisonment and lays a healthy foundation for the prisoner's reintegration into their community upon release. According to a 2011 study in America, they are less likely to reoffend if they are visited frequently.[2] During their time in prison, receiving visits reduces depressive episodes among women and adolescents. Continuing relationships during prison provide a prisoner with a sense of worth and security.[3]

People in prison have described the negative impact that imprisonment has on their dependents in particular.[4] Visitation mitigates the negative impact which

[1] See e.g., Shannon Sims, 'The end of American prison visits: jails end face-to-face contact and families suffer' The Guardian (9 Dec 2017)
[2] Minnesota Department of Corrections, 'Effects of Prison Visitation on Offender Recidivism' (2011)
[3] Creasie Finney Hairston, 'Family ties during imprisonment: Important to whom and for what?' (1991) Journal of Sociology and Social Welfare, 87
[4] Irish Penal Reform Trust, 'Picking up the Pieces: The Rights and Needs of Children and Families Affected by Imprisonment' (2012) 37

imprisonment otherwise has on the family of the prisoner.[5] Families feel that it humanises the prison experience for their loved one. Maintaining consistent contact helps the family to function healthily post release.[6] Research suggests that there are 'strong social, economic, and emotional reasons to develop programs that enhance family ties and to change prison policies that inhibit family interaction.'[7]

Prison Locations

Prison locations present many difficulties. The more remote they are, the higher the travel expenses and the less practical the visits. Factors such as children, disabilities, or mobility issues make long journeys particularly difficult. Many Irish prisons are in areas poorly served by public transport.[8] Financial assistance for low-income families and those travelling long distances has been recommended.[9] There are only two locations that accommodate female prisoners, the Dóchas Centre and Limerick Prison. This means these prisoners are significantly less likely to be placed in an area near to or convenient for their families, putting them at a particular disadvantage regarding visits.

Children Visiting Parents in Prison

Children with imprisoned parents often suffer from a range of physical and mental problems such as depression, hyperactivity, aggressive behaviour, sleep problems, eating disorders, running away, truancy and poor school grades.[10] These struggles are exacerbated by prohibitive visiting practices.

The UN Convention on the Rights of the Child specifies that, "in all actions concerning children, undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 41.1 of the Irish Constitution ensures that "the State recognises the Family as the natural primary and fundamental unit group

[5] Department of Justice and Equality, 'Strategic Review of Penal Policy' (2014) 73
[6] Irish Penal Reform Trust, 'Information for Families of Prisoners' (2016) 37
[7] Karen De Claire and Louise Dixon, 'The Effects of Prison Visits From Family Members on Prisoners' Well-Being, Rule Breaking, and Recidivism: a review of research since 1991' (2017) 18 Trauma, Violence, and Abuse 185
[8] Danielle Sheehy, ''Staying Connected': Families' experiences of visiting an imprisoned relative and implications for social work practice' (2010) Critical Social Thinking Journal 2 143
[9] National Economic and Social Forum, 'Re-intigration of Prisoners' (2002) Forum Report no. 22
[10] Joseph Murray and David P Farrington, 'Effects of Parental Imprisonment on Children' (2008) 37 Crime and Justice: a review of research

of society, and as a moral institution possessing inalienable and imprescriptible rights." These guarantees set a standard under which support of prisoners with children should be expected, though Irish policy and legislation may not reflect this very strongly.[11] For example, the current limitations on physical contact with children allowed to parents in prison are subject to much criticism,[12] as growing research suggests the importance of contact for the well-being of the child.[13]

The positive effects of spending time with their parents may be undone if the visit procedure is unsuitable or unfriendly for children. Experts have recommended the establishment of 'consultations and support groups' for families, as well as working with children through more practical, direct methods to 'familiarise them with the prison environment and prepare them for visits ahead of time.'[14] Current difficulties in bringing children to prison include travelling long distances, limited toys and play equipment, rigid security procedures, long waiting times for visits, lack of privacy, and crowded and restrictive visiting centres.[15]

Some families will choose not to visit, or bring children to visit, prisoners with addiction problems.[16] Visitors can often be 'vulnerable to requests for drugs, or high-value items' that can be 'used as currency within the prison.'[17] This security concern is one of the main justifications for the lack of privacy and opportunities for physical contact associated with prison visits.

