

Scottish Elections (Franchise and Representation) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Scottish Elections (Franchise and Representation) Bill introduced in the Scottish Parliament on 20 June 2019.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 51–EN);
- a Financial Memorandum (SP Bill 51–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 51–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

General overview

4. The Bill sets out a number of changes to the electoral franchise in respect of Scottish Parliament and local government elections in Scotland. It includes provisions extending the electoral franchise for those elections to include all those with a legal right to live in Scotland and extending the right to vote to some prisoners. This extension will apply in respect of other devolved elections that rely on the local government franchise (at present, only elections for membership of a National Park authority come within this description). It also extends candidacy rights for Scottish Parliament and local government elections for foreign nationals, so that these broadly mirror the extension to voting rights (with some exceptions detailed below).

5. The Bill does not affect the franchise for other elections or referendums, though the rules set up for another election or referendum could adopt the franchise as amended by the Bill (e.g. the local government election franchise as amended could be used for a referendum held under devolved legislation, in terms of section 4 of the Referendums (Scotland) Bill, introduced in the Scottish Parliament on 28 May 2019).

Background

6. The Scottish Government is committed to increasing participation in elections both in terms of voter turnout and encouraging citizens to stand for election. Democratic participation challenges the inequalities of power and influence that exist in society. The Bill seeks to ensure an electoral system that supports and empowers the engagement in elections of all those who have chosen to make Scotland their home.

Increased powers for the Scottish Parliament

7. The Scotland Act 2016¹ amended the Scotland Act 1998² to devolve further powers to the Scottish Parliament. The changes were based on recommendations made in the Report of the Smith Commission³ published on 27 November 2014 for further devolution of powers to the Scottish Parliament. These additional powers provided the ability to amend certain sections of the Scotland Act 1998 and gave the Scottish Parliament and the Scottish Ministers increased autonomy in relation to the operation of Scottish Parliament and local government elections in Scotland.

Consultation

8. Following the enactment of the Scotland Act 2016, the Scottish Government has held two separate public consultation exercises on electoral reform and prisoner voting in relation to Scottish Parliament and local government elections.

9. The consultation on Electoral Reform⁴ was undertaken between December 2017 and March 2018 and sought views on a number of issues, including:

- term lengths;
- extending the franchise in relation to foreign nationals;

¹ <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>

² <http://www.legislation.gov.uk/ukpga/1998/46/contents>

³ <https://www.parliament.uk/smith-commission-inquiry>

⁴ <https://www.gov.scot/publications/consultation-electoral-reform/>

- extending the role of the Electoral Management Board for Scotland;
- access to voting and elected office;
- electronic voting;
- the role and remuneration of Returning Officers; and
- boundary reviews.

10. This consultation paper was the first step towards electoral reform. It included a number of suggestions as to how the new powers could be used to bring about improvements in the administration of devolved elections. Over 900 responses were received from organisations and individuals. The consultation was independently analysed and the analysis report⁵ as well as individual responses⁶ published in line with Scottish Government guidance. As well as the online consultation, a range of roundtable discussions were held with a range of accessibility and equality organisations.

11. The consultation on Electoral Reform revealed that there was general support amongst organisations and individuals for extending the electoral franchise for devolved elections to everyone who is legally resident in Scotland, with 78% of those who responded agreeing to this proposition.

12. A further consultation exercise, on Prisoner Voting, took place from 14 December 2018 to 8 March 2019. Over 260 responses were received from organisations and individuals. The consultation responses and analysis report have been published.⁷ Further details are set out at paragraphs 36 to 39.

13. Ongoing consultation with electoral organisations, including the Electoral Commission, Electoral Management Board and Electoral Registration Committee of the Scottish Assessors Association as well as the Scottish Prison Service continued during the consultation period and the development of the draft legislation, and their views were taken at various stages. Consultation with these groups will continue during the

⁵ <https://www.gov.scot/publications/electoral-reform-consultation-analysis/pages/1/>

⁶ https://consult.gov.scot/elections/electoral-reform/consultation/published_select_respondent

⁷ <https://consult.gov.scot/elections/prisoner-voting/>

implementation period in order to ensure a smooth introduction of the proposed changes, including updated forms and guidance.

Extending the franchise to foreign nationals

14. Currently, only British, qualifying Commonwealth⁸, Irish and EU citizens are able to vote in devolved elections. The Bill makes no change to the currently unrestricted rights of EU citizens to vote and stand in devolved elections as provided in statute. Should this position change as a result of the UK's departure from the European Union, the Bill provides an opportunity for these rights to be reaffirmed. In line with the Scottish Government's position in relation to immigration, its desire to demonstrate that Scotland is a welcoming place for all, and the New Scots refugee integration strategy⁹, the intention is to ensure that citizens of all countries who are legally resident in Scotland are able to vote in the elections which affect them.

