STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

SCOTTISH ELECTIONS (FRANCHISE AND REPRESENTATION) BILL 2019

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Executive Summary

- This submission relates to the elements of the Scottish Elections (Franchise and Representation) Bill which relate to the enfranchisement of prisoners (clauses 2 and 3).
- The right to vote is a human right which is fundamental not only to democracy in Scotland but also to the Scottish Parliament's obligations under Article 3 of Protocol 1 ECHR. It is, however, a qualified right, the removal of which can be justified as a punishment for serious criminality.
- The UK will not be in compliance with Article 3 of Protocol 1 ECHR as interpreted by the European Court of Human Rights in cases such as *Hirst* as a result of the UK Government's policy of permitting prisoners on day-release to vote.
- Following the transfer of competences to the Scottish Parliament to determine Scottish electoral law under the Scotland Act 2016 it is incumbent upon the Parliament to fulfil its duty as a rights-respecting institution by tackling this breach of rights. In the short-to-medium term, the enfranchisement of prisoners sentenced to up to 12 months imprisonment will likely comply with the requirements of Article 3 of Protocol 1 ECHR.
- The arguments put by the Conservative Party in opposition to these legislative proposals draw upon a respect for law and order. These arguments do not engage with justifications for the reform based on the requirements of ECHR compliance; they set up a counter narrative. These assertions can be tackled by drawing upon justifications for enfranchisement grounded in democratic principles, the history of prisoner voting in Scotland and the potential rehabilitation benefits.
- The historical record of legislation affecting prisoner voting does not support assertions that the ban on the prison franchise has been a long-standing aspect of Scotland's criminal justice system. Many prisoners held in Scottish prisons were able to vote by postal ballot between 1949 and 1969.

Author Information

Colin Murray is a Reader in Public Law in law at Newcastle University. His research examines the concepts of citizenship and democracy in the UK. He has written extensively on the UK's law on prisoner enfranchisement and in 2013 served as Specialist Advisor to the UK Parliament's Joint Committee on the Draft Prisoner Voting Bill. He submitted evidence to the Scottish Parliament's Equalities and Human Rights Committee on prisoner voting in February 2018.

Will the sub-12 month enfranchisement proposal satisfy the requirements of the ECHR?

Prisoner disenfranchisement under section 3 of the Representation of the People Act 1983 remains one of the most high-profile breaches of the UK's human rights commitments. The subject matter of the breach of Article 3 of Protocol 1 of the ECHR is, of course, of intrinsic importance in a democracy. The duration of the UK's breach, recognised well over a decade ago in the *Hirst* case (*Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41), and the willingness of successive UK Government's to question the decision and remit of the European Court of Human Rights on this issue have nonetheless increased its significance. It has therefore become a totemic issue in terms of how democratically elected institutions approach their human rights obligations.

The problems with the current operation of the Representation of the People Act 1983, as identified in *Hirst*, are two-fold. First, the penalty operates in an arbitrary manner (especially in short-sentence cases), with its imposition depending on little more than whether someone is imprisoned on the date of an election. Second, the institution of the current restrictions on prisoners' voting in the Representation of the People Act 1969 was not subject to any meaningful explanation in Parliament. The conclusions of a Speaker's Conference, conducted behind closed doors in 1965, were implemented without substantive debate.

The UK Government's 2017 reforms to prisoner voting, instituted when David Liddington was Secretary of State for Justice, are unlikely to address this breach. The enfranchisement of prisoners on day release on the date of an election amounted to an administrative fix, explicitly intended to offer some concession to the human rights concerns at issue without having to justify legislation before the UK Parliament. It affected a mere 100 prisoners out of a UK prison population of nearly 85000, and did not address either of the concerns raised by the European Court. It is certain to be subject to litigation, and although this confrontation with the UK has not been welcomed by the Court, accepting this arrangement as ECHR compliant would amount to a major climbdown by the Court from its jurisprudence on the right to vote.

Given that the Scottish Parliament gained competence to address this issue through the enactment of the Scotland Act 2016, respect for the Parliament as a rights-respecting institution obliges a legislative response to this issue. Unlike the approach adopted by the UK Government, the solution proposed in clauses 2 and 3 of the Scottish Elections (Franchise and Representation) Bill is likely to be accepted as human-rights compliant for the foreseeable future. It provides an opportunity for the rules regarding the removal of the vote from prisoners serving sentences of more than 12 months to be fully justified by ministers in the course of parliamentary debate.

Moreover, although a 12-month cut off point will still produce anomalies (many prisoners who serve relatively short sentences between elections will not lose their right to vote, whereas others will dependent upon when elections fall relative to an election), this remains a marked improvement upon the present system, whereby the additional penalty of disenfranchisement can apply unevenly between to prisoners serving very short sentences simply because of the timing of an election.

This solution might, in the long run, need to be revisited. The ECHR is a living instrument and the European Court's jurisprudence on prisoner voting could therefore become more prescriptive in the future as more legal systems enfranchise more prisoners (evidencing a shift in Europe-wide attitudes on this issue). Furthermore, with the Welsh Government currently proposing to enfranchise all prisoners serving sentences of less than 4 years, MSPs (and ultimately the courts) might question the rationale behind the more restrictive provisions being proposed for Scotland. For now, however, the legislative proposals contained within the Scottish Elections (Franchise and Representation) Bill suffice for compliance with the current state of human rights law.

Will the enfranchisement of some prisoners threaten "law-and-order" in Scotland?