Visitation under European Law

Visitation rights are strongly protected under European law. Often a restriction on family visits is among the factors of a prisoner's detention that leads to the European Court of Human Rights (the ECtHR) finding a breach of Article 3.[18] The ECtHR has

[11]Danielle Sheehy, ''Staying Connected': Families' experiences of visiting an imprisoned relative and implications for social work practice' (2010) Critical Social Thinking Journal 2 142
[12] Joseph Murray and David P Farrington, 'Effects of Parental Imprisonment on Children' (2008) 37 Crime and Justice: a review of research 74
[13] Melinda Tasca, 'The Gatekeepers of Contact: Child-Caregiver Dyads and Parental Prison Visitation' (2016) 43 Criminal Justice and Behavior 739
[14]Liz Ayre, Kate Philbrick, and Hannah Lynn, 'Children of Imprisoned Parents: European Perspectives on Good Practice' (2014) EU Fundamental Rights and Citizenship Programme
[15] Irish Penal Reform Trust, 'Information for Families of Prisoners' (2016) 39
[16] Gearóid O'Loingsigh, 'Getting Out, Staying Out: The experiences of prisoners upon release.' (Community Technical Aid, 2004)
[17] Rose Smith, Roger Grimshaw, Renee Romeo, Martin Knapp, 'Poverty and disadvantage among prisoner's families,' (Joseph Rowntree Foundation, 2007)
[18] See Ilascu and Others v. Moldova and Russia App No. 48787/99 (8 July 2004)

also found such restrictions to breach the prisoner's right to family life, as protected by Article 8.[19] Visits must further be of sufficient regularity. For example, in *Khoroshenko v Russia*, the ECtHR held that a prison regime allowing only short family visits twice a year breached Article 8.[20]

The Irish Courts on Visitation

A restriction or suspension of certain constitutional rights of prisoners is seen as necessary and justifiable for the security and good order of prisons. These restrictions can extend to visitations and communications. Many cases on a domestic and European level have hinged on the court's determination of the extent to which a prison can interfere with, for example, the right to liberty, the right to privacy, or the right to family.

In *Mulligan v Portlaoise Prison*, MacMenamin J stated that "[a]ny attenuation of rights must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is expected in a mature society. Insofar as practicable, a prison authority must vindicate the individual rights and dignity of each prisoner."[21] However, the judge also acknowledged that a prisoner's rights may be lawfully limited due to "considerations of practicality, the common good or protection of the prisoner himself."[22]

Judicial ability to identify a violation of rights is further fettered by the separation of powers. Finlay J in *The State (C.) v. Frawley* explained that the court cannot recommend to the government "what is desirable or to fix the priorities of its health and welfare policy."[23] The great discretion allowed to prison governors in designing visitation policy under the Prison Rules 2007, discussed below, makes it unlikely for a court to find against them. For example, In *McDonnell v Governor of Wheatfield Prison*, the Supreme Court overturned the High Court's order[24] granting the applicant

[19] See Piechowicz v. Poland App No. 20071/0 (17 April 2012) and Horych v. Poland App No. 13621/08 (17 April 2012)
[20] App No. 41418/04 (30 June 2012)
[21] [2010] IEHC 269 para 14
[22] Ibid para 93
[23] [1976] IR 365 para 90
[24] [2015] IEHC 362

two family visits per week of one hour duration, stating that the High Court order interfered disproportionately with the internal management of the prison.

It was held in *Foy v Governor of Cloverhill* that screened visits of families with remand prisoners was a justifiable and balanced restriction of the prisoner's right to family, and necessary for reasonable prison management and governance.[25] In fact, Charleton J noted with regret that a prisoner on remand, despite enjoying a presumption of innocence, may be subject to more restrictions in visitations than convicted prisoners. He said that the determination of the balance "between what is possible in terms of upholding rights and, on the other hand, maintaining the purpose of imprisonment within good order, is for the governor."[26]

In *Egan v Governor of Wheatfield Prison*, a prisoner's partner was prohibited from visiting due to an exchange of illegal contraband during previous visits. The partner applied for a review of this decision and the processing of the petition faced delays, resulting in a lack of visits for a considerable time. This was held to be a fundamental breach of the prisoner's constitutional right to fair procedures.[27] The courts appear more willing to recognise procedural rather than substantive rights, and in general afford much deference to prisons in regulating visits.

Visitation Under the Prison Rules 2007

As we have seen, the management and regulation of prison visitations is the responsibility of the Oireachtas. The best guidance we have on Irish standards is therefore found in legislation and legislative instruments. The Prison Rules 2007 (hereinafter referred to as the Prison Rules) provide clear guidelines on visitations, and so long as a governor complies with these, there is little the courts can do.

Rule 35 of the Prison Rules states that convicted prisoners are entitled to a minimum of one visit per week of at least 30 minutes; convicted prisoners under 18 are entitled to no less than two visits of at least 30 minutes; and remand prisoners are entitled to no less than three visits lasting fifteen minutes a week, and if possible one visit per day for six days a week..

[25] [2010] IEHC 529
[26] [2010] IEHC 529 para 22
[27] [2014] IEHC 613

The governor of a prisoner may not preclude certain individuals from visiting without permission from the prisoner. It is at the governor's discretion to permit a prisoner to receive more visits than required by rule 35, or for visits to go on longer than specified, if they believe permitting it would be beneficial to the prisoner's welfare.

Physical contact is generally not permitted unless the governor allows it. Prisons are obliged to have facilities in the visiting area where the visitor and the prisoner can communicate through a screen, barring physical contact.