15. The local government electoral franchise and its exercise is regulated by Part 1 of the 1983 Act. Section 2(1) of the 1983 Act sets out a list of conditions which must be satisfied for a person to be entitled to vote as an elector at local government elections in Scotland. These conditions are that, on the date of the poll, the individual is:

- registered in the register of local government electors for that area;
- is not subject to any legal incapacity to vote (age apart);
- is a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union; and
- is of voting age (i.e. 16 for Scottish local government electors).

16. Under section 4(3) of the 1983 Act, a person is entitled to be registered in the register of local government electors for any electoral area if, on the relevant date, the person:

⁸ Under section 4(6) of the 1983 Act a person is a 'qualifying' Commonwealth citizen for registration purposes if they do not require leave to enter or remain in the UK or they do require leave to enter or remain in the UK but have been granted such leave or are treated as having been granted such leave. Any type of leave to enter or remain is acceptable, whether indefinite, time limited or conditional.

⁹ <https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-2022/>

- (a) is resident in that area;
- (b) is not subject to any legal incapacity to vote (age apart);
- (c) is a qualifying Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union; and
- (d) is of voting age.

17. The franchise for Scottish local government elections is also used in Scottish Parliament elections. Section 11(1) of the Scotland Act 1998 provides that:

“The persons entitled to vote as electors at an election for membership of the Parliament held in any constituency are those who on the day of the poll:

- (a) would be entitled to vote as electors at a local government election in an electoral area falling wholly or partly within the constituency, and
- (b) are registered in the register of local government electors at an address within the constituency.”

18. The Bill proposes to extend the devolved franchise to citizens of any country who are legally resident in Scotland.

Prisoner Voting

19. There has been a longstanding¹⁰ prohibition on convicted prisoners voting in all elections in the UK while they are detained in a penal institution. The Representation of the People Act 1983¹¹ (“the 1983 Act”) established the current legal basis for the ban. Section 3 of that Act sets out that any convicted person is “legally incapable” of voting at any election while detained in pursuance of their sentence or while unlawfully at large when required to be so detained. This ban applies irrespective of the length of the sentence and applies to all UK elections, including Scottish Parliament and local government elections.

¹⁰ Historical background on prisoner voting is summarised in this House of Commons Standard Note:

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport> A further paper sets out developments since 2015:

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7461>

¹¹ <http://www.legislation.gov.uk/ukpga/1983/2>

20. Prisoners who are held on remand (e.g. persons who await trial or who have not been sentenced) are able to vote, casting their ballots by postal and proxy voting. Those who have been released from prison on parole or home detention curfew are also eligible to vote, since they are no longer “detained”.

21. In 2005 the European Court of Human Rights (ECtHR) found in *Hirst v UK (No 2)*¹² that the UK blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR). This Article provides that member states (of the Council of Europe): “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” This has been interpreted by the courts to give individuals the right to vote and to stand for election.

22. The Court allows member states a wide “margin of appreciation” in relation to the exercise of the franchise by convicted prisoners. This reflects the wide variety of approaches on prisoner voting across the member states of the Council of Europe. In *Hirst*, the UK’s blanket prohibition on prisoner voting was deemed to be outwith this margin, as it applied to all convicted prisoners, regardless of the nature of their offence or length of their sentence.

23. Successive UK governments have explored a number of approaches to resolve the issue identified in *Hirst v UK (No 2)* for elections to the UK Parliament. The Labour government elected in 2005 issued two consultations: one in 2006 and one in 2009. No proposals were brought forward before the 2010 general election.

24. In December 2010, legislation was announced which would allow those offenders sentenced to a custodial sentence of less than four years the right to vote in UK Parliamentary and European Parliament elections, unless the sentencing judge considered this inappropriate. No timetable was announced for the proposed legislation.

25. On 10 February 2011, following a backbench business debate, the House of Commons passed a motion which supported the current situation in which no prisoner was able to vote except those imprisoned for contempt, default or on remand. The motion also noted the finding of the ECtHR in *Hirst v UK (No 2)* that there had been no substantive debate by

¹² <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

the UK Parliament on the issue and stated that decisions of this nature should be a matter for democratically elected lawmakers.

