



Submission from:

The LGBT+ Restorative Justice Campaign

to the

Department of Justice Public Consultation to inform the final recommendations of the Working Group to Examine the Disregard of Convictions for Certain Qualifying Offences Related to Consensual Sexual Activity Between Men

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December 2022

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A: Introduction

The LGBT+ Restorative Justice Campaign seeks to commemorate and memorialise those who were directly impacted by laws which criminalised same-sex activity in Ireland and aims to build a deeper understanding of the histories and lives of LGBT+¹ people and communities in Ireland directly and indirectly impacted over the century since independence, with a restorative justice approach.

The campaign had a series of meetings with LGBT+ community organisations since the announcement of the consultation, consulted with a wide range of people with expertise in this area, established a website (www.LGBTDisregard.ie) and printed and circulated a booklet (attached, and available at <https://bit.ly/3W1yIJQ>), to support the public consultation.

We welcome the commitment of the Minister for Justice and the Department of Justice to follow through on the proposal in the Programme for Government to ‘introduce a scheme for the expunging of criminal records for gay men convicted of historical offences’ and the establishment of the Working Group. We also appreciate the extensive work done by the Working Group to date.

We welcome the inclusion of three external people with LGBT+ expertise and a representative of the Irish Human Rights and Equality Commission on the Working Group

We welcome the open and transparent process of the Public Consultation, and the detailed documents published, as a key part of the disregard legislation and wider Restorative Justice project.

We believe that the criminalization of same-sex desire between men was a gross human rights violation by the State resulting in arrests, prosecutions, convictions and incarceration, and had wider destructive impacts on LGBT+ people.

1 The laws being considered for the Disregard scheme criminalised men who had sexual relationships with other men, whether they identified as gay, bisexual, men who had relationships with men, queer, or didn’t identify in this way at all. Those laws, while they didn’t directly criminalise sex between women, did have a huge impact on lesbian and bisexual women and women who had relationships with women.

These laws and other laws – such as vagrancy and public order laws - extended to criminalising other ordinary aspects of same-sex relationships – holding hands, kissing, displays of affection etc. – and they impacted on people who were trans.

Much further research is needed into how trans people were policed and under what legislation.

Collectively, these laws created a hostile environment for people who might now identify as LGBTIQ+.

Throughout this submission the term LGBT+ is used to refer to all people who were directly and indirectly impacted, and to the communities to which they belong.

The Disregard legislation should be based on principles of human rights and equality. It should be as inclusive and generous as possible and should cover all the offences under which people may have been arrested, prosecuted, convicted, imprisoned, fined, sent to an industrial school or were otherwise incarcerated for engaging in same- sex desire and consensual conduct.

B: Human Rights and Equality principles for consideration

Section 7 of the Working Group's Key Issues Paper and Question 6 of the Public Consultation questionnaire both raise the issue of Human Rights Considerations in the context of the proposed Disregard Scheme.

Principles of Human Rights and Equality are central to the exoneration of gay and bisexual men² convicted under the anti-gay laws that were found to be contrary to the European Convention of Human Rights by the European Court of Human Rights in 1988 in the case brought by Senator David Norris.

Sources for these principles in this context include:

- the 2005 UN Resolution [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (UN 2005) and other UN and European Human Rights instruments, including Article 8 of the Universal Declaration on Human Rights
- Reports from the [UN Rapporteur on the Promotion of truth, justice, reparation](#).
- Reports of the Irish Human Rights and Equality Commission (IHREC) on other human rights violations such as in their [Mother and Baby Homes report](#) (IHREC 2021)
- Reports by international human rights and equality bodies to Ireland on issues of redress for human rights violations, such as the Magdalene Laundries
- Reports by NGOs such Justice for the Magdalene's Research (JMFR)
- Studies such as 'Redress: Ireland's Institutions and Transitional Justice' edited by Katherine O'Donnell (UCD), Maeve O'Rourke and James Smith provides many learning opportunities
- various articles such 'The Human Right to Memorialisation' by Kelly Ledoux (Irish Centre for Human Rights NUIG) in www.openheartcitydublin.ie,
- the Constitution of Ireland

The key human rights and equality principles from these sources which should inform all aspects of the proposed Disregard scheme and further measures to provide redress for the gross human rights violations of the criminalising legislation include:

➤ From the UN 2005 resolution:

- Victims' rights to remedies – UN 2005 Article VII

² The term gay and bisexual men is used throughout this submission to refer to those people who were directly targeted by the legislation, however they identified.