Rule 36 governs the regulation of visits. It sets out that prisoners are not obliged to take visitors, and visits must take place within the view and hearing of a prison officer. No items can be exchanged between the prisoner and their visitor, save with the governor's permission. This section also sets out regulations involving the performance of searches of visitors to the prison.

Under the Prison Rules, the governor is given a large amount of discretion. According to *Foy v Governor of Cloverhill*, this discretion cannot be interfered with save in cases where a decision of the governor has breached the Prison Rules.[28] The governor decides when visits can take place, in the interest of 'security, good order and government of the prison.' There is no obligation on the governor to take into consideration times most suitable for family and friends to visit, such as evenings and weekends.

All of this should be considered in light of Rule 75, which requires the governor "to conduct himself or herself and perform his or her functions in such a manner as to respect the dignity and human rights of all prisoners."

Means of Correspondence Other Than Visits

Other than visits, private correspondence is a prisoner's principal means of contact with the outside world.[29] It has therefore been granted significant protection by the ECtHR under the Article 8 right to private and family life. The nature of Article 8 means the identity of the sender or recipient will determine the amount of protection the correspondence warrants. For example, communication with lawyers are

[28] [2010] IEHC 529
[29] Liam Herrick, 'Prisoners' Rights' in Dr Ursula Kilkelly (ed), *ECHR and Irish Law* (2009) 347

explicitly afforded great privacy, to allow for 'full and uninhibited discussion.'[30] Article 8 may further require positive obligations upon the prison service to facilitate correspondence.[31]

The 2007 Prison Rules have been noted as improving Ireland's compliance with Article 8,[32] as prison services had previously been allowed to read any and all prisoner correspondence.[33] Now they may only examine letters under specific circumstances, such as if the letter is likely to cause serious distress to the recipient or facilitate the commission of a criminal offence.[34] However one of the circumstances under which the examination of a letter is permissible is if it is "contrary to the interests of the security, good order and government of the prison." Given the vagueness of this provision, commentators have urged for a strict interpretation in order to ensure Ireland's compliance with Article 8.[35] It is important to note that none of these circumstances justify examination of a letter addressed to government officials or solicitors.

Under s.42 of Prison Rules 2007, live video link can be permitted by the governor if the facilities are available and if practicable. It is possible that, with the increasing sophistication and availability of technology, new methods of communications will be utilised by the prison service in coming years.

The protections afforded to correspondence generally don't extend to correspondence from the media, and courts view this as a justifiable limitation on prisoners' rights.[36]

Conclusion

This section has identified the following key considerations:

- Visits are an integral and necessary part of the detention process.

[30] Campbell v United Kingdom [1993] 15 EHRR 137, para 48
[31] Liam Herrick, 'Prisoners' Rights' in Dr Ursula Kilkelly (ed), *ECHR and Irish Law* (2009) 348
[32] Claire Hamilton and Ursula Kilkelly 'Human Rights in Irish Prisons' (2008) 2 Judicial Studies Institute Journal 58
[33] Rule 63, Prison Rules 1947
[34] Rule 45, Prison Rules 2007
[35] Liam Herrick, 'Prisoners' Rights' in Dr Ursula Kilkelly (ed), *ECHR and Irish Law* (2009) 348
[36] Holland v Governor of Portlaoise Prison[2004] 2 IR 573

- The location of a prison significantly impacts the frequency and convenience of visitations.
- Visits are particularly important between imprisoned parents and their children, and factors such as non-contact, lack of privacy, and remote locations have particularly negative effects on visiting children.
- The right to visitation is strongly protected by the ECtHR, but Irish courts are less willing to interfere with the government's decisions regarding visits.
- The Prison Rules 2007 afford much discretion to the governor in regulating visits, and the courts are hesitant to challenge this.
- The ECtHR are unlikely to allow interference with a prisoner's private correspondence, and while the Prison Rules 2007 have improved protections for private correspondence, there is still a risk of breaching the ECtHR.

6: Reintegration Upon Release

Each issue dealt with so far in this report— health services; overcrowding and sanitation; solitary confinement and restricted regimes; and visitation— has significant impact on not only an individual's time in prison, but their ability to readjust to life outside of it upon release. The first section of this report, examining prison demographics, demonstrated that society's most disadvantaged and marginalised face a higher likelihood of spending time in prison. For these people, the obstacles created by their time in prison only exacerbate the challenges they already face in safely navigating our society.

One of the main measures of effective reintegration is reoffending, but there are many other relevant considerations, such as access to state welfare, family support, and engagement with the prisoner's community. Modern writings and jurisprudence emphasise the importance of assisting ex-prisoners to overcome the significant barriers they face upon release. This section shall examine:

- effect of prison on an individual's experience in society,
- employment upon release,
- accommodation upon release,
- the Habitual Residence Condition's impact on reintegration,
- ECtHR jurisprudence on prisoner reintegration,
- spent convictions,
- general education in prison,
- academic education in prison,
- skills training in prison,
- non-academic or vocational activities in prison,
- an overview of restorative justice,
- the effect of restorative justice on reoffending, and
- restorative justice in other jurisdictions.