26. In 2011, the decision of the ECtHR in *Hirst (No 2)* was reaffirmed in *Greens and MT v United Kingdom*¹³. In 2012, in *Scoppola v Italy (No 3)*,¹⁴ the UK Government made submissions on the issue to the Grand Chamber of the ECtHR as a third party intervener in the case. The Grand Chamber once again reaffirmed the judgment in *Hirst (No 2)*. The Grand Chamber found that restrictions on prisoner voting rights will not necessarily be automatic, general and indiscriminate, and therefore incompatible with the Convention, simply because they are not ordered by a judge. The ECtHR will confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds the acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol 1.¹⁵

27. On 22 November 2012, a draft Voting Eligibility (Prisoners) Bill was published by the UK Government and pre-legislative scrutiny was undertaken by a joint committee of the House of Commons and House of Lords. The Committee reported in December 2013.¹⁶ It recommended that all prisoners serving sentences of 12 months or less should be entitled to vote in UK Parliamentary, local and European elections. In response, the Lord Chancellor and Secretary of State for Justice undertook to keep the matter under consideration,¹⁷ but no final Bill was brought forward.

28. On 16 October 2013, the UK Supreme Court rejected a claim that the blanket ban on prisoner voting was incompatible with EU law. However, the Court also followed the position determined by the ECtHR in relation to Convention rights; although it refused to make a further “declaration of incompatibility” under the Human Rights Act 1998, considering it

¹³ <https://www.bailii.org/eu/cases/ECHR/2011/686.html>

¹⁴ <https://www.bailii.org/eu/cases/ECHR/2012/868.html>

¹⁵ *Hirst (No 2)* at para 84; *Scoppola v Italy (No 3)* at para 85.

¹⁶ HL Paper 103; HC 924.

<https://publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf>

¹⁷ <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2012-13/voting-eligibility-prisoners-draft-bill/>

unnecessary in the circumstances.¹⁸ The ECtHR noted the continuing violation relating to prisoner voting in *Firth and others v United Kingdom*,¹⁹ *McHugh and Others v United Kingdom*²⁰ and *Millbank and Others v United Kingdom*²¹ but did not award the applicants any compensation or legal expenses.

29. Following further calls from the Committee of Ministers of the Council of Europe to resolve the issue, the UK Government published administrative proposals in November 2017 in relation to elections which are reserved to the UK Parliament. In December 2017, the proposals were welcomed by the Committee of Ministers. The measures, which came into effect across the UK in summer 2018, provided that:

- (a) Those who are in the community on temporary licence should be able to vote. Temporary licence is a form of discretionary and temporary parole aimed at the resettlement and rehabilitation of offenders.
- (b) It should be made clear to those given custodial sentences that they will lose the right to vote in prison. This measure was said to address a concern of the judgment in *Hirst* that UK offenders are not informed with sufficient clarity that they cannot vote while serving a prison sentence.

30. On 6 December 2018, the Committee of Ministers, having examined an action report by the UK Government and recalling the wide margin of appreciation in this area, noted the administrative measures taken by the UK Government. Accordingly, it closed its examination of the execution of the ECtHR's judgments in the prisoner voting cases against the UK.²²

31. On 11 April 2019, a further prisoner voting judgment was delivered by the ECtHR, *Miller and Others v United Kingdom*.²³ The Court held that, having regard to its case-law on the subject, at the date of the relevant

¹⁸ *R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63. <https://www.supremecourt.uk/cases/docs/uksc-2012-0151-judgment.pdf>

¹⁹ <https://www.bailii.org/eu/cases/ECHR/2014/874.html>

²⁰ <https://www.bailii.org/eu/cases/ECHR/2014/1012.html>

²¹ <https://www.bailii.org/eu/cases/ECHR/2016/595.html>

²² CM/ResDH(2018)467

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808feca9

²³ <https://www.bailii.org/eu/cases/ECHR/2019/285.html>

elections complained about by the applicants (all of which preceded the package of measures adopted by the UK Government in 2018 and which included the Scottish Parliament elections on 5 May 2016) the statutory ban on prisoners voting in elections was, by reason of its blanket character, incompatible with Article 3 of Protocol 1 of the ECHR. Once again, the Court declined to award any compensation or legal expenses to the applicants.

32. The responsibility for devolved elections is now a devolved power within the competence of the Scottish Parliament. The Scotland Act 2016 amended Schedule 5 of the Scotland Act 1998 (which sets out the reserved matters) in relation to elections. It provides that the Scottish Parliament has devolved responsibility for the conduct of local government and Scottish Parliament elections, including the franchise at such elections (subject to some reservations set out in the amended paragraph B3 of Schedule 5 of the Scotland Act 1998, as amended by the Scotland Act 2016). Accordingly, the Scottish Parliament now has the responsibility for ensuring compliance with the ECHR in relation to prisoner voting in these elections.

33. The role of the Scottish Parliament's Equalities and Human Rights Committee includes considering and reporting on human rights issues. As part of its work programme, the Committee decided in June 2017 to take evidence on the current UK legal position on prisoner voting, the practical issues around voting in prisons and the arguments for and against allowing prisoners to vote.

