

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

SCOTTISH ELECTIONS (FRANCHISE AND REPRESENTATION) BILL

WRITTEN EVIDENCE FROM SCOTTISH HUMAN RIGHTS COMMISSION

The Scottish Human Rights Commission welcomes the opportunity to submit evidence on the Scottish Elections (Franchise and Representation) Bill. The Commission supports an overall drive to improve democratic participation for the groups identified in the Bill. We focus, however, on the issue of voting for prisoners, in view of the necessity to remedy this long outstanding issue of human rights compliance found by the European Court of Human Rights (ECtHR) in *Hirst v United Kingdom (No 2)*.

The overarching principles which can be identified from ECtHR judgments in relation to the right to vote in terms of Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR) are well rehearsed. In particular, it is well-established that an automatic blanket ban on prisoner voting is a disproportionate measure¹ and we are pleased to see that the need for consequent reform is accepted in the Bill.

It is similarly clear that the ECHR does leave a wide margin of appreciation to states to determine the proportionate disenfranchisement of prisoners. That margin extends to allowing the state to decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied².

However, the ECHR defines the floor rather than the ceiling of human rights protection. In recognition of its role, the ECtHR has deliberately and carefully avoided giving much in the way of direction as to which options within the broad range falling within the margin of appreciation states should adopt. It has highlighted the importance of substantive debate by the democratic legislature on the continued justification for restrictions in light of modern day penal policy and of current human rights standards³. To inform that debate, we consider what guidance is offered by general human rights principles and international human rights standards to indicate the option for enfranchisement which would be most proportionate and which would best protect and promote human rights. We conclude with our view on which approach to enfranchisement would most respect those principles and standards.

- The human rights purpose of imprisonment

International human rights instruments recognise that the purpose of imprisonment is primarily rehabilitative and concerned with the deprivation of one's liberty.

¹ *Hirst v United Kingdom (No. 2)* (2006) 42 E.H.R.R. 41, *Frodl v Austria* (2011) 52 E.H.R.R. 5, *Scoppola v Italy (No. 3)* (2013) 56 E.H.R.R. 19

² *Scoppola v Italy (No. 3)*

³ *Hirst* at para. 79

Article 10 paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR) states that “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” In its 2001 review of the UK, the Human Rights Committee (which monitors the implementation of ICCPR) expressed concern that the general deprivation of the right to vote for convicted prisoners did not meet this requirement⁴.

The deprivation of a person’s liberty is the punishment for committing a crime. Some human rights may necessarily require to be restricted as a consequence, although even such restrictions require to be justified. For example, the right to private and family life including autonomy over all aspects of a person’s life, will often be restricted if necessary for security purposes. However, a person’s human rights should not be restricted more than necessarily flows from the deprivation of liberty⁵. Disenfranchisement constitutes an additional penalty which some states choose to impose and others do not and is therefore not a necessary or automatic consequence of imprisonment.

- Maximum suffrage and trend towards inclusion:

The caselaw of the ECtHR establishes that the presumption must be in favour of universal suffrage. In *Hirst* the Court made clear that “the right to vote is not a privilege. In the 21st century, the presumption in a democratic state must be in favour of inclusion”⁶.

In *Scoppola (No.3)*, the Court, while preserving the state’s margin of appreciation, noted that since *Hirst* “analysis of the relevant international and European documents and comparative-law information reveals the opposite trend, if anything—towards fewer restrictions on convicted prisoners’ voting rights.”⁷

Beginning from the principle of maximum suffrage, it is then necessary to consider whether the various reasons for restricting enfranchisement are rationally connected to legitimate aims and are aimed at the promotion and protection of human rights.

