

**CONSULTATION SUBMISSION on**

**Prisoner Voting**

**March 2019**

**Question 1: Do you think that prisoners’ right to vote in Scottish Parliament and Local**

**Government elections should be linked to the length of their sentence?**

No

**Question 2: If your answer to Question 1 is ‘no’, what would be your preferred**

**approach to extending prisoners’ voting rights?**

The Scottish Human Rights Commission welcomes the consultation on prisoner voting and its recognition that the Scottish Parliament must act upon the long outstanding issues found by the European Court of Human Rights (ECtHR) in *Hirst v United Kingdom (No 2)*.

The consultation provides a useful overview of 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). In particular, it is well-established that an automatic blanket ban on prisoner voting is a disproportionate measure[[1]](#footnote-1) and we are pleased to see that the need for consequent reform is accepted.

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 applied[[2]](#footnote-2).

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. Therefore, we consider what guidance is offered by general human rights principles and international human rights standards to indicate the option which would be most proportionate and which would best protect and promote human rights. We conclude with our view on which of the options for consultation 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.

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 requirement[[3]](#footnote-3).

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 liberty[[4]](#footnote-4). 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”[[5]](#footnote-5).

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.”[[6]](#footnote-6)

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 consultation 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 Committee[[7]](#footnote-7) (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 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.”[[8]](#footnote-8)*

The EHRiC 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 arbitrary[[9]](#footnote-9) 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 voting[[10]](#footnote-10). We share these doubts and find much more persuasive the findings of the EHRiC 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.”[[11]](#footnote-11)*

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.*”[[12]](#footnote-12)

Those arguments which do appear to have the most rational connection between the aims pursued and a proportionate deprivation of the right to vote are 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”[[13]](#footnote-13). While this would limit disenfranchisement to a small number of crimes, such an outcome would be in line with the principle of maximum suffrage.

* Consideration of 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.

Considering the options available, the Commission considers that full enfranchisement as proposed by the EHRiC report would be a progressive option which would be 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 option of disenfranchisement applied during sentencing (Option 2) 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 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.

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 (Option 3). 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 approaches (Options 2 and/or 3 above) when applied appropriately are likely to be compliant with human rights standards, as noted above, the Commissionconsiders that full enfranchisement as proposed by the EHRiC report would be a progressive option which would be in line with human rights principles and standards.

**Question 3: If your answer to Question 1 is ‘yes’, what length of sentence would be**

**appropriate as the eligibility threshold for prisoner voting rights?**

**12 months or less ☐ 6 months or less ☐ Another duration ☐**

n/a

**Question 4: If your answer to the above is ‘another duration’, please specify this**

n/a

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 [↑](#footnote-ref-1)
2. *Scoppola v Italy (No. 3)* [↑](#footnote-ref-2)
3. When read in conjunction with the Article 25 which provides the right to vote. See CCPR/CO/73/UK [↑](#footnote-ref-3)
4. *“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 [↑](#footnote-ref-4)
5. at para. 59 [↑](#footnote-ref-5)
6. at para. 95 [↑](#footnote-ref-6)
7. *‘Prisoner Voting in Scotland’*, Equalities and Human Rights Committee, Scottish Parliament, 14 May 2018 [↑](#footnote-ref-7)
8. *Hirst v United Kingdom (No.2)* at para. 70 [↑](#footnote-ref-8)
9. Paras. 71 - 82 [↑](#footnote-ref-9)
10. Paras. 75 and O-I5 [↑](#footnote-ref-10)
11. Para. 130 [↑](#footnote-ref-11)
12. *UN Human Rights Committee: Concluding Observations: United Kingdom and UK Overseas Territories*, 6 December 2001, CCPR/CO/73/UK [↑](#footnote-ref-12)
13. *Hirst* at para 62 [↑](#footnote-ref-13)