Effect of Prison on an Individual's Experience in Society

Going from a highly structured, restrictive environment to having considerable freedom, autonomy, and responsibility can be incredibly difficult. This combines with the stigma faced by people who have spent time in prison, the lack of supports available to them upon release, the mental suffering they endured with potentially long-lasting effects, the social isolation and decline of personal relationships which may have happened over the time spent in prison, and the disadvantaged marginalised background most prisoners come from, and results in an incredibly challenging transitionary period back into society. Being released from prison is not the end of a prisoner's tribulations. As noted by the National Economic and Social Forum, 'it is unrealistic to expect that people will leave prison and start to lead a socially included, crime-free existence without any supports being put in place for them before they complete their sentence.'[1]

Despite the improvement in conditions and services in prisons, there remains a lack of throughcare services, those which continue upon release, which is sorely felt by many ex-prisoners.[2]

Employment Upon Release

Unemployed ex-prisoners are twice as likely to reoffend as those in full-time or even part-time employment. Accordingly, employment services play an important role in the reduction of recidivism rates.[3] It also provides stability, structure, and social involvement to ex-prisoners, making their reintegration easier. Unfortunately, time in prison reduces a person's ability to secure employment, job stability, and good earnings.[4]

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[1] National Economic and Social Forum, *Re-Integration of Prisoners Forum Report No 22* (2002) 69
[2] M Fitzgerald O'Reilly, 'Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland' (2014) 53.5 Howard Journal 473
[3] Law Reform Commission, *Report on Spent Convictions* (LRC 84-2007) 26
[4] Devah Pager, 'The Mark of a Criminal Record,' (2003) 108 American Journal of Sociology 937

Ex-offenders can face various obstacles as they try to re-enter the workforce, both practical and psychological. Long periods of time spent in prison can negatively affect a person's coping skills and self-esteem, resulting in some individuals being less likely to actively seek employment. Moreover, personal skills, such as time management, presentation and team working, which are highly valued by many employers, may be lost or lacking among those released from prison.[5] One practical issue which is often overlooked is that some ex-prisoners have difficulties in opening a bank account, as banks generally require a gas or electric bill to prove one's identity, which ex-offenders may not have. This may be a barrier to employment where the employer pays by credit transfer.[6] For female ex-offenders, employment issues can be exacerbated by a lack of availability of affordable childcare. Moreover, women can face double discrimination in the job market both as women and as ex-offenders,[7] and international research indicates that they also face particular issues in seeking employment.[8] This may be impacted by the fact that women are more likely to work in industries which require personal interactions with customers and clients, and the negative traits associated with time in prison, like untrustworthiness and aggression. are less desirable in such industries.[9] As found by the NESF, only half of employers in Ireland would consider employing an ex-offender. [10] However, quite positively, research in other jurisdictions has shown that in some cases people may even have higher rates of employment upon release than prior to incarceration, if there is a robust system of employment support available to them.[11]

[5] M Fitzgerald O'Reilly, 'Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland' (2014) 53.5 Howard Journal 474
[6] National Economic and Social Forum, *Re-Integration of Prisoners Forum Report No 22* (2002) 90
[7] ibid 86
[8] See e.g., Janna Verbruggen, 'Effects of Unemployment, Conviction and Incarceration on Employment: A Longitudinal Study on the Employment Prospects of Disadvantaged Youths' (2016) 54 British Journal of Criminology 729
[9] ibid
[10] National Economic and Social Forum, *Re-Integration of Prisoners Forum Report No 22* (2002) 97
[11] see e.g., Jeffrey R. Kling, 'Incarceration Length, Employment, and Earnings,' American Economic Review (2006) 96

Accommodation Upon Release

Accommodation is a major and immediate issue faced by prisoners upon release. Contact with family can be lost and relationships can break down while in prison. This sometimes results in an offender being unable to return to their previous place of residence upon release, and as a result they have to look for alternative housing options. Low literacy rates and little technological know-how mean access to help is sometimes limited for ex-offenders.[12] A high proportion of women prisoners have children (staying with relatives or in care), which often intensified their post-release accommodation needs.[13] Moreover, if they were on a social housing waiting list prior to committal, it is unlikely that they have been allowed to stay on the list and will have to reapply on release. They are also unlikely to have adequate financial resources to pay the market rate for private-rented accommodation.[14] The current housing crisis in Ireland only makes the situation for prisoners worse upon release.