- Proportionality and the principle against arbitrariness:

As the policy memorandum acknowledges, there is a range of strong public opinion in respect of the issue of prisoner voting. The report of the Equalities and Human Rights Committee⁸ (the EHRiC report) highlights the emotive nature of the issue in the UK as compared to other nations such as Canada and Ireland. We would be concerned if populist opinion acted as a primary driver of reform rather than a more objective assessment of human rights standards and, accordingly, which option promotes and protects human rights to the greatest degree. In the words of the

⁴ When read in conjunction with the Article 25 which provides the right to vote. See CCPR/CO/73/UK

⁵ “Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty.” Rule 3, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 2015

⁶ at para. 59

⁷ at para. 95

⁸ ‘Prisoner Voting in Scotland’, Equalities and Human Rights Committee, Scottish Parliament, 14 May 2018

ECtHR: “Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.”⁹

The EHRC report illuminates the background to the ban on prisoner voting in the UK, from which the connection between imprisonment and disenfranchisement does appear to be somewhat arbitrary¹⁰ and it is difficult to discern the rational connection between the stated legitimate aims and the measure of disenfranchisement. We note the Scottish Government’s view that disenfranchisement furthers the aims of preventing crime by sanctioning the conduct of convicted prisoners and of enhancing civic responsibility and respect for rule of the law. While they did not rule on the matter, a number of judges in *Hirst* expressed doubt as to the efficacy of achieving these aims through a bar on voting¹¹. We share these doubts and find much more persuasive the findings of the EHRC report that “From what we have heard, it seems unlikely that not being able to vote would deter people from committing a crime. Not being able to vote also does not seem to be linked to protecting the public from the commission of other crimes. Not being able to vote might, however, impact negatively on an individual’s rehabilitation. On the basis of this evidence, it would seem that decisions on allowing prisoners to vote or not are more linked to issue of ‘retribution’ or punishment than anything else.”¹²

Similarly, the Human Rights Committee has queried the rationale stating that it “fails to discern the justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation, contrary to article 10, paragraph 3, in conjunction with article 25 [the right to vote] of the Covenant.”¹³

- The Commission’s view on possible options

This reform presents an opportunity to take progressive steps which foster inclusion and democratic participation and contribute towards the social rehabilitation of prisoners and, in so doing, to demonstrate human rights leadership. While the Bill proposals would achieve basic compliance, the Commission considers that full enfranchisement as proposed by the EHRC report would be a progressive option which would be more in line with human rights principles and standards.

If that option is not taken, however, the above principles and standards favour options which achieve the greatest degree of precision and rational connection between crime and disenfranchisement. The consultation preceding this bill considered alternative options, including an approach based on type of crime and disenfranchisement applied as an additional penalty. The option of disenfranchisement applied during sentencing allows for a more individualised consideration of the appropriateness of the measure in response to the conduct and circumstances of the individual, and thus greater proportionality. The rationale

⁹ *Hirst v United Kingdom (No.2)* at para. 70

¹⁰ Paras. 71 - 82

¹¹ Paras. 75 and O-15

¹² Para. 130

¹³ *UN Human Rights Committee: Concluding Observations: United Kingdom and UK Overseas Territories*, 6 December 2001, CCPR/CO/73/UK

behind the use of disenfranchisement would, however, need to be clarified by Parliament for the assistance of the judiciary vested with such a task, which again raises questions of the extent to which legitimate aims can be identified and justified.

The Commission also appreciates that there may be a rational connection between the aims pursued and a proportionate deprivation of the right to vote where the offence relates to abuse of public office and crimes of dishonesty in public office. These accord with the essence of Article 3 Protocol 1 in “maintaining the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage”¹⁴. While this would limit disenfranchisement to a small number of crimes, such an outcome would be in line with the principle of maximum suffrage.

Another means of achieving the greatest degree of proportionality in accordance with human rights, would be to limit the scope of disenfranchisement based on particular types of crime against the state or electoral system. If there is a concern that there are different levels of seriousness within the definition of a specific crime, the option of judicial decision-making on disenfranchisement could be combined with this approach i.e. Parliament could identify the offences in which disenfranchisement could be considered at sentencing.

Whilst these alternative approaches, when applied appropriately, are likely to be compliant with human rights standards, as noted above, the Commission considers that full enfranchisement as proposed by the EHRiC report would be a progressive option which would be most in line with human rights principles and standards.

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¹⁴ *Hirst* at para. 62