Commission on Sex in Prison

Consensual sex among men in prison

Briefing paper 1

Key points

- There is evidence to show that sex in prison does happen
- There is no prison rule prohibiting sex between prisoners but prison staff do not allow prisoners to have sex
- It is difficult, if not impossible, for prison staff to be able to distinguish between consensual and coercive sexual relationships between prisoners
- Prisons need to ensure that they protect the vulnerable
- Prisoners should be able to access condoms confidentially to minimise the risk of sexually transmitted infections
- Prisons have a duty under the Equalities Act 2010 not to discriminate against anyone because of their sexuality. Policies to prevent sex in prison can be perceived by some as discriminatory towards openly gay prisoners
- The prison population is a high-risk group for sexually transmitted infections and risk-taking sexual behaviour. The need for harm reduction measures in prisons is widely recognised but they are poorly delivered
- Prison staff need training on how to deal with sex between prisoners
- Most prisoners will return to the community. Sexual health policies are important not just for prisoners but for wider society.

Introduction

The Howard League for Penal Reform has established an independent Commission on Sex in Prison. The Commission comprises eminent academics, former prison governors and health experts and is focusing on three broad themes:

- consensual sex in prisons
- coercive sex in prisons
- healthy sexual development among young people in prison.

This is the first ever review of sex inside prisons in England and Wales. There is currently little reliable evidence available on both consensual and coercive sexual activity in prisons. It is not known to what extent men and women who identify as heterosexual may have sex with other prisoners while in prison. The Commission will also consider the nature and extent of coercive sexual activity, including rape, harassment, intimidation, assault and bribery in return for sex.

The Commission aims to understand the nature and the scale of the issues and problems surrounding sex in prison. It will make a series of recommendations with a view to making prisons safer. It will also examine how the situation in England and Wales differs from other countries, looking for best practice.

This is the first in a series of briefing papers for the Commission on Sex in Prison. It looks at consensual sex between prisoners and makes recommendations for change.

The Commission on Sex in Prison has received written and oral evidence from voluntary and statutory agencies, prison governors and serving prisoners. It held seminars on sexual health and consensual sex in prison and heard evidence from key statutory stakeholders including the National Offender Management Service (NOMS), Her Majesty's Inspector of Prisons (HMIP) and the Prisons and Probation Ombudsman (PPO). This briefing paper is based on the written and oral evidence submitted to the Commission on Sex in Prison. All names of prisoners given in evidence have been changed.

1. Consensual sex between prisoners

Prison Service Instruction 47/2011 Prisoner Discipline Procedures:

1.76 There is no rule specifically prohibiting sexual acts between prisoners, but if they are observed by someone who finds (or could potentially find) their behaviour offensive, a charge under PR 51 (20) / YOI R 55 (22) may be appropriate particularly if the act occurred in a public or semi-public place within the establishment, or if the prisoners were 'caught in the act' during a cell search. But if two prisoners sharing a cell are in a relationship and engage in sexual activity during the night when they have a reasonable expectation of privacy, a disciplinary charge may not be appropriate.

Prison rules have changed, reflecting changes in domestic law and social attitudes towards sex.

Under Rule 47 of the Prison Rules 1968 a prisoner could be found guilty of an offence against discipline if he was 'indecent in language, act or gesture'. This phrase disappeared from the Prison Rules, perhaps reflecting the decriminalisation of sexual acts such as gross indecency and buggery which disappeared from statute following the passing of the Sexual Offences Act 2003.

A former prison governor who gave evidence to the Commission on Sex in Prison stated:

In order to make sexual relations between prisoners a disciplinary offence, the Governor would have to make a specific rule thus allowing prisoners to be charged under paragraph 23, 'disobeys any rule or regulation.' In practice Governors confine such rules to the visits room.

While sex between prisoners may not be unlawful, NOMS informed the Commission on Sex in Prison that prison staff did not allow prisoners to engage in consensual sexual activity and if they became aware of a sexual relationship between prisoners, they would separate them. NOMS argued that it was difficult, if not impossible, for prison staff to determine whether a relationship between prisoners was consensual or coercive and the nature of the relationship could change over time.

Prison governors have expressed concerns about whether relationships formed in prison can ever be truly consensual as prisoners are constrained by their environment and may be forced into choices they would not make outside of prison. Similar concerns have been voiced by Human Rights Watch (2001).

