

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

SCOTTISH ELECTIONS (FRANCHISE AND REPRESENTATION) BILL

WRITTEN EVIDENCE FROM HOWARD LEAGUE SCOTLAND

We have previously submitted evidence on prisoner voting rights to the Referendum (Scotland) Bill Committee on the Scottish Independence Referendum (Franchise) Bill; given [evidence](#) to the Scottish Parliament Equalities and Human Rights Committee; and submitted a response to the [consultation on prisoner voting](#), in relation to elements of the Scottish Elections (Franchise and Representation) Bill.

We welcome the opportunity to respond to this call for evidence by the Scottish Parliament's Standards, Procedures and Public Appointments Committee on the Bill, which aims to help increase participation by extending the franchise and candidacy rights for Scottish Parliament and local government elections in Scotland. Acknowledging the Committee's request that responses should focus on areas of the Bill which are relevant to Howard League Scotland, our submission attends to the following areas: 'extending the franchise in Scottish Parliament and local government elections to convicted prisoners sentenced to terms of 12 months or less (section 4); 'the proposal for determining the uninterrupted or notional residence of convicted prisoners in prison' (sections 5 and 6); and 'the proposal that convicted prisoners will only be able to vote by proxy or by postal vote'. We welcome the extension of the franchise to at least some convicted prisoners, but argue that an extension only to those serving 12 months or less is much too unambitious; and we have concerns about the implementation of the proposed provisions for proxy or postal voting.

Voting for those sentenced to prison terms of 12 months or less

It has been almost 14 years since the European Court of Human Rights (ECtHR) ruled that the UK blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 (A3P1) of the European Convention on Human Rights (ECHR) (*Hirst v. UK (No.2)*)¹, which requires states to "hold free elections ... by secret ballot, under conditions which will ensure the free expression of the opinion of the people"². The blanket ban was found to remove the rights of approximately 48,000 prisoners, who were serving sentences from one day to life and for the most minor to the most serious of offences.

Despite what the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell, described recently as a "crystal clear"³ ruling, Scotland's progress in meeting its human rights obligations has been protracted, characterised by opportunities not taken by either the UK or Scottish Governments (for example, as part of the Scottish Independence Referendum (Franchise) Bill). It also flouts

¹ European Court of Human Rights, *Hirst v. UK (No.2)*. Available at: <http://hudoc.echr.coe.int/eng?i=001-70442>

² European Court of Human Rights, Article 3 of Protocol 1, page 5. Available at https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf

³ <https://www.gov.scot/news/franchise-for-shetland-by-election-to-be-aligned-with-court-ruling/>

recommendations from the Council of Europe's Commissioner for Human Rights and the United Nations Human Rights Committee.

In 2017, the Scottish Parliament's Equalities and Human Rights Committee took evidence from a broad range of individuals and organisations – both domestic and international - recommending that legislation be brought to remove the ban on prisoner voting in its entirety. The Committee recommended that:

“making minor changes to the rules on prisoner voting to meet the issues raised in relation to the Hirst judgement would only open up the right to vote to a very limited number of prisoners serving custodial sentences [and that] ... [i]n addition, it seems unlikely that taking such an approach would address the various issues raised in evidence on the need for a more liberal approach to prisoner voting in Scotland”⁴.

In dismissing this recommendation, the Scottish Government has made it clear that its preference is not for meaningful reform in this area, but instead is for the minimum level of compliance with our human rights obligations:

“We are not persuaded of the case for enfranchising all prisoners and we do not think that that is required in order for us to comply with the European convention on human rights (sic)”⁵

This minimum level of compliance is reflected in the making of a Remedial Order under Section 12 of the [Convention Rights \(Compliance\)\(Scotland\) Act 2001](#), to align the franchise for the forthcoming Shetland by-election with the ECHR, prior to consideration of the Scottish Elections (Franchise and Representation) Bill.

