

SCOTTISH INDEPENDENCE REFERENDUM (FRANCHISE) BILL

SUBMISSION TO THE REFERENDUM (SCOTLAND) BILL COMMITTEE ON BEHALF OF THE HOWARD LEAGUE FOR PENAL REFORM IN SCOTLAND, THE PRISON REFORM TRUST, SACRO, POSITIVE PRISON? POSITIVE FUTURES, PROFESSOR FERGUS MCNEILL AND EMERITUS PROFESSOR MIKE NELLIS

We welcome this opportunity to comment on the Scottish Independence Referendum (Franchise) Bill. Our comments are about the proposal to prevent convicted prisoners from taking part in the referendum.

Summary of our position

- This is the first time the Scottish Parliament will legislate on the franchise. Instead of simply reproducing the Westminster blanket ban on prisoners' voting rights, there is an opportunity for the Parliament to put down a marker about the value placed on democratic rights and social justice in Scotland.
- We wish to highlight that almost all other European democracies recognise that voting is too hard-won a fundamental right to be lost automatically on imprisonment.
- We welcome the Scottish government's recognition that too many people are sent to prison in Scotland. We therefore ask that the Committee seeks more explanation from the Scottish Government of why it believes that imprisonment on one particular date should be enough in all cases to prevent citizens from taking part in a vote which will determine the constitutional future of their country and may not be repeated in their lifetime.
- We would welcome a broad debate on whether to follow the model of many other developed democracies, and allow some or all convicted prisoners to vote. However, we realise that the timetable for the legislation does not realistically allow for that sort of debate.
- Noting that arrangements already need to be made for those held on remand, we believe that the Parliament should at least investigate and debate the potential for allowing prisoners serving short-term sentences to vote in September 2014. This would reduce the scale of arbitrary disenfranchisement, recognise the exceptional nature of this poll and signal that the unusually hard line taken by the UK Government on this issue does not reflect the values of the Scottish Parliament.

The proposals in the Bill

Section 3 of the Bill takes the existing UK ban on convicted prisoners voting in elections and extends it to the referendum. The documents accompanying the Bill mainly note the factual and legal position, with the commentary limited to stating only:

- "The ECHR ruling (and human rights case law) does not relate to referendums, and convicted prisoners will not be able to vote in the referendum irrespective of whether UK electoral law is amended to extend the vote to prisoners for parliamentary elections before the referendum in 2014." (Policy Memorandum, para 13); and

- “It has been included in the Bill because the UK Parliament is considering proposals to alter section 3 of the 1983 Act and the Scottish Government would not wish any alteration to apply for the purposes of an independence referendum.” (Explanatory Notes, para 9)

Why Voting Matters

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.

The constitutional court of South Africa in a decision on prisoners’ voting rights (1999)

The creation of a universal franchise is one of the great political achievements of the past 150 years: we should never take it for granted. How much care we exercise when we decide to remove voting rights is a token not just of how we value fellow citizens, but of how much we value voting itself.

In many countries, the vote is seen as an inalienable right that cannot be taken away as a punishment. We think that is a powerful position which better represents the values of a modern democracy, than the current position in the UK, which has its roots in the mid-nineteenth century relationship between voting and property ownership, and the forfeiture of property for certain crimes.

As the Scottish Government is using this opportunity to amend the franchise in other ways, **we would like it to give a fuller explanation of its decision to follow the UK blanket ban on prisoners voting.**

The European Context

The UK is unusual in Europe in implementing a blanket ban. On the best available recent research (*Briefing Note SN/PC/01764*, from the House of Commons Library, December 2012):

- At least eighteen European nations, including Denmark, Finland, Ireland, Spain, Sweden and Switzerland, have no form of electoral ban for imprisoned offenders. Norway has provision for removing voting rights from certain offenders, but this appears never to have been used.
- In other countries electoral disqualification depends on the crime committed or the length of the sentence. In France, certain crimes are identified which carry automatic forfeiture of political rights and Germany’s ban extends only to prisoners whose crimes target the integrity of the state or the democratic order, such as political insurgents.
- Among the Council of Europe countries, those with which the UK keeps company in not allowing any convicted prisoners the right to vote are Armenia, Bulgaria, Estonia, Georgia, Hungary, Liechtenstein, San Marino and Russia: in at least two of these, consideration is being given to change.