Whereas the Scottish Government's justifications for the legislative changes on prisoner voting prioritise human rights concerns and the need for the Scotland's institutions to respect human rights, the opposition to these provisions voiced to date by the Scottish Conservatives has instead raised "law-and-order" concerns and the interests of victims. There is a risk of both sides of the debate 'talking past' each other, and any case for the enfranchisement of prisoners must address these claims.

Law-and-order concerns are based on a flawed premise that under the current law disenfranchisement acts as an additional punishment upon offenders which is proportionate to the seriousness of their crimes. When it applies to short-term prisoners, however, disenfranchisement punishes the timing of an offence, not the commission of an offence. One prisoner serving a 28-day sentence for criminal damage at the time of an election will lose the right to vote, whereas another sentenced a few days after the election will not.

Nothing about the current law therefore protects the interests of victims or advances the cause of law and order. The loss of liberty remains the primary punishment for sufficiently serious crimes, and nothing about the proposed changes reduces the loss of liberty (with it being important to note that, with Scotland's per capita incarceration rate being particularly high in European terms, there is nothing to suggest that the Scotland's overall criminal justice policy can in any way be characterised as insufficiently punitive).

As noted above, a solution which builds in a one-year cut-off point with regard to sentences will still result in some cases where the extra punishment of disenfranchisement will be applied, and others where it will not be, despite the crimes at issue being ostensibly similar, dependent upon the timing of elections. The higher the cut off point adopted in legislation, the greater the reduction in this effect. If a cut-off point of four years is chosen, for example, as proposed in Wales, it becomes more likely that prisoners to whom such a law applies will lose the right to vote in one electoral cycle, making the application of this punishment less arbitrary (even under this example the problem is not eliminated; in light of sentence remission some offenders covered by such rules will still be imprisoned between elections, and thus escape this sanction). The current proposal nonetheless dramatically reduces the number of cases in which this arbitrary additional punishment will apply, and limits the effect of this punishment to more serious instances of criminality.

Will the enfranchisement of some prisoners have rehabilitation benefits?

In a Scottish prison population of roughly 8000, at an estimate some 1500 remand and awaiting-sentence prisoners can vote at present. The proposal will probably increase the number of enfranchised prisoners to 2500-3000 on any given election day. The section of the prison population impacted by the reform is therefore, in effect, the churn of short-term prisoners. Many of these individuals will be serving prison sentences after multiple criminal convictions for low-level offences.

Rebuilding the connection between short-term prisoners and society matters. The right to vote can be used as part of rehabilitation programmes, thereby emphasising that Scotland still believes that individuals serving short term sentences can make a valued contribution to society. Requiring MSPs to engage directly with prisoners through the electoral process could, moreover, give law makers cause to more carefully consider prison policy.

Will enfranchisement undermine long-standing practice within the Scottish criminal justice system?

The enfranchisement of prisoners cannot be presented as the Scottish Parliament simply "doing the bidding" of the European Court. Indeed, the enfranchisement proposals do not fly in the face of historical practice in Scotland allowing some prisoners to vote by post. Between 1949 (following the end of outlawry in Scots law) and the enactment of the Representation of the People Act 1969 all prisoners in Scotland (no matter the seriousness of their offence) could vote in this manner for as long as their name remained on the electoral register (essentially up to one year into their sentence).

It is therefore not alien to Scotland to allow prisoners to vote. Indeed, the efforts of Edinburgh prisoners to be registered to vote in the mid-1960s demonstrates Scotland's distinct engagement with the interaction between democracy and imprisonment (*Donnelly v Edinburgh Electoral Registration Officer*, 1964 SLT (Sh. Ct.) 80). In this case the prisoners in question were not prevented from voting because they were in prison, but on the technicality that because Saughton Prison (HMP Edinburgh) was in their "home" constituency no postal vote could be issued (the story illustrates how other prisoners, not affected by this quirk of the postal voting system, could vote).

Will the enfranchisement of some prisoners benefit Scotland's democratic culture?

It has become fashionable to discuss thick and thin conceptions of democracy. In the era of "alternative facts" much has been written about the danger to a polity's democratic culture of falling levels of trust in media news reporting. This attention; however, should not distract from the core basis of a democratic society, the principle of one person, one vote, of equal worth. Law makers, who derive the legitimacy of their position from the operation of this principle, should not lightly legislate to restrict it. A democracy does not allow for classes of individuals to be disenfranchised because they are unpopular, and if the rationale for removal of the vote is to be the seriousness of societal harm that an individual has caused, the threshold requires careful consideration and clear justification.

Ireland and Canada, both countries with comparable legal systems to Scotland, have for over a decade enfranchised their entire prison populations without manifest administrative difficulty or deleterious impact on societal respect for law and order. Ireland legislated in reaction to the *Hirst* decision, whereas Canada legislated in response to a ruling by its own Supreme Court. The majority's rationale in the Canadian Supreme Court should provide pause for thought for legislators tempted to dismiss out of hand the right of prisoners to vote; 'the wholesale disenfranchisement of all penitentiary inmates … is not demonstrably justified in our free and democratic society'.

Scotland is no less confident or mature a liberal democracy than Canada or Ireland. In light of their example it cannot be maintained that core societal norms or the democratic process will be threatened by the Scottish Parliament permitting a measure of prisoner enfranchisement. The Scottish Parliament should therefore exercise its competences in this regard and assert its commitment to liberal democratic values which the UK Parliament has been so reluctant to uphold.