In the context of imprisonment, much more so than in the outside world, the concepts of consent and coercion are extremely slippery. Prisons and jails are inherently coercive environments. Inmates enjoy little autonomy and little possibility of free choice, making it difficult to ascertain whether an inmate's consent to anything is freely given.
(Human Rights Watch, 2001)

Prisoners told the Commission on Sex in Prison that they believed the policy of separating prisoners believed to be in a sexual relationship was discriminatory towards openly gay prisoners. One prisoner stated:

In the four prisons I have been held at, I have never been aware of any prisoner being charged for having consensual sex with a cell mate. I have however witnessed openly gay partners be split up and moved to other wings, simply because they were 'together', with no sexual activity taken place.

If a prisoner is observed being overtly affectionate towards another prisoner or suspected of engaging in sex, he can be given a warning under the Incentives and Earned Privileges (IEP) scheme, according to prisoners who have submitted evidence to the Commission:

Officers would push open my door very quickly, unannounced, in an attempt to catch us having sex. Of course it never worked but it put us on edge all the time. A senior officer did this once as Simon and I were sat on my bed holding hands watching a movie on TV. He ordered us to stop holding hands and move apart, or he would give us an IEP warning.

Her Majesty's Inspectorate of Prisons noted that there was a lack of tolerance towards non-sexual physical contact and displays of affection in some prisons (Dunn, 2013).

Other prisoners said that the response of prison staff appeared to be discretionary. One prisoner said that if you were discreet then officers might not do anything, but if you were boasting to other prisoners, officers would be much more likely to separate you. The prisoner believed that separation might also have been to protect people from homophobic bullying from other prisoners.

Concerns have been raised by sexual health charities about the effect of using sanctions to prevent sex in prison. A report by the Prison Reform Trust (PRT) and the National AIDS Trust (NAT) (2005) stated:

If sexual activity is subject to punitive sanctions, or stigmatised, the likelihood is that people will be less likely to take precautions.

The NAT (2013) stated:

Attempts to control consensual sexual activity between prisoners risk undermining efforts to promote HIV prevention and improved sexual health in prison populations.

2. What is known about consensual sex in prison?

Very little is known about the extent of consensual sexual activity in prisons. In comparison with research into coercive sex, there has been little research into consensual sex in prison and the majority of the research focuses on the experiences of women. For example Propper, 1982; Greer, 2000; and Koscheski et al., 2002. Consensual sex among male prisoners has attracted considerably less research interest.

PRT and NAT (2005) stated:

A Home Office study conducted in 1994/5 indicated that between 1.6 and 3.4 per cent of their random

sample of 1009 adult male prisoners reported having had sex with another man while in prison, and little use was made of condoms.

Evidence submitted to the Commission by the British Association for Sexual Health and HIV (BASHH) on sex in prison stated that evidence of sexual activity in prisons was largely anecdotal but widely reported in both male and female prisons. BASHH reported that women prisoners were quite open with clinical staff about sex with other prisoners but this was not the same in the male estate where denial of sexual activity was more common. This may have been because male prisoners perceived there was more of a stigma attached to men who have sex with men.

The World Health Organisation (WHO) (2007) stated it was difficult to obtain reliable data on the prevalence of sexual activities in prisons.

Sex violates prison regulations and sexual behaviour involves identity issues that often spur shame and a fear of homophobic violence from other prisoners (Mahon, 1997). Many prisoners decline to participate in studies because they claim not to have engaged in any high-risk behaviours (Health Canada, 2004, with reference to Pearson, 1995). This can result in low generalizability and underreporting. Prisoners who do participate may underestimate the incidence of sex because they are concerned with possible repercussions from fellow prisoners and correctional officers.

Evidence submitted to the Commission by Offender Health reported that some studies suggested people serving short sentences of between three and six months were not likely to have sex in prison, but the data was poor and included anecdotal evidence and exponential data.

The Terrence Higgins Trust (THT) has worked with young men in prison. In evidence submitted to the Commission (2013) THT said that officers believed prisoners did have sex but rarely was anyone found engaging in sex. Male prisoners had told THT that there was no sex in prison and they did not want to have sex. THT said that homophobic attitudes could be more pronounced in prison than in the community. This could account for why some young men were reluctant to admit to sex with other men.