Howard League Scotland believes that there has been ample time to comply with the 2005 ECHR ruling, which could have been done in such a way as to signal the inclusive and democratic character of Scottish society the Scottish Government wishes to support. As Dr.Cormac Behan (Lecturer in Criminology, University of Sheffield) posits, a Government could consider “allowing prisoners access to the franchise ... not because it has been instructed to do so by a European or any other court, but rather because ... [it] is a chance for politicians and policymakers to think anew”⁶.

Instead, a Remedial Order has been used to extend the franchise only to those sentenced to prison terms of 12 months or less. Having stated that “[t]his is a pragmatic, short-term solution, and our intention is that [the] Bill currently before Parliament, if passed, will provide the longer-term solution”⁷, it is apparent that the

⁴Prisoner Voting in Scotland, Equalities and Human Rights Committee Report (May 2018). Available at <https://digitalpublications.parliament.scot/Committees/Report/EHRIC/2018/5/14/Prisoner-Voting-in-Scotland#Introduction>

⁵ Scottish Government response to the Equalities and Human Rights Committee's report on Prisoner Voting. Available at: https://www.parliament.scot/S5_Equal_Opps/Prisoner_Voting_-_Equalities_and_Human_Rights_Committee_Report_-_Response_to_Committee.pdf

⁶ Behan C., 2015, Punishment, Prisoners and the Franchise. Available at: https://howardleague.org/wp-content/uploads/2016/04/HLWP_20_2015.pdf

⁷ <https://www.gov.scot/news/franchise-for-shetland-by-election-to-be-aligned-with-court-ruling/>

legislative goal of section 4 of the Scottish Elections (Franchise and Representation) Bill is simply the same, minimum level of compliance.

This is both unambitious and unsatisfactory. Howard League Scotland believes that Scotland should legislate to remove the ban on prisoner voting in its entirety, following the examples set by our fellow Council of Europe states such as Croatia, the Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Norway, Slovenia, Spain, Sweden and Switzerland.

Extending the vote to prisoners is not simply about criminal justice, penal reform or rehabilitation. It is about human rights, inclusive societies and citizenship: creating a universal franchise for all adults in Scotland and ensuring democratic rights for all citizens. The existence of a universal franchise is an important measure of the strength of our democracy and of social equality. Using that measure, Scotland's democracy currently falls short.

As we have consistently stated, imprisonment is simply the deprivation of liberty; thus nothing that is not an inevitable result of this should be included in a person's punishment. But in 2001 the United Nations International Covenant on Civil and Political Rights, Human Rights Committee, advised that a ban on prisoner voting "amounts to an additional punishment"⁸.

This 'additional punishment' for those sentenced to more than 12 months imprisonment remains an arbitrary one, dependent on a combination of the date of sentencing, diet, how long someone has previously spent on remand and on the timing of elections.

Decisions about the use of imprisonment are made drawing on a wide range of factors, and thus there is not a straightforward divide between the types of offences which attract a sentence of 12 months' imprisonment and those which do not. Using their discretion, sentencers take many issues into account, including the welfare of the offender him or herself and which particular community sentencing options are available in the local area – points underlined by the extension from 3 to 12 months of the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019. Furthermore, it is well known that there is wide sentencing variation in the use of imprisonment across Scotland⁹.

In denying some prisoners the vote, an additional punishment is also inflicted, by way of 'civic death':

"such people [prisoners] are also wounded in a civic sense, in that they have already been substantively disenfranchised before their formal disenfranchisement by punishment. They come from communities where their life opportunities are severely restricted, where health inequalities are profound and where levels of political participation are already minimal and deeply troubling. They are therefore civically wounded, and then as part of their punishment — or as an accidental consequence of it — we apply civic

⁸ <https://www.refworld.org/publisher,HRC,,GBR,3cbbec3d2,0.html> – Part 10

⁹ Link to Tata's and CJScotland's evidence to the Justice Committee for PASS?

death in the form of full and formal disenfranchisement during their punishment. To make matters more absurd — in my view — we insist that they resurrect themselves civically at the moment of their release and enter back into society, fully prepared to make a robust and rounded contribution as politically and civically engaged citizens. That is completely paradoxical.”