The ban is often defended on the basis that those sentenced to prison have broken their contract with society, in a substantially different way from the many other offenders who are given non-custodial sentences or fines, and that this must mean

that all convicted prisoners should lose their vote while they are held in prison. **When so many of our fellow democracies reject that logic, we should stop and consider it again.**

The international position underlines that respecting the rights of victims, as we should, does not require the removal of the vote. We are not aware of any evidence that it functions as a deterrent. Indeed, we find the idea that prison should automatically carry a penalty of “civic death” at odds with the agendas for rehabilitation and reintegration that have been a welcome part of Scottish political debate in recent years. We believe effective rehabilitation is central to addressing the needs of victims of crime.

The way we use prisons

As a society, we expect the criminal justice system to punish offenders appropriately and reduce the risk of reoffending. Prisons will always be an essential part of that system.

Decisions about imprisonment are often not clear-cut, however: **there is not a straightforward divide between the types of offences that attract imprisonment and those that do not.** In 2011-12, 28 per cent of shoplifting convictions, 54 per cent of housebreaking convictions, and 61 per cent of convictions for serious assault and attempted murder ended in a custodial sentence (Source: *Criminal Proceedings in Scotland 2011-12*). The remaining cases were dealt with using non-custodial measures. Using their discretion, sentencers take many issues into account, including the welfare of the offender him or herself and what particular community sentencing options are available in the local area.

Scotland's rate of imprisonment is one of the highest in Western Europe and over twice as high as the prison populations of the Nordic countries. The sentenced prison population is around 25 per cent higher than it was ten years ago (Source: *Prison statistics and population projections Scotland: 2011-12*). We applaud the commitment of the Scottish Government to reducing the use of imprisonment and support the view of the Cabinet Secretary for Justice, speaking in the Scottish Parliament on 20 September 2007:

The Government refuses to believe that the Scottish people are inherently bad or that there is any genetic reason why we should be locking up twice as many offenders as Ireland or Norway. ... We need to face up to some tough questions. Who are we sending to prison and why? ... Scotland is undoubtedly a civilised society, but perhaps it relies on prison to do too much with too many... One study indicated that half of our prison population comes from 15 per cent of Scotland's poorest council wards.

Speaking to the Justice Committee on 26 February 2013 the Cabinet Secretary has also highlighted that:

In Scotland, we still have too many short-term prisoners. In Scotland, a higher proportion of offenders—15 per cent—are sent to prison than in England and Wales.

Prison statistics and population projections Scotland: 2011-12 notes that:

- *the rise in the prison population over the past five years or so is set against a backdrop of relatively stagnant or falling levels of recorded crime ...*
- *the sentenced population has increased by 3 per cent, reaching 6,578 in 2011-12. This is primarily due to marked increases in sentences between 3 months and two years ...*
- *there are several drivers behind the increase in prison population over the past couple of decades [including] ... the increase in the number of convicted offenders getting custodial sentences for lower level crimes and offences.*

Inquiries into prisons and offending commissioned by the Scottish Government in recent years tell a consistent story about the over-use of imprisonment in Scotland, in particular for those from the most deprived and vulnerable backgrounds. This is not a new issue: similar points have been made by earlier inquiries.