34. Having taken evidence from a wide range of stakeholders and interested parties, the Committee published a report on Prisoner Voting in Scotland²⁴ on 14 May 2018. The Committee recommended that the Scottish Government should "legislate to remove the ban on prisoner voting in its entirety".

35. However, whilst making that recommendation, the Committee also recommended that the Scottish Government should consider a wide range of views on this issue going forward, and should consult as many stakeholders as possible, including groups representing the interests of victims of crime and the general public.

²⁴<https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/5/14/Prisoner-Voting-in-Scotland#Introduction>

36. In response to this latter recommendation, the Scottish Government held a public consultation which concluded on 8 March 2019. The consultation paper rehearsed the legal background, actions taken by other UK administrations and provided information on prisoner voting arrangements in other Council of Europe member states. The consultation paper made clear that Scottish Ministers consider that the blanket ban on prisoner voting is not fit for purpose as it is not compatible with human rights law as it applies to Scottish Parliament elections. The consultation paper noted that there was a difference in application of Article 3 of Protocol 1 of the ECHR which only applies to elections to a “legislature.” In the devolved Scottish context, therefore, the Article applies only to Scottish Parliament elections and local government elections fall outside its scope. However, it was concluded that, as the two franchises are linked, any change should be made equally to both.

37. Responses were sought on the favoured proposal to link voting rights to length of sentence: specifically, to prisoners serving six or 12 month sentences. It is also consistent with the position in many other member states of the Council of Europe. Research in 2015 found that an approach based on sentence length is used in Austria, Belgium, Greece, Italy, Luxembourg, Romania, Slovakia and Turkey. In Malta, a threshold of 12 months is used.²⁵ The consultation paper also sought views on the practicalities of prisoner voting.

38. The paper also explained (at pages 8 and 9) the steps taken to date by the UK Government in response to the ECtHR caselaw, and also noted the consideration of the issue by the Scottish Parliament’s Equalities and Human Rights Committee which recommended that the Scottish Government should “legislate to remove the ban on prisoner voting in its entirety”.

39. Responses were received from 35 organisations and 230 individuals. The responses were externally analysed and a report published online²⁶. Respondents to the consultation were split fairly evenly across three main positions. Around 3 in 10 thought that prisoners’ right to vote should be linked to the length of their sentence (Option 1). Of the remaining respondents, those who went on to comment generally preferred one of

²⁵ House of Commons Library, “Prisoners’ voting rights (2005 to May 2015), Standard Note SN/PC/01764 (11 February 2015). Available at:

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

²⁶ at <https://www.gov.scot/publications/>

two approaches: allowing no prisoners to vote (around 1 in 3 of all respondents); or extending the franchise to all prisoners (around 3 in 10 of all respondents). Of those respondents that engaged with the question about an appropriate threshold, around 20% favoured a threshold of 6 months or less, one third of respondents favoured a threshold of 12 months or less, and almost half favoured ‘another duration’.

Provisions of the Bill

Extending the franchise to foreign nationals

40. This Bill proposes to extend the devolved franchise to citizens of any country who are legally resident in Scotland. It empowers those with the right to reside in Scotland and who may be paying taxes, own or rent a home or use public services in Scotland. The Bill goes beyond the existing arrangement of providing voting rights in devolved elections to EU citizens and qualifying Commonwealth citizens resident in Scotland. The Scottish Government wants Scotland to be a country where every individual who has chosen to live here is equally valued, no matter where they were born. With this in mind, the Scottish Government wants to allow all foreign nationals who are legally resident in Scotland to vote at Scottish Parliament and local government elections.

41. Allowing persons of all nationalities legally resident in Scotland to vote at Scottish Parliament and local government elections has been estimated to extend the franchise to include around 55,000²⁷ non-EU, non-Commonwealth citizens who are currently not able to vote in any elections in Scotland.

42. As the policy is to enfranchise citizens of all nationalities who are legally resident in Scotland, this will include those whose claim for asylum has been allowed and have been granted refugee status and leave to remain in the UK (usually for an initial period of five years). It would also include those who have been granted temporary protection or humanitarian protection or other forms of leave to remain in the UK. These individuals are likely to be residing in Home Office supported accommodation and the documentation which they have from the Home Office should enable them to demonstrate residence to an Electoral Registration Officer (“ERO”) in Scotland for the purposes of electoral registration.

²⁷ National Records of Scotland publish information on the breakdown of numbers of citizens of non-EU non Commonwealth countries by local authority area, available at the following link:

http://www.scotlandscensus.gov.uk/documents/cde/CT_0202_2011.xlsx

43. Those without leave to remain in the UK will be ineligible to register and to vote in elections. This will include individuals who are illegally present in the UK and/or subject to deportation or removal, and also asylum seekers who have an undetermined claim for asylum.