- a) equal and effective access to justice
 - b) adequate, effective, prompt reparation for harm suffered.
This should include a short timeframe for decisions, for example a commitment to provide a decision with three months of application.
 - c) access to relevant information concerning violations and reparation mechanisms'
 - Victim's access to justice – UN 2005 Article VIII
'provide proper assistance to victims seeking access to justice' (12(c))
 - Reparation for Harm Suffered – UN 2005 Article IX
Including restitution, compensation, rehabilitation and satisfaction, which includes 'verification of the facts and full and public disclosure of the truth' (22(b)) and 'commemorations and tributes to the victims' (22(g)) and guarantees of non-repetition.
 - non-discrimination UN 2005 Article XI and non-discrimination and equality (IHREC 2021)
Redress measures must take account of 'special vulnerabilities of certain categories of persons' IHREC and note also the references to 'classism' p23.
Dr. Averill Earls research on policing of male same-sex desire in Ireland in 1884 – 1950 notes that most of those prosecuted for sex in public places were working class men
 - a wide definition of 'victims' - UN 2005 Article V
'victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights'.
The redress scheme should recognise that some of those victimised were those who were persecuted under the legislation in a way that did not lead to a conviction, but which had a very significant impact on their lives, causing enormous harm. The Disregard scheme should provide for the possibility of an apology or other restorative justice measures or remedies for those people.
- From the IHREC 2021 report:
- fair procedures, accountability and transparency
Which would include the right to receive copies of reports and recommendations on an application
 - trauma informed approach
which would include a non-adversarial approach to victims
 - the right to truth, such as access to records held by agencies of the State
 - the universe of survivors
such as inclusion of those prosecuted but not convicted, and those arrested/investigated but not prosecuted, and the families, friends and communities. This would also include those prosecuted in Ireland prior to the foundation of the State in 1922.

- survivor participation
- the need for an effective communications campaign on redress opportunities
- Independence and oversight
including the need to monitor the effectiveness of the disregard scheme
- Apology as a form of reparation

The State formally issued an apology in a Motion passed in both the Dáil and Seanad in June 2018.

Consideration should also be given to an apology from the Gardai, Attorney General, Director of Public Prosecution, Courts Service.

Consideration should also be given to a statement from the President.

➤ From the Right to Memorialisation

- the right to memorialisation: 'a people's knowledge of the history of its oppression is part of its heritage' (Kelly Ledoux)

Recently the Government announced that a National Centre for Research and Remembrance will be established in the former Magdalene Laundry on Sean McDermott Street to honour those incarcerated in Mother and Baby Homes, industrial schools and reformatories, Magdalene Laundries and related institutions.

There is a need for a resourcing of similar process of study, research, document collection, exhibitions and publications that provide for a wider and more detailed study of the impacts of criminalisation on LGBT+ people and communities. This should be commissioned as part of the process of Disregard and Redress.

An HIV/Aids Monument is being developed for a site in the Phoenix Park.



C: Issues for Consideration by the Working Group

1. A wider Restorative Justice programme could be put in place that would include research into and reparations for the broader damage done by criminalization such as: denial of funding to Gay Health Action for their HIV/AIDS work; the use of the 'homosexual panic' defence in trials of killers of gay men; the widespread harassment of the gay community by Gardai in the Charles Self murder investigation; the deliberate humiliation of gay men in the Courts by Judges; the lenient treatment of the killers of gay men by the Courts, as in the Declan Flynn case; how criminalisation affected people other than men, in particular how the presence of laws criminalising homosexuality impacted on decisions in family courts with lesbian and bisexual women, or how psychiatric hospitals or other institutions may have been used to incarcerate women who expressed same-sex desire or how trans people were treated by police and institutions; and how the criminalization created a climate of fear, an 'epidemic of homophobia' and a denial of equal dignity for LGBT+ people as well as underpinning violence and bigotry against LGBT+ people leading to loss of employment, forced emigration, loss of family support, poverty and social exclusion.