Those released from prison face a heightened risk of becoming homeless compared to the rest of the population.[15] By entering a life of homelessness upon release from prison, many ex-offenders are exposed to the same conditions which may have led to their initial imprisonment. The lack of opportunities faced by those who are homeless can be a factor in their reoffending. It has been found that, of prisoners in Dublin, one in four had been homeless upon committal, and that over half of prisoners had, at some stage in their life, been homeless.[16]

[12] Irish Penal Reform Trust, Facts & Figures http://www.iprt.ie/prison-facts-2 - accessed 15/03/2018
[13] National Economic and Social Forum, *Re-Integration of Prisoners Forum Report No 22* (2002) p 87
[14] National Economic and Social Forum, *Re-Integration of Prisoners Forum Report No 22* (2002) 88-89
[15] M Seymour and L Costello, 'A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody' (2005) 2 Irish Probation Journal 52
[16] M Seymour and L Costello, 'A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody' (2005) 2 Irish Probation Journal 52

The Habitual Residence Condition's Impact on Reintegration

The Habitual Residence Condition (HRC) is attached to most Irish social welfare schemes,[17] and for many prisoners exacerbates their difficulties in accessing accommodation. This clause, which has been the subject of both international and domestic condemnation,[18] requires social welfare applicants to prove Ireland is their 'main centre of interest.' While on its face it maintains general applicability, it is clear that there are certain groups who will be particularly disadvantaged by it, many of whom are over-represented in the prison population: namely members of the Traveller, Roma,[19] and Migrant[20] community. There is no statutory definition of the HRC, and Deciding Officers maintain a lot of discretion in determining whether someone has met this standard, leading to uncertainty and inconsistency in its application. However, there are some guidelines for determinations, and one consideration is the length or continuity of an applicant's residence in Ireland. Crucially, time spent in prison is not counted towards this.[21] This means many people upon release, when they are at their most vulnerable and most in need of support, are also unable to get it. Not qualifying for state welfare may preclude them from receiving rent allowance. In order to access state-funded after prison support services, one needs to qualify under the HRC.[22] As economic disadvantage and social isolation have been directly linked to the likelihood of imprisonment, the negative consequences of having spent time in prison, such as not qualifying under the HRC, risk locking ex-prisoners in cycles of recidivism. Creating a significant

[17] Including the back to work family dividend; blind pension; carer's allowance; child benefit; disability allowance; domiciliary care allowance; guardian's payment (non-contributory); jobseeker's allowance and jobseeker's allowance transitional payment; one-parent family payment; state pension (non-contributory); supplementary welfare allowance; and widow's, widower's or surviving civil partner's (non-contributory) pension.

[18] Irish bodies such as Pavee Point, the National Women's Council of Ireland, and SAFE Ireland have all condemned the HRC. The UN has also urged the Irish government to remove it.

[19] Kitty Holland, 'Disproportionate Number of Travellers in Prison Population' *The Irish Times* (20 October 2017)

[20] Irish Prison Services Annual Report 2016

[21] Department of Employment Affairs and Social Protection, Guidelines for Deciding Officers on the determination of Habitual Residence.

[22] Pavee Point, Position paper - impact of the Habitual Residence Condition (HRC) on Travellers and Roma, September 2011

impediment for non-negligible sections of the prison population-- Travellers, Roma, and migrants-- to access state support upon release puts them at considerable risk.

Jurisprudence of the ECtHR

Three recent cases have significantly developed the ECtHR jurisprudence regarding integration upon release and rehabilitation: *Mastromatteo v Italy,*[23] *Vinter and others v UK,*[24] and *James, Wells and Lee v UK.*[25]

Mastromatteo concerned an application made by a woman whose son was murdered by a group of people on leave of absence from prison. The applicant asserted that when the Italian authorities granted leave to the prisoners, they breached their positive duty to protect her son's life as guaranteed by Article 2. In their rejection of this argument, the ECtHR recognised the 'progressive social reintegration' of prisoners as a legitimate aim of government policy.

Vinter concerned three applicants who had been given whole-life terms following convictions for multiple murders. Whole-life sentences do not have a fixed duration, but rather elapse upon the prisoner's death. The applicants argued that it breached their rights under the Convention to detain them without any provision for a review of their sentence following the completion of a minimum term.

In their judgment, the ECtHR cited Lord Justice Laws, who said that:

> 'a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath… But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent

[23] *Mastromatteo v Italy* App No 37703/97 (ECtHR, 24 October 2002)
[24] *Vinter and others v UK* App No 66069/09 (ECtHR, 9 July 2013)
[25] *James, Wells and Lee v UK* App No 57877/09 (ECtHR, 18 September 2012)

circumstances. That is to pay lip-service to the value of life; not to vouchsafe it.'[26]

The ECtHR thus found that incarceration without any prospect of release or review carried the risk prevented the prisoner from true atonement or redemption, and was incompatible with the requirement of human dignity under Article 3. Whole life prisoners were entitled to know, at the beginning of their sentence, what conditions were necessary for release. The ECtHR concluded that there had been a violation of the applicants' rights.