44. The current minimum Scottish voting age of 16 will apply to voters of all nationalities.

45. The Scottish Government has made a public commitment to ensuring that the rights of EU citizens to vote are protected after the UK leaves the EU. The amendments to the franchise for devolved elections in the Bill make clear that all foreign nationals living in Scotland and with a legal right to be in the UK will be able to vote in devolved elections. As is currently the case, UK, Irish and EU nationals will not require to demonstrate a right to remain in order to vote in devolved elections. The Bill provides that, like Commonwealth citizens at present, qualifying foreign nationals will require to demonstrate that they have leave to remain in the UK, or are a person who does not require such leave, in order to register to vote.

46. Newly enfranchised individuals under this policy would be required, as is currently the case for all voters, to prove residency in a particular local authority area in order to register to vote in Scotland. This will ensure that, in most cases, only those with a permanent address in Scotland will be able to vote and that temporary visitors and tourists will not be able to register. EROs will assess residence as they do at present for existing voters.²⁸

47. It is intended that the extension of the franchise to this new category of voter should result in as little practical change as possible in terms of electoral registration and administration. Foreign nationals will be able to register with exactly the same options as existing voters, such as via a declaration of local connection, and make use of existing processes for anonymous registration and postal and proxy votes where appropriate. Furthermore, it is proposed that no minimum residency period should be imposed before voters are eligible to register. This will avoid creating a two-tier system where non-British citizen voters could have been considered “second class” voters. It is also recognised that any residency period might inadvertently disenfranchise some individuals, who may not

²⁸ Electoral Commission guidance on residence and registration is available at

https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/16257/3/Part-2-Registration-framework.pdf

have the necessary documentation to prove residency in a particular part of the country.

48. Under these proposals, EROs will still be required to verify the nationality status of applicants in order to determine whether they are eligible to vote only in devolved elections, or also in UK Parliamentary elections (and European Parliament elections prior to the UK leaving the EU). Existing arrangements, including the requirement to state nationality in the application registration form and annual canvass form, the power of EROs to request further information where appropriate and the power to check against Home Office records, will ensure that EROs can confirm eligibility.

Representation: candidacy rights and the right to hold office

49. In general terms, persons able to vote in devolved elections are able to stand as candidates and to hold office. The main exception to this concerns persons aged 16 or 17, who are unable to stand as candidates.

50. Under current legislation, only Commonwealth citizens (including UK citizens), citizens of the Irish Republic and EU citizens are allowed to stand as candidates in Scottish Parliament and local government elections, with some exceptions as set out below.

Foreign nationals

51. The Bill seeks to allow all foreign nationals with an indefinite right to live in Scotland to stand as candidates in devolved elections and hold office following those elections. Although foreign nationals with a limited right of residence will be able to vote in a devolved election, there are reasons not to allow a person with a limited right of residence to stand as a candidate (see paragraphs 72 and 73 below).

52. The same eligibility requirements and disqualifications which currently apply to candidates in devolved elections will also apply to any new potential candidates permitted to stand following this Bill (e.g. in relation to age, being a registered elector/resident in a local authority area (for local government elections) and disqualification due to public office etc).

53. Section 31 of the Local Government (Scotland) Act 1973²⁹ (the “1973 Act”) provides a list of certain disqualifications for nomination, election and holding office as a member of a local authority. Section 31A of the 1973 Act provides that a person elected a member of a local authority who is the holder of any paid office or employment or other place of profit in the gift or disposal of the authority (i.e. a “politically restricted post”) is disqualified from remaining a member of the authority after the relevant day unless that person resigns the relevant office etc. These disqualifications will continue to apply to all candidates.

54. Under section 15 of the Scotland Act 1998, a person is disqualified from being a member of the Scottish Parliament (subject to section 16) if the person is:

- (a) disqualified from being a member of the House of Commons under paragraphs (a) to (e) of section 1(1) of the House of Commons Disqualification Act 1975³⁰ (judges, civil servants, members of the armed forces, members of police forces and members of foreign legislatures);
- (b) disqualified otherwise than under that Act (either generally or in relation to a particular Parliamentary constituency) from being a member of the House of Commons or from sitting and voting in it, or
- (c) an office-holder of a description specified in an Order in Council made by Her Majesty.

55. These disqualifications will continue to apply to all candidates for the Scottish Parliament.

56. Under the provisions of section 29 of the 1973 Act, a newly arrived person in Scotland would have to register to be an elector in a particular local government area before being able to stand as a candidate at local government elections (because they would not be able to demonstrate previous residence in the area).