The term heteroflexible has been used by sexual health workers to describe the behaviour of men in prison who identify as heterosexual but are flexible about having sex with men while in prison. There is anecdotal evidence but little data and a lack of research on the impact of prison on sexual behaviour or sexual orientation. A study by Garland et al. (2005) found that prisoners' behaviours and attitudes to same-sex acts changed the longer they were held in prison. Prisoners serving longer sentences or held in high security facilities were more likely to acknowledge a homosexual identity.

3. Promoting the sexual health of prisoners

Prisoners are at greater risk than the general population of acquiring sexually transmitted infections. According to the Department of Health (2009), people in the criminal justice system are more likely to have engaged in higher levels of risk-taking behaviour including injecting drugs, sharing drug paraphernalia, excess alcohol consumption and unprotected sex. Prisoners are disproportionally affected by blood-borne viruses including HIV, Hepatitis B and Hepatitis C (Government Office for the South West 2009; the Department of Health, 2012; The National AIDS Trust, 2013). The World Health Organisation (2007) has stated that prisons are high-risk environments for the transmission of HIV.

Prisons have a duty to promote the sexual health of prisoners and prevent the spread of sexually transmitted diseases:

Condoms may be prescribed if in the clinical judgment of the doctor there is a risk of HIV or STD transmission.
(*Prison Service Order 3845: Blood borne and related communicable diseases*)

This policy of limiting access to condoms was unsuccessfully challenged in court in 1999 in the case of *R* v. *Home Secretary ex parte Fielding*:

It was argued that the policy was irrational because a request for condoms by a homosexual prisoner meant that he was intent upon otherwise unsafe sexual activity and therefore clinical judgment was irrelevant. However, the court held that the policy was lawful due to the Prison Service's legitimate concern that it should not be seen to encourage homosexual activity within prisons. […] The court highlighted that condoms should be provided where prison medical staff were satisfied that a genuine request was being made by a practicing homosexual who would otherwise have unsafe sex. (*Creighton and Arnott, 2009*)

Her Majesty's Inspector of Prisons raised concerns about the variable access to condoms at a seminar held by the Commission on Sex in Prison in November 2012. He reported that the Prison Service had not adopted a uniform approach to the distribution of condoms to prisoners. In some prisons, barrier protection, dental dams, lubricants and confidential advice were widely available whereas in others, condoms were only available on

request or if the prisoner attended a clinic. Other prisons provided condoms to prisoners about to take home leave. One prison claimed that access to barrier protection was unnecessary because none of its prisoners were homosexual. A prisoner who was HIV positive had told inspectors that he had requested and was refused condoms. He was having unprotected sex with another prisoner.

Giving evidence to the Commission in 2013, the NAT and the THT also expressed concerns about the variable and at times poor access to condoms in prisons. In some cases prisoners had been denied access to barrier protection.

In its submission to the Commission on Sex in Prison the THT (2013) gave the following case study:

Sam was a long term prisoner in a high security prison. Condoms were in theory accessible on all other wings if prisoners were prepared to line up and ask for one at a time from the nurse. However, Sam's wing was separately medically managed from the rest of the prison, by the local Mental Health Trust. Their senior nurse decided that patients on that wing would not be supplied with condoms because he would not condone sexual conduct between what he saw as 'vulnerable' prisoners.

The THT's argument that unprotected sexual activity was already taking place, making people vulnerable to HIV and other STIs, had no effect until Sam used legal aid to bring a case against the prison which resulted in condoms being made available to all prisoners.

The Commission was told that in at least one private prison condoms were provided only if a prisoner took back the used condom for a 'one-for-one swap'. Sexual health workers have told the Commission that such practice would be unheard of in a community sexual health clinic. The Commission on Sex in Prison heard evidence that some prisoners had been sanctioned for requesting too many condoms.

The WHO (2007) has stated that many prisoners engaging in sexual activity will not request condoms for fear of repercussions. The NAT (2013) stated that many prisoners 'will not actively seek access to condoms and lubricants because of lack of safer sex education or because of fear of breaches of confidentiality, discrimination, harassment or even punishment for revealing their intention to have sex.'

Prisoners told the Commission on Sex in Prison that they obtained condoms from other prisoners rather than healthcare, to avoid the repercussions they would face if prison staff knew they were engaging in sex.