(Professor Fergus McNeill, SCCJR¹⁰)

However long they are sentenced for, prisoners are still citizens and members of society. Howard League Scotland thus supports Professor Fergus McNeill’s stance; the point made by Dr.Cormac Behan (Lecturer in Criminology, University of Sheffield) in his written evidence¹¹ that “[t]he concept of civic death on which the denial of the right to vote to prisoners is predicated is an antiquated and outdated idea in a modern democracy”; and the European Court of Human Rights (Hirst v the United Kingdom (No.2)) judgement that “there is no room in the Convention for the old idea of “civic death” that lies behind the ban on convicted prisoners’ voting”¹².

Removing the right to vote also adds to the dislocation between prisoner and community, increases the ‘othering’ of prisoners, and reinforces social exclusion in such a way as to work against successful rehabilitation. That is not to say that providing the franchise will solve this complex and entrenched exclusion, but we argue that it will nonetheless contribute positively to rehabilitative efforts, and, importantly, signal that prisoners are still part of our society and have a stake in its future.

Uninterrupted or notional residence of convicted people in prison

Research has shown that reintegration is aided by strong links between prisoners and their local community. Indeed, the evidence shows that such links could be one of the ‘hooks for change’ which encourages desistance from crime. In the words of a serving prisoner in Ireland, whom Dr.Cormac Behan interviewed as part of his research:

“Voting allows the prisoner to feel part of a wider community, something incarceration takes away ... Being in custody takes away a large part of a person’s feeling of self-worth, being allowed to vote gives back some of that lost feeling. This in turn will make better citizens”¹³

As Patrick Harvie MSP pointed out in his evidence to the Equalities and Human Rights Committee on 7 September 2017, it is important to see voting “placed in the context of a relationship with the community to which the person will ultimately return

¹⁰ Equalities and Human Rights Committee, Prisoner Voting in Scotland Report, 14 May 2018: 26) (<https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/5/14/Prisoner-Voting-in-Scotland/EHRiC-S5-18-3.pdf>)

¹¹ http://www.parliament.scot/S5_Equal_Opps/Inquiries/Response_from_Dr_C_Behan_to_the_Convenor_20171010.pdf

¹² <http://hudoc.echr.coe.int/eng?i=001-70442>

¹³ As cited by Professor Fergus McNeill in his evidence to the Equalities and Human Rights Commission (<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11067>)

when they leave prison”¹⁴. HLS therefore supports the Bill’s proposals to grant an absent vote to the convicted person at their home address, or alternative required address, where this is not possible.

Proxy or postal voting mechanism

HLS supports the Bill’s proposal that voting is facilitated via proxy or postal vote, as it already operates for those currently eligible to vote (for example, for those on remand pending trial).

Evidence given to the Equalities and Human Rights Committee from the Scottish Prison Service (SPS), does suggest, however, that this is a relatively complex (and presumably time-intensive) process. It is vital that prisoners are made fully aware of their entitlement to vote, and that the process is made accessible to all. On a practical level, this should include support for those with low levels of literacy; those for whom English is not their first language; and those with physical or mental impairments, as well as appropriate support for those voting for the first time. As happens in Canada for example, prisoners should have access to as much information as is required to make an informed voting decision. Ideally, this should also include a process by which prisoners can engage directly with parliamentary candidates.

This will need to happen against a backdrop of an increasingly high prison population, which reduces the capacity of the SPS. Its recent decision to temporarily reassign Throughcare Officers to Prisoner Officer duties, to ensure that all prisons continue to operate safely and decently, attests to this and should be borne in mind during both planning and implementation of the Bill, should it be passed.

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¹⁴ Equalities and Human Rights Committee, Official Report, 7 September 2017, Col 10: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11067&mode=pdf>