Prisoners

57. Section 31 of the 1973 Act also provides that individuals are disqualified from standing in local government elections, from being

²⁹ <https://www.legislation.gov.uk/ukpga/1973/65/contents>

³⁰ <http://www.legislation.gov.uk/ukpga/1975/24/contents>

elected, or from continuing to serve as a councillor if they have been sentenced to a prison term of three months or more at the time of their nomination or on polling day. They are then barred from seeking office as a councillor for five years. For elections to the Scottish Parliament, people are disqualified from standing or continuing to serve as an MSP if they have been convicted of an offence and have been sentenced to be imprisoned or detained for more than a year and are detained anywhere in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large (section 1 of the Representation of the People Act 1981³¹, as it applies to Scottish Parliament elections by virtue of section 15 of the Scotland Act 1998). The Bill does not seek to change the law in this area.

Prisoner voting

58. As set out above, the Scottish Parliament gained enhanced powers over the franchise of Scottish Parliament and local government elections through the Scotland Act 2016. This Bill therefore represents the first opportunity since 2016 for the Scottish Parliament to pass legislation which will allow some prisoners the right to vote in devolved elections and ensure compliance with Article 3 of Protocol 1 of the ECHR.

59. The Scottish Government's consultation paper acknowledged the strength of opinion on whether or not prisoners should be permitted to vote. Consultees presented a range of opinions, with comments on the rights of victims, the civic responsibility inherent in voting, the needs of rehabilitation and fundamental human rights. Having considered these varied opinions and the report of the Equalities and Human Rights Committee, the Scottish Government's position remains that set out in the consultation paper: that it is neither appropriate, nor necessary to ensure compliance with the ECHR, to enfranchise all prisoners, but that the correct balance is to be found in extending voting rights to those prisoners serving shorter sentences.

60. The Bill proposes that those prisoners sentenced to a term of 12 months or less should be able to vote in Scottish local government and Scottish Parliament elections. This will apply to all "prisoners" who are detained in Scotland, including young offenders who are detained in young offender's institutions.

61. The length of sentence reflects the sentencing judge's assessment of the severity of the offence and other circumstances including the criminal

³¹ <http://www.legislation.gov.uk/ukpga/1981/34/contents>

record of the accused. The approach taken by the Bill therefore ensures that disenfranchisement is similarly linked to the seriousness of the crime.

62. Fixing the prisoner voting threshold at 12 months or less is consistent with the distinction within the Scottish criminal justice system between the sentencing powers of courts of summary jurisdiction and courts of solemn jurisdiction.

63. There is no intention to alter the position in relation to persons who are not currently disenfranchised (e.g. those detained on remand, prisoners on temporary release or home curfew, prisoners on committal as they are not included within the definition of convicted person in section 3 of the 1983 Act or prisoners detained for default). Prisoners sentenced to a term of 12 months or less who are unlawfully at large will not be enfranchised.

64. The 12-month threshold is to be considered only in relation to the sentence passed by the sentencing judge. In other words, whether a prisoner retains the right to vote will be determined by the sentence passed and not taking into account any potential for early release. Any prisoner sentenced to a period of imprisonment in excess of 12 months would not be entitled to vote in devolved elections, even if they ultimately serve less than 12 months in prison.

65. The right to vote in devolved elections will not be extended to convicted persons who are sentenced to consecutive or concurrent terms of imprisonment which, in total, exceed 12 months. For example:

- where a prisoner receives a six-month sentence for one offence and an additional seven-month sentence for another offence and those sentences are to be served consecutively, the prisoner will not be able to vote as they will be considered to be serving a term of 13 months in total, exceeding the 12-month threshold;
- where a prisoner is serving two concurrent seven-month sentences that begin on the same day, that prisoner will be able to vote, as the total term will be seven months; and
- where a prisoner who is two months into a seven-month sentence receives a new sentence of eight months to be served concurrently, that prisoner will be able to vote because the total term served will be considered to be 10 months (the two months already served followed by the eight-month sentence served at the same time as the remaining five months of the original sentence).

66. This policy will cover both Scottish local government and Scottish Parliament elections. This will ensure that the link between these two franchises is maintained even though there is no requirement under the ECHR to grant prisoners voting rights for local government elections.

67. In terms of compliance with the ECHR, the Government's view is that this policy pursues the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law. This approach, based on the length of sentence, strikes the correct balance between the need to ensure that serious offenders are punished, that respect for the law and responsible citizenship are promoted, and the wider objectives of ensuring that prisoners are rehabilitated into society. This approach would ensure that there is no longer a blanket restriction on voting in devolved elections for all prisoners in Scotland, irrespective of the length of their sentence or the nature and gravity of their offence.