James, Wells and Lee v UK built on the *Vinter* decision, and called into question the 'tariff' or minimum sentencing system in England and Wales. The three applicants complained that, while in detention, they were not provided with the opportunity to complete the courses that the Parole Board required for their rehabilitation. The courses were unavailable in their prisons due to resource constraints and thus the applicants were deemed unsuitable for release.

The ECtHR recognised that a reasonable balance had to be struck between the need to provide appropriate conditions for detention and rehabilitation and the efficient management of public funds. However, the loss of a prospect of release, caused by no support systems within the prison, led the ECtHR to identify a breach of Article 5.

Both *Vinter* and *James* suggest that Member States have a positive duty to provide rehabilitation, though the quality or extent of this remains uncertain. In Vinter, rehabilitation was considered so integral to a fair and humane prison system that its absence breached the Convention. A prisoner must be able to have their sentence reviewed, and for this review process to be more than a formality, the prisoner may need prior access to rehabilitative services. The *Mastromatteo* decision underlines the importance the ECtHR affords to the prisoner's opportunity for reintegration.

[26][2007] EWHC 1109 [39]. .

Spent Convictions

The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 states that various specified minor offences will become spent after seven years. These offences include, inter alia, all convictions in the District Court for minor public order offences, and a single conviction in the District or Circuit Court which resulted in a term of imprisonment of 12 months or less (or a fine). The offences covered in this act do not have to be disclosed in most circumstances, most notably to possible employers, after seven years, except in specified circumstances.[27] The provision of this Act was recommended by the Law Reform Commission.[28] However, for all offences not covered by the Act, ex-offenders have a duty to disclose their criminal record in a number of circumstances, notably when applying for a job.[29] This can have an impact on ex-offenders' chances of finding employment.

Approaches to Education in Prison

One of the main services within prisons that can benefit a prisoner upon release is education. The worth of prison education has been the subject of debate for many years.[30] The Irish Prison Service emphasises the importance of providing for literacy and numeracy education, given that many prisoners come from a disadvantaged background and may have no formal education.[31] It has been recognised that the failure to provide for any form of education or training means prisoners are likely to leave without any skills in numeracy, literacy, accreditation and thus are more likely to reoffend, given difficulties in obtaining and maintaining employment. While educational services in the Irish prison system have seen recent improvements, the

[27] http://www.citizensinformation.ie/en/justice/criminal_law/spent_convictions.html - accessed 25/03/2018
[28] Law Reform Commission, *Report on Spent Convictions* (LRC 84-2007) 45
[29] Law Reform Commission, *Report on Spent Convictions* (LRC 84-2007) 6
[30] Kate Kennedy, 'The Perspectives of Prison Educators on the Education System in Irish Prisons' (2010) Dublin Business School
[31] Carl O'Brien, 'Half of prisoners drop out of school before Junior Certificate,' *Irish Times* (6 Feb 2018)

reoffending rate amongst some categories of prisoners remains at 70%, suggesting that there is more to be done.[32]

There are varying approaches to education in prison, both conceptually and practically. It can be seen as an opportunity to rehabilitate the person and support them in re-entering and contributing to society in a healthy and secure manner. A more narrow approach views the prisoner as an 'offender' who is to be punished for their actions and educational opportunities are seen as more of a distraction than a useful tool providing both short-term and long-term benefits and opportunities.

Treating the prisoner as a member of society and as a citizen is in theory a central component of the Council of Europe's general penal policy.[33] The Council regard adult education as 'a fundamental factor of equality of educational opportunity and cultural democracy,'[34] and believe that people in prison are fully entitled to it. In effect, education was justified on three grounds: bringing a degree of normality to life within prisons, addressing educational disadvantage, and offering prisoners the possibility of redirection their lives.

Provision of Academic Education in Irish Prisons

Prison authorities and commentators alike recognise that a high number of people in prison lack basic literacy and numeracy skills. In order to address this issue, Junior and Leaving Certificate courses are available in Irish prisons. Prisoners may voluntarily elect to study traditional subjects and obtain accreditation for these courses. A recent unpublished prison survey obtained by the Irish Times showed that over half of prisoners dropped out of school before their Junior Certificate.[35] The study showed the clear correlation between low levels of education and the general prison population. Four out of five prisoners had left the education system prior to

[32]'The case for better rehabilitation in Irish prisons' *The Irish Times* (17 Dec 2015)
[33] Council of Europe, European Prison Rules
[34]Recommendation No. R (81) 17 of the Committee of Ministers to member states on adult education policy (Council of Europe, 1981)
[35]Carl O'Brien, 'Half of prisoners drop out of school before Junior Certificate,' *Irish Times* (6 Feb 2018)

their Leaving Certificate. Cutbacks in funding of the Irish Prison Service from 2008 to 2010 have not helped combat this.