From *Scotland's Choice: The Report of the Scottish Prisons Commission* (2008) established by the Scottish Government and chaired by the Rt Hon Henry McLeish [our emphasis]:

*Our review shows that we are not using prisons mainly to tackle serious crime [the] breakdown of data shows we use prison for a very different purpose. Instead of investing in a system that can secure stronger, safer communities, **a series of problematic and largely unnecessary uses of prison are revealed....**[including]*

- *The short sentences problem - **people who are more troubling than dangerous**: Eighty-three percent of prison sentences in 2005/06 were for 6 months or less (and 57% of all prison sentences were for 90 days or less)...*
- *The warehousing problem - **a place to hold the damaged and traumatised**: Ninety percent of women in prison have drug and alcohol problems, and 75% have a history of abuse and major health problems. The picture for male offenders and young people is similar....*

*Research has demonstrated and defence lawyers are well aware that **similar cases are sentenced very differently in different courts - and even by different judges in the same courts...***

We calculate that it would be possible to reduce the prison population by as many as three to four thousand offenders who have not committed serious crimes and do not constitute a danger to the public...

From the *Report of the Commission on Women Offenders* (2012) established by the Scottish Government and chaired by Dame Elish Angiolini [our emphasis]:

There are women who should be in prison to protect the public and to mark the seriousness of their crimes. Even for these women, opportunities for rehabilitation should be available to reduce the likelihood they will reoffend and help reintegrate them back into the community.... For other women who have been repeatedly

*convicted of committing lower level offences, **their offending is often the result of significant underlying issues, such as drug or alcohol addiction and mental health problems, that could be better addressed in the community....** 75 per cent of custodial sentences imposed on women are for periods of six months or less.... **... further analysis is required to gather the information which will help to explain the reasoning behind sentencers' decisions.***

Female prisoners have higher lifetime incidences of trauma, including severe and repeated physical and sexual victimisation, than either male prisoners or women in the general population.

The evidence is compelling that being sentenced to imprisonment alone should not be regarded as providing a strong enough justification for removing a person's right to vote and that the current ban impacts disproportionately on the most deprived and vulnerable. As in other developed European democracies, if we are to remove the vote at all, we should set a higher bar.

The referendum as a special case

We agree with the Scottish Government that the referendum is different from general elections. **We think that makes it more important for prisoners to have a vote in it, not less.** The long-term significance of this poll provides a reason for including as many prisoners as possible in the process.

We also believe that in this context prisoners will be more aware than usual of being excluded from the democratic process and that, if this has any effect, it will reinforce their sense of being separate from, and rejected by, mainstream society. This will work against successful rehabilitation.

Specifically, we would like the Scottish Government to explain the policy reasons for preventing prisoners from voting in the referendum even if by then some have acquired voting rights in general elections. We note that in the current draft UK legislation, alongside the UK government's preferred option of no change, there are other options extending voting either to all those serving sentences up to six months or up to four years.

Voting and rehabilitation

We welcome the current inquiry by the Justice Committee into purposeful activity in prisons and in particular the Cabinet Secretary's recent statement to the Committee that:

the Scottish Government believes that offenders should be sent to prison as punishment, but that our prisons should also be about the rehabilitation and reintegration of offenders back into society as contributing citizens.

We do not want to suggest that voting by itself will make a large difference but we do believe that **participation in democratic decision-making could contribute to the process of rehabilitation and send a strong message to prisoners that they remain part of wider society and have a stake in its future.**

Arbitrary effects

Including those on short sentences in the ban on voting will create some unusually acute anomalies in the specific case of the referendum.