The wider damage is recognised by the Motion of Apology given in the Dáil and Seanad in 2018.

As part of this wider redress program there could be 'memorialisation' as set out in UN Human Rights policies, for example UN 2005 paragraph 22 (g), including State funding for a detailed and comprehensive historical study of criminalisation including arrests, prosecutions etc, and possible incarceration in psychiatric hospitals or use of aversion therapy on LGBT+ people, or incarceration of women in Magdalene Laundries for same-sex desire, and incarceration in Industrial Schools or other places of juvenile detention.

For example, the records of the Department of Justice and other Government Departments and agencies relating to criminalization could be gathered together and made available to researchers.

There is further need to research the experiences of people who were convicted under the legislation - were men and juveniles referred to the Probation Service and what were their experiences there? Were young men sent to industrial schools or other juvenile institutions under the laws?

These processes and further research would comply with the UN 2005 principle "verification of the facts and public disclosure of the truth" (paragraph 22 b)

See Kelly Ledoux 'The Human Right to Memorialisation', www.openheartcitydublin.ie



2. In its 2021 report IHREC recommended the collection and reporting of disaggregated data to examine the effectiveness and operation of the redress scheme

The Tasmanian disregard legislation included an Independent review of the operation of the legislation after two years.

We would recommend that the legislation includes a statutory provision for a review of the operation of the legislation after a period of two years from the passage of the legislation through the Oireachtas.

3. It is vital that some form of redress should be available to those who were prosecuted but not convicted given the damage likely to have been done to their lives. The same applies to those arrested and those treated unjustly by the Gardaí, for example the 1,500 men interviewed, photographed and fingerprinted as part of the Charles Self murder, whose records are still retained by the An Garda Síochana (as reported recently by the Dublin Inquirer). The IHREC discusses, in the context of the Mother and Baby Homes scheme, the concept of the 'universe of survivors' and how the 'stigmatising effect of the violations suffered' must be considered, as is also recognised in UN 2005 Article V.
4. It is crucial that pre-independence prosecutions and convictions are included in the disregard programme, and that consideration be given to handling disregard applications that related to what is now the Northern Ireland jurisdiction but were covered under the British administration pre-1922.
5. Sex in 'public' places; or men 'cruising', looking to meet other men, should be eligible for disregard, including use of legislation other than the 1861 and 1885 Acts, such as Vagrancy Acts or local authority by laws (see Dr. Averill Earls research on Dublin).

This applies, in particular, where general legislation, such as that which covered 'public morality', that applied both to same and opposite-sex behaviours was used in a discriminatory or disproportionate way to target same-sex behaviour. Such 'offences' should be eligible for a disregard.

There may be convictions under additional legislation that should also be eligible – e.g. public order etc. It is important to acknowledge the historical realities and structural homophobia that are likely to have led to laws being disproportionately or unjustly applied to same-sex desire.

6. The documented discriminatory policing targeting homosexuality and use of entrapment should be recognized (see for example research by Dr. Averill Earls).
7. Prosecutions or proceedings under the Defence Forces Acts or disciplinary proceedings, or offences related to 'moral turpitude' or other offences that relate to same-sex desire

or activity within An Garda Siochana and the Irish Defence Forces should be eligible for a disregard.

A Garda was dismissed in 1982 for alleged homosexual activity as part of the Garda investigation into the Charles Self murder according to the Garda Commissioner in media reports in 2019 and 2020 (See Irish Times 4.3.2020 and GCN 8.8.2019).