However, during this period of cuts in 2010, the number of prisoners sitting Leaving Certificate exams had increased by 50%, while approximately 600 were enrolled in FETAC courses.[36] Reports of the quality of education in the Irish prison system are generally positive. A review carried out in December 2017 on Oberstown Children Detention Campus by the Department of Education found 'high quality of teaching and learning' and that 'progress has been made in developing individual educational plans for students.' The report also emphasised that 'students are supported with care and sensitivity and an ethos of respectful teacher-student interactions is in evidence.'[37]

Provision of Vocational Training in Irish Prisons

The Irish Prison service also makes provision for a number of workshops in basic crafts such as woodwork, metalwork, computers and horticulture. Such courses are accredited by recognised bodies such as City & Guild, Food Safety Authority of Ireland, and ECDL. However, such programmes can be treated with some level of hesitation. While in our neoliberal capitalist economy, an ability to work may be necessary in the short-term, focusing on prisoners' employability is worrying, and can overshadow more human measures of improvement, such as mental health, the quality of family relationships, or social inclusion.

Non-Academic or Vocational Activities in Irish Prisons

More holistic approaches to prison services provide creative or sporting activities to prisoners. The Arts Council of Ireland and the Department of Justice and Equality fund a number of schemes for artists and writers in prison. An article in the Guardian

[36] IPRT, '50% increase in prisoners sitting Leaving Cert exams' (2010) <http://www.iprt.ie/contents/1708> accessed 10 March 2018.
[37]Department of Education and Skills, 'Evaluation of Schools at High Support Units, Special Care Units, and Children Detention Centres: Oberstown Children Detention Campus' (2017)

describe art and sport in prison as facilitating personal growth, and a powerful tool again the boredom and frustration otherwise associated with prison life.[38] This was based on a study finding prisoners who participate in sport in prison had more positive experiences in resettling into society after they're released, as well as a 30% lower reoffending rate.[39]

Restorative Justice

Western criminal justice systems are traditionally punitive. The most popular alternative to this is restorative justice, particularly embraced by decarceration activists, who prioritise lowering the number of people facing time in prison. Restorative justice is a community based method of dealing with crime. It has been defined as "a process whereby all parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future."[40] It is characterised by such practices as victim-offender mediation, family group conferences, community volunteer work, and sentencing circles. In this way, it keeps the offender integrated in their community, whereas prison severs that connection.

Reintegrative shaming, a philosophy devised by criminologist John Braithwaite,[41] is one of the foundational principles of restorative justice. According to the reintegrative shaming theory, crime should not be fully destigmatized, as "[societies] will have lots of violence if violent behavior is not shameful, high rates of rape if rape is something men can brag about, endemic white collar crime if business people think law-breaking is clever rather than shameful."[42] However, Braithwaite also says that crimes are often stigmatised in an unhelpful way, and this can in fact lead to more crime. This happens when the stigma is focused on the individual committing the crime, rather

[38] Erwin James, 'Keeping ex-offenders lawful needs a creative touch'
[39] Rosie Meek, Nina Champion, and Seb Klier, 'Fit for release' (2012) Prisoner's Education Trust
[40] Tony F Marshall, *'Restorative Justice: An Overview'* (Home Office. Research, Development and Statistics Directorate, 1999)
[41] John Braithwaite, *'Crime, Shame, and Reintegration,'* (Cambridge University Press, 1989)
[42] Ibid, 1

than the crime itself, and leads to social exclusion. Braithwaite calls this 'disintegrative shaming.' Reintegrative shaming is stigma accompanied by respect for the individual, forgiveness, and acceptance back into the group.

Restorative Justice in Ireland

In 2007 the then Minister for Justice, Equality and Law Reform, Michael McDowell TD, announced the appointment of a National Commission on Restorative Justice to examine the current application and effectiveness of restorative justice in Ireland. In 2009 the Commission published their final report, where they concluded "that the implementation of restorative justice on a nationwide basis will make a positive contribution to the lives of all citizens," and recommended, among other things, that the Government locate funding for the expansion of such a scheme.[43] This did not happen.

Directive 2012/29/EU (the Victims' Directive), adopted into Irish law by the Criminal Justice (Victims of Crime) Act 2017 (the 2017 Act), contains two articles that directly relate to Restorative Justice in Ireland. Article 12 relates to the regulation of restorative justice services, which prioritises the victim and their best interests. Article 25 is concerned with the training of any officials that would regularly come into contact with victims of crime. Section 46 requires preventative measures against abuse of restorative justice processes, such as taking into account the severity and duration of the crime, the ensuing trauma, the power imbalance between the victim and offender, the age and maturity of the victim etc. in determining the suitability of certain offenders and victims for such a service. This is reflected in S26 of the 2017 Act, which requires any body administering restorative justice to safeguard against repeat victimisation, though it fails to list specific factors that may create a risk of this happening.

[43] National Commission on Restorative Justice, 'Final Report,' (2009) Department of Justice, Equality and Law Reform

In Ireland, there are four programmes in operation based on restorative justice: Garda Juvenile Diversion Programme; Family Welfare Conferences; Restorative Justice Services in Tallaght; and Restorative Justice in the Community (formerly Nenagh Community Reparation Project).