If I want to practice safe sex, I have to ask for condoms from healthcare, who then send a memo to OMU [offender management unit] that I am sexually active, at which point I would be moved off the wing for 'operational reasons'. I had to pay a ridiculous price for condoms from other prisoners, just so I would not be split up with my partner.

There are examples of good practice in the distribution of condoms in prisons.

NHS Surrey: policy for the issue of condoms to those within the prison setting

NHS Surrey has developed a policy for the issue of condoms to all patients within Surrey prisons. The policy provides prison healthcare staff with information, training and agreed procedures regarding the issue of condoms with the aim of preventing the transmission of sexually transmitted diseases in prisons and minimising the risk of harm.

All prisoners in Surrey are issued with two condoms on arrival and discharge. Prisoners can choose to obtain condoms confidentially from healthcare staff or CARATS workers.

The policy specifies that prisoners should not be punished under prison rules for having up to three condoms in their possession. Prisoners can be disciplined for having more than three condoms or for failing to dispose of them safely.

Other prisons have adopted innovative ways of distributing condoms to prisoners without the need to put in a request to healthcare. In one prison, condoms were placed at the back of the chapel and prisoners could take them discreetly. In another, a prisoner was given a bag of condoms which he could distribute to others who needed them.

The NAT (2013) said it was vital that prisons in England and Wales re-commit to ensuring safer sex advice and barrier protection are easily accessible to all prisoners who need it.

The THT (2013) stated in evidence to the Commission on Sex in Prison:

If prisoners are actively seeking [safe sex] materials then they should be provided with them. To ignore requests and to place individuals at risk of HIV and STI exposure is highly irresponsible and unethical.

4. Prison culture, equality and diversity

Homophobic and sexist attitudes exist in prisons as well as outside. Jewkes (2002) has noted that prisons are environments 'where misogyny and homophobia go hand in hand with proof of one's own normal masculinity.' There is a danger that policies to prevent sexual contact in prison could be used by some to 'legitimise' homophobic attitudes (Dunn, 2013).

Section 149 of the Equalities Act 2010, the Public Sector Equality Duty, places a duty on public bodies, including prisons, to consider all individuals when carrying out their day-to-day work. Prisons are required to have due regard to the need to eliminate discrimination and harassment on the grounds of ethnic origin, religious belief, gender, sexual orientation or disability.

Prisons have established equality and diversity groups and support groups for lesbian, gay, bisexual and transgender prisoners, and Prison Service Order 4445 outlines the duty of prison governors to consider requests from prisoners who wish to register a civil partnership under civil partnership registration, although prisoners would not be able to share a cell or have a sexual relationship afterwards.

5. Training for prison staff

Evidence submitted to the Commission on Sex in Prison suggests that it is rare for prison staff to come across prisoners engaging in sex, probably because prisoners face repercussions if they do.

Prisoners have little or no privacy and are often placed in shared cells. If prison staff observe a sexual act, they need the skills to be able to deal with the situation professionally, to determine whether a sexual assault may have taken place and to minimise the risk of any potential sexually transmitted infection between prisoners. Staff may also need professional support in dealing with their own feelings after witnessing a sexual act.

Conclusions

The public health agenda must be the paramount consideration in all policies relating to consensual sex between male prisoners. Prison staff and healthcare staff have a role to play in supporting the public health agenda, minimising the risk to prisoners and the public of sexually transmitted infections and preventing the transmission of blood-borne viruses.

Maintaining contact with partners and families on the outside can reduce reoffending and help with prisoners' rehabilitation. The health of prisoners' partners should not be placed in jeopardy. If a prisoner should acquire an STI while in prison they will potentially take that back into the community when they leave, and infect sexual partners. Specific issues around sex in prison, such as the provision of condoms, need to be approached pragmatically to protect the health of prisoners, their partners and the wider public.

Consensual sex in prison is an issue which creates embarrassment, controversy and conflict among politicians and policy makers, prison staff, healthcare staff, prisoners and the public. Tensions exist between the need to protect the vulnerable in prison, maintain public health both within prisons and in the wider community and prevent discrimination on the grounds of sexual orientation. A mature approach to sex in prison is needed and it should be seen within the wider agenda of public health. As the World Health Organisation has noted, 'protecting prisoners' health protects general public health'.

A full list of references is available on the Howard League website at http://www.howardleague.org/consensual_sex_prison/

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