8. It is likely that others in the employment of the State, including civil and public servants, were subject to disciplinary procedures, up to and including dismissal, that related to their same-sex desire, attitudes or behaviours. It is unclear what legislation or regulations may have applied in these contexts over the decades. These issues should also be addressed in the context of the disregard legislation and restorative justice measures.
9. Posthumous disregard should be possible for deceased men and applications should be accepted from family, partners, friends, LGBT+ groups and researchers.
10. Applications in the first instance should be made to an independent body, such as IHREC. This will lessen the potential for re-traumatising victims and the potential for people to be dissuaded if applications had to be made to a body involved in or connected with their original prosecution.
 - The procedures should comply with administrative justice and human rights best practices, such as UN 2005 article VII.
 - Simple, plain English guidelines should be provided
 - The applicant should be able to receive a copy of the report and recommendation on their case and reasons for refusal if appropriate
 - Applicants should be able to request or demand an oral hearing
 - There should be a time limit of say 3 months for decision on an Application or Appeal
 - There should be the possibility of an appeal of a refusal to an independent body.
11. There was a class dimension to the cases brought to prosecution under legislation, according to Dr. Averill Earls (see www.averillearls.com). It was mostly working class or unemployed men who were prosecuted and convicted. The consequences of a criminal conviction, in particular a conviction under this legislation, will have been a factor in forced emigration or isolation from traditional support structures of family and community, and impacted on education and employment prospects. It may be the case that a number of these men, having emigrated to places like London, could now be living in poverty and isolation.

Free legal aid, assistance with research and engagement with the disregard process should be available to potential applicants.

See UN 2005 article XI reference to 'special vulnerabilities of certain categories of persons'

12. The disregard legislation should be widely promoted at home and internationally in the media and via LGBT+ organisations and the Irish Embassy network, see IHREC 2021 report.

State funding should be available for outreach and publicity work at home and abroad.

Messaging and education work that comes out of this disregard process, including promotion of access to the disregard scheme, should draw attention to the invisible victims – for example those charged but not prosecuted or convicted, where it is very likely that significant harm will have been done to family relationships, careers, mental health.

13. Compensation should be possible for these victims of gross human rights violations.
14. There should be apologies from other relevant State bodies such as An Garda Síochána, the Attorney General's office, who would have carried out prosecutions before the Director of Public Prosecutions office was established, the DPP, and the Courts Service for the additional humiliation inflicted on those charged which was caused by Judges (see accounts by David Norris, Nell McCafferty, Garrett Sheehan).

Apologies may also be considered by The Defence Forces and An Garda Síochána to their members for proceedings on the basis of sexual orientation, and the Department of Foreign Affairs, for proposing that HIV/AIDS be used as a reason not to decriminalise in the Government's case at the European Court of Human Rights.

See IHREC 2021 on apology as a form of reparation.

15. A personal apology should be issued by the Minister for Justice to those arrested, prosecuted and convicted and imprisoned.

The Scottish Government issue a 'letter of comfort' to those who are granted a disregard.

16. If records are not available there should be the possibility of an affidavit by the applicant.

There are two principles here: the first is that it is the responsibility of the State to maintain the records of prosecutions, not the victim. Secondly, it is the responsibility of the public body preparing the report and recommendation on a disregard to carry out the necessary extensive research. It cannot be the responsibility of the applicant to carry out the difficult research.

The public body managing the disregard process should adopt a trauma informed, non-adversarial approach to applicants, see IHREC 2021, with appropriate training for staff.

17. 'Guarantees of non-repetition' UN paragraph 23 the recent arrests, prosecutions and convictions of men regarding a toilet in Dublin would appear to against this UN principle
18. Recognising that many people who could avail of a disregard may be dead, that significant harm was done to people arrested or charged but not convicted and that significant harm was done to the wider LGBT+ community, a commitment to education, funding and support more broadly on LGBT+ histories and issues could be part of a restorative justice response.
19. LGBT+ community organisations and services still today deal with the legacy of harm that emerged from criminalisation.

Urgently needed legislation to protect LGBT+ people remains unenacted – hate crimes, trans legislation, protections from conversation therapy. Crucial policy reforms and service provision in areas such as health, mental health, education, trans health and sexual health are long overdue.

The LGBT+ sector is grossly underfunded and struggles to support people and communities who continue to be impacted by the hurts and harms done over decades by the legislation, and the prejudice which followed.

For any disregard scheme to be effective, it has to be considered as part of an overall response and resourcing that understands how criminalisation affected LGBT+ people and communities and how that can now be addressed.