- Prisoners on short sentences are regularly released soon after conviction, due to the time they have already spent on remand. They suffer little or no impact on their voting rights. Others, where the courts have been content to grant bail, serve their whole sentence as convicted prisoners. Of two people convicted side by side and given the same sentence in the run-up to September 2014, the one granted bail could lose their only opportunity to vote on the issue of independence, while the other does not.
- More generally, during 2011-12, around 10,000 people received a prison sentence of less than 6 months (around one-third of those were sentences of less than 3 months) (Source: *Scottish Parliament Question S4W-13083*). On an average day only 433 of these were actually in prison serving their sentence, due to: the rapid turn-over of these prisoners; time already spent on remand; and early release (including on Home Detention Curfew; we understand prisoners on early release would be eligible to vote). On this pattern, **there will be a significant element of arbitrary disenfranchisement among those serving short sentences during the year surrounding the referendum.**

Practical issues

We understand that electoral administrators will face additional work taking forward other parts of the Bill. However, arrangements will anyway need to be made for prisoners on remand by electoral administrators and the SPS. Remand prisoners already make up around one-fifth of the prison population – typically around 1600 on any day – and can vote by post. At first sight, there is not an obvious reason why prisoners on short-term sentences at least could not be treated in the same way.

At a minimum, the practicalities of extending the vote to those on short-term sentences, which are defined in law as being less than 4 years, should be tested with the organisations involved and it should not simply be assumed that it would be unachievable.

On an average day in 2011-12, in addition to the 433 serving sentences of less than 6 months, 1822 prisoners were serving sentences from 6 months up to less than two years, and 1172 were serving sentences between two years and less than four years. (Source: *Prison statistics and population projections Scotland: 2011-12*)

There is also a case for seeking to include those nearing the end of a sentence and being prepared for release, although we realise that they may be harder to identify in law and would bring into the debate prisoners who have committed more serious crimes.

The relevance of ECHR

We recognise that ECHR compliance is a more significant matter for Scottish legislation than UK legislation, because of the limitations on legislative competence in section 29(2)(d) of the Scotland Act 1998, and that the Scottish Government has

stated that it does not believe that the ECHR applies to voting in referendums. While recognising that it will be important for the government and the Parliament to satisfy themselves on the legal issues, **we want to make this as a moral case, not a legal one.**

Conclusion

We would ask the Parliament to consider allowing at least those prisoners serving shorter sentences to vote in the referendum.

We take encouragement from the recent words of the First Minister, at First Minister's Questions on 7 March, that:

The UK Government is out of step with civilised people across the Continent. Its attitude towards human rights is parochial and regressive. The European Convention on Human Rights fulfils a valuable role in Scottish society. An independent Scotland with a written constitution would allow us to assert the positive rights that people in a modern democracy expect to have and are entitled to have.

There is an immediate opportunity with this Bill for Scotland to strike a distinctive course which brings us closer to the practice in other developed European democracies, rather than automatically following the model set by Westminster. We believe the question of voting rights for prisoners in the referendum is more, rather than less, acute than in general elections.

We hope that at minimum the Committee will find time to explore the issues raised and do whatever it can to ensure that when this legislation comes before the Parliament as a whole, this issue is fully debated, in a way which reflects positively on Scotland as a country which values democratic rights and social justice.

We would be happy to provide further material to the Committee or to appear before it.

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Chair

The Howard League for Penal Reform in Scotland

Juliet Lyon CBE

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Positive Prison? Positive Futures

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Sources

Prison statistics and population projections Scotland: 2011-12:
<http://www.scotland.gov.uk/Resource/0039/00396363.pdf>

Criminal Proceedings in Scotland 2011-12:
<http://www.scotland.gov.uk/Publications/2012/11/5336/3>

Scottish Parliament Question S4W-13083: answered by Kenny MacAskill MSP on 8 February 2013

Scotland's Choice - Report of the Scottish Prisons Commission

<http://www.scotland.gov.uk/About/Review/spc>

Commission on Women Offenders: Final Report

<http://www.scotland.gov.uk/About/Review/commissiononwomenoffenders/finalreport-2012>

For further background on the history of the ban on prisoners voting, recent legal cases and international comparisons: Prisoners' Voting Rights - Commons Library Standard Note SN/PC/01764, December 2012. An annex to the note provides information on the position in each of the Council of Europe countries
<http://www.parliament.uk/briefing-papers/SN01764>

21 March 2013