The United Nations Convention on the Rights of the Child has specified that where possible, alternative methods such as restorative justice should be implemented instead of incarceration. The Garda Juvenile Diversion Programme seeks to use reintegrative shaming techniques to divert children whose behaviour has caused harm from crime and involvement with the criminal justice system. Youth offending is at an all time low and referrals to the programme, in place of other methods of handling children who come to the attention of the Garda, are steadily increasing.[44]

Impact of Restorative Justice on Reoffending

Most academic sources cite the offender comprehending and accepting their responsibility and the recovery of the victim as the primary aim of restorative justice, rather than lowering reoffending rates. McCarthy posits that, given that "[a restorative justice] process can be more satisfying to victims than retributive criminal justice, the introduction of [a restorative justice] system would be justified for that reason alone even if it made no difference to the reconviction rate."[45] However, reconviction rates can still be a useful measure for the scheme's effectiveness.

International studies have found that offenders who have participated in restorative justice programmes have a 12% lower recidivism rate than offenders who did not participate in such programmes.[46]

[44] Annual Report of the Committee Appointed to Monitor the Effectiveness of the Garda Diversion Programme 2015

[45]Shane McCarthy, "Perceptions of Restorative Justice in Ireland: The Challenges of the Way Forward" (2011) 8 Irish Probation Journal, 185.

[46] David O'Mahony and Jonathan Doak, 'Restorative Justice and Criminal Justice: International Developments in Theory and Practice,' (2008) for the National Commision on Restorative Justice

There is little research on the link between restorative justice and reoffending in Ireland. McCarthy suggests that caution is needed in analysing data from the Irish experience of restorative justice, due to the limited participation levels.[47] Furthermore, participation in restorative justice programmes is contingent on the offender fully admitting to their wrongdoing, and showing genuine commitment to the restorative justice scheme. This means it is difficult to know how effective restorative justice would be for more reluctant offenders, or people convicted or accused of offences without admitting guilt. However, the Restorative Justice in the Community project has received categorically positive feedback from key stakeholders including the judiciary, An Garda Síochána, and solicitors. Keeping in mind McCarthy's hesitations, and the fact that the project does not handle the most serious offences, it has been recorded that 84% of first-time offenders who had participated did not reoffend.[48]

Restorative Justice in Other Jurisdictions

Several other jurisdictions have integrated restorative justice initiatives successfully into their legal framework. Each state in Australia has enacted legislation providing for restorative justice. A 2014 government report indicated positive results among both offenders and victims, and a lowered rate of reoffending.[49]

Several communities in the Yukon in Canada have implemented 'sentencing circles' to overcome the adversarial nature of the criminal justice system. Sentencing circles bring together victims, offenders, supporters of both, judiciary, court personnel and other interested community members with the aim of devising an appropriate plan for sentencing.[50]

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[47] Shane McCarthy, "Perceptions of Restorative Justice in Ireland: The Challenges of the Way Forward" (2011) 8 Irish Probation Journal, 185.
[48] Nenagh Community Reparation Project (2004), Nenagh Community Reparation Project Evaluation, Nenagh: NCRP
[49] Jacqueline Joudo Larsen, 'Restorative justice in the Australian criminal justice system' (2014) Research and public policy series no. 127, Australian Institute of Criminology
[50] Judge Barry Stuart, 'Circle Sentencing in Yukon Territory, Canada: A Partnership of the Community and the Criminal Justice System' (1996) 20 International Journal of Comparative and Applied Criminology 291

Japan is seen as the developed country which has most thoroughly incorporated reintegrative shaming into their criminal justice system.[51] It has a low incarceration rate of 37 per 100,000 (less than half that of Ireland), and is the only country in which an actual steady decline in crime since the mid-20th century has been recorded.[52]

Conclusion

This section therefore makes the following conclusions:

- Prisoners face many obstacles in readjusting to life outside prison, with regards employment, accommodation, family life, mental health, economic security, and accessing social welfare.
- These obstacles can lead to criminal behaviour, creating a cycle of reoffending.
- The ECtHR has recognised a right of prisoners to be considered for release, and this right may further require prison programmes which facilitate personal reform.
- Given the low literacy, numeracy, and education levels among the prison population, academic education programmes and skills training programmes can be incredibly useful and empowering, and creates employment or further education prospects outside prison.
- Other creative or sporting activities have also shown great benefits for prisoners.
- While restorative justice is not yet a mainstream process in Ireland, there have been positive experiences where it has been applied. Other countries which have embraced it more thoroughly also report incredibly positive results.

[51] See e.g., Mari Sakiyama, 'Reintegrative shaming juvenile delinquency in Japan' (2011) UNLV Theses, Dissertations, Professional Papers, and Capstones, 995
[52] See e.g., Toru Fujioka, 'Crime in Japan Falls to Lowest Level in More than 70 Years' *Bloomberg* (21 February 2018)