68. Some consultees suggested that the net result of penal policy, such as the Government's plans to extend the presumption against short sentences to sentences of under 12 months, would be to minimise the number of prisoners enfranchised by the reforms made by the Bill. Clearly, a reduction in the number of prisoners serving sentences under 12 months in duration will be likely to reduce the number of persons enfranchised by the reform. But there is no fundamental contradiction between the concept of granting prisoners on short sentences a right to vote and a reduction in the number of prisoners who receive short sentences. The Government's policy on prisoner voting is not to seek to enfranchise a specific number of prisoners. It is instead driven by the desire, set out in the consultation paper, to strike an appropriate balance between promotion of the rule of law and responsible citizenship, as well as the wider objectives of the rehabilitation and reintegration of prisoners in order to reduce reoffending.

69. Prisoners will not normally be registered as residing at a prison. In most instances, they will be registered by reference to their previous home address or, failing that, a declaration of local connection which is a legal mechanism used to allow an individual with untypical residence to be allocated to an electoral community. All registration decisions will be made by the ERO on the basis of information provided by the Scottish Prison Service, the prisoner and any other relevant sources. Only where the previous address cannot be used and no local connection can be established will a prisoner be registered to the ward in which the prison is situated. The Electoral Register entry will not identify any person as being

resident at the prison. Prisoners will only be able to vote by proxy or by postal vote. Polling stations will not be set up in prisons.

Alternative approaches

Choice of legislation

70. Primary legislation is required for substantive changes to the electoral franchise. Scottish Ministers consider that the blanket ban on prisoner voting in Scottish Parliament elections is not compatible with human rights law, necessitating a change to the law. It would be possible to legislate on prisoner voting in Scottish Parliament elections in isolation, but Ministers have concluded, on the basis of the Scottish Government's consultation exercises and for the reasons set out above, to make additional changes to the franchise for foreign nationals, for prisoner voting in local government elections and on candidacy. These changes require primary legislation, although some aspects of the reform will be pursued by secondary legislation.

71. Secondary legislation will seek to make changes to the following instruments to complement the Bill. Existing powers will be used to make these changes wherever possible:

- the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 (S.S.I. 2007/170) in relation to provision of information required by a prisoner in order to exercise a proxy vote;
- the Scottish Parliament (Elections etc.) Order 2015 (S.S.I. 2015/425) in relation to the method and requirement for prisoners voting by postal vote and by proxy and to facilitate voting by qualifying foreign nationals; and
- the Representation of the People (Scotland) Regulations 2001 (S.I. 2001/497) in relation to registration of prisoners and to facilitate voting by qualifying foreign nationals.

Representation: candidacy rights and the right to hold office

72. Consideration was given to matching the franchise directly to permit any person who can vote to also be able to stand for and hold office. While in general terms, persons able to vote in devolved elections are able to stand as candidates and hold office, there is a current exception for persons aged 16 or 17, which the Bill does not seek to change. Ministers have not consulted on this option.

73. On foreign nationals the view is taken that it would be undesirable to allow a person with a limited right of residence to stand as a candidate. Such a person could be elected to a term of office that extends beyond the period in which they are legally allowed to reside in the UK. Their departure from the country would prejudice the effective representation of constituents and could bring the electoral system into disrepute. In some cases persons permitted to remain for a limited period are subject to a condition against seeking employment, which would include serving as an elected representative.

Prisoner voting

74. The Scottish Government's consultation paper acknowledged the strength of opinion on whether or not prisoners should be permitted to vote. Consultees presented a range of opinions, with comments on the rights of victims, the civic responsibility inherent in voting, the needs of rehabilitation and fundamental human rights. Having considered these varied opinions and the report of the Equalities and Human Rights Committee, the Scottish Government's position remains that set out in the consultation paper: that it is neither appropriate, nor necessary to ensure compliance with the ECHR, to enfranchise all prisoners, but that the correct balance is to be found in extending voting rights to those prisoners serving shorter sentences.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

75. The proposed provisions within the Bill in regard to extending the franchise and candidacy rights would allow anyone legally resident in Scotland and who is 16 years or over to vote and stand in Scottish Parliament and local government elections (although foreign nationals from outwith the EU (or UK) without indefinite leave to remain will be unable to stand as candidates). This is in line with the Scottish Government's position in relation to immigration, its desire to demonstrate that Scotland is a welcoming place for all, and the New Scots refugee integration strategy.

76. The intention is to ensure that citizens of all countries who are legally resident here are able to vote and stand in the elections which affect them.

77. By expanding democratic engagement and accountability in extending the franchise, the Bill will contribute to the achievement of the Scottish Government's National Performance Framework Outcomes of

inclusive, empowered, resilient and safe communities and support respect, protection and fulfilment of human rights and lives free from discrimination.

78. The Bill is not considered to have a negative impact on any of the protected equality groups. It promotes equality by ensuring that any eligible person who wishes to vote is able to do so. The Bill will affect everyone in Scotland who will become entitled to vote as a result of its provisions. It has the potential to impact positively on those who share the following protected characteristics:

Age – young people aged 16 or 17 are already able to vote in devolved elections if they are EU or Commonwealth nationals. Extending the franchise to all those legally resident in Scotland will enfranchise young people aged 16 or 17 from countries other than the EU and the Commonwealth. This is likely to positively impact upon young people in Scotland as empowered and valued members of the community.

Race – the protected characteristic of race includes nationality³². Extending the franchise in Scotland will enfranchise foreign nationals from countries other than the EU and the Commonwealth who are legally resident in Scotland. This is likely to positively impact upon all those resident in Scotland as empowered and valued members of the community.

Sex – some of those responding to the consultation on prisoner voting highlighted that female prisoners typically serve shorter sentences, and that many will therefore be enfranchised by removal of the prohibition of voting for those prisoners serving 12 months or less. This is likely to positively impact upon those prisoners as a part of rehabilitation.

79. The Bill's Equality Impact Assessment will be published at:
<https://www.gov.scot/publications/>

Human rights

80. By extending voting rights to certain prisoners in devolved elections, Part 2 of the Bill establishes compliance with Article 3 of Protocol 1 of the ECHR (right to free elections) as it applies to elections to the Scottish Parliament. It ensures that the restriction on the rights of prisoners to vote cannot be characterised as arbitrary and does not apply irrespective of the

³² Section 9 of the [Equality Act 2010](#)

length of sentence given to a prisoner, or the nature and gravity of their offence. It therefore addresses the concern of the ECtHR in *Hirst v UK (No 2)*³³, and subsequent decisions, that there should not be a “blanket ban” on prisoner voting rights.

81. The right to vote under Article 3 of Protocol 1 of the ECHR is considered by the ECtHR to be the “active” element of the rights guaranteed by that Article. Any restrictions to the right to vote must not run counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. However, the ECtHR has recognised that voting rights are not absolute and they may be restricted in pursuit of a legitimate aim, provided that the means employed are not disproportionate. It is for the domestic legislature, within the wide margin of appreciation afforded by the ECtHR in this area, to determine the circumstances in which persons convicted of offences should lose the right to vote.

82. The approach taken by the Bill pursues the legitimate aims of sanctioning the conduct of offenders (by maintaining the restriction on voting by those sentenced to more than 12 months in prison) and promoting the rule of law and responsible citizenship. It also pursues the wider objectives of the rehabilitation and reintegration of prisoners on shorter sentences with the aim of reducing reoffending. The ECtHR recognised such aims as appropriate in terms of Article 3 of Protocol 1 in *Hirst*. By extending voting rights to certain prisoners on shorter sentences, the Bill pursues these legitimate aims in a proportionate manner and, accordingly, has a positive effect on the human rights of those prisoners who are enfranchised.

Island communities

83. The Bill has no disproportionate effect on island communities.

Local government

84. It is intended that the extension of the franchise to everyone legally resident in Scotland will be on the same basis as existing voters in terms of electoral registration and administration. Foreign nationals should be able to register via a declaration of local connection, subject to current qualification requirements (e.g. for homeless persons), and make use of existing processes for anonymous registration and postal and proxy votes where appropriate. Furthermore, no minimum residency period will be

³³ <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

imposed before voters are eligible to register. This will avoid creating a two-tier system where non-British citizen voters could have been considered “second class” voters.

85. Under these proposals it is likely that EROs will require to verify the nationality status of applicants (as they currently do with EU citizens) in order to determine whether they are eligible to vote only in devolved elections, or also in UK Parliamentary elections. Existing arrangements, including the requirement to state nationality in the application registration form and annual canvass form, the power of EROs to request further information where appropriate and the power to check against Home Office records will ensure that EROs can check eligibility. No change is intended to these rules.

86. In consequence of the proposed changes to candidacy, the nomination forms for the election of councillors will require to be changed (as they currently refer to qualifying Commonwealth citizens, Irish citizens or a relevant citizen of the EU). The form is currently set out in the Scottish Local Government Election Order 2011 and will be changed, by secondary legislation, in time for the next scheduled local government elections in May 2022.

Sustainable development

87. The Bill will, in itself, have no impact on sustainable development. However it is hoped that the changes to the franchise will encourage those who move to the UK to make their homes in Scotland. If this does happen then this will lead to an increase in Scotland’s diversity and productivity which will make Scotland a more sustainable economy

Scottish Elections (Franchise and Representation) Bill

Policy Memorandum

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