
Report To:	Policy & Resources Committee	Date:	5 February 2019
Report By:	Head of Legal & Property Services	Report No:	GM/LP/016/19
Contact Officer:	Gerard Malone	Contact No:	01475 712710
Subject:	Scottish Government Consultation: Prisoner Voting		

1.0 PURPOSE

- 1.1 CoSLA has requested the Council's view on the Scottish Government Consultation on Prisoner Voting. It is CoSLA's intention to develop a co-ordinated local government response on the consultation and it has requested the Council's views by Thursday 7 February 2019.

2.0 SUMMARY

- 2.1 The Scottish Government consultation paper is attached (**Appendix 1**). It is the Scottish Government's view that a balance has to be achieved between the rights of victims and the public interest in sanctioning criminal conduct and in enhancing civic responsibility and respect of the rule of law, on the one hand, and in relation to the rights of prisoners as members of society and their needs for rehabilitation.
- 2.2 The current blanket ban on voting by convicted prisoners in custody is not consistent with the European Convention on Human Rights and views are sought on what arrangements be proposed to replace the blanket ban.
- 2.3 A suggested Council response is attached as **Appendix 2** as a draft for discussion and/or approval. This draft proposes that prisoners' right to vote should be linked to the length of their sentence and suggests that sentences of 12 months or less be the threshold for eligibility to vote.

3.0 RECOMMENDATION

That the Committee

- 3.1 Considers the terms of the Scottish Government consultation paper; and
- 3.2 Considers and approves the Council's response for onward transmission to CoSLA.

Gerard Malone
Head of Legal & Property Services

4.0 BACKGROUND

- 4.1 The Scottish Government has issued a consultation paper on prisoner voting and CoSLA has requested the Council's views by 7 February 2019 so that a co-ordinated local government response can be submitted.
- 4.2 The Scottish Government has responsibilities for Scottish Parliament and Local Government Elections and, accordingly, the Council's views on the consultation paper are sought.
- 4.3 There has been a long standing ban on convicted prisoners voting in any elections in the United Kingdom. The European Court of Human Rights has made findings to the effect that the UK's blanket ban on convicted prisoners voting in elections is in breach of Article 3 of Protocol 1 of the European Convention on Human Rights.
- 4.4 It is recognised that there will be many strongly held views on whether or not prisoners should be allowed to vote. The Scottish Government recognises there needs to be a balance between the rights of victims and the public interest in sanctioning criminal conduct and in enhancing civic responsibility and respect of the rule of law, on the one hand, as well as the rights of prisoners as members of society and their needs of rehabilitation.
- 4.5 The current blanket ban on voting by convicted prisoners is not consistent with the European Convention of Human Rights and the Scottish Parliament is considering what arrangements could be proposed to replace the blanket ban.
- 4.6 The options within the consultation paper (**Appendix 1**) include the Scottish Government's favoured option to remove the right to vote only from those prisoners who have been sentenced to longer sentences of imprisonment. Accordingly, views are sought on the threshold length of service below which prisoners should be entitled to vote.
- 4.7 It is appreciated that a range of views and options may be held by individual members in relation to the options. It is the entitlement of any Elected Member to make their own response to the Scottish Government consultation, if so wished. An intended draft response on behalf of the Council is attached as **Appendix 2** for consideration and/or approval at the Committee meeting. This draft proposes that prisoners' right to vote should be linked to the length of their sentence and suggests that sentences of 12 months or less be the threshold for eligibility to vote.

5.0 IMPLICATIONS

5.1 Finance

Financial Implications:

One off Costs

Cost Centre	Budget Heading	Budget Years	Proposed Spend this Report	Virement From	Other Comments
N/A	N/A	N/A	N/A	N/A	N/A

Annually Recurring Costs/ (Savings)

Cost Centre	Budget Heading	With Effect from	Annual Net Impact	Virement From (if Applicable)	Other Comments
N/A	N/A	N/A	N/A	N/A	N/A

5.2 Legal

There are no other legal issues outwith the terms of the above report.

5.3 Human Resources

There are no direct HR implications on this report.

5.4 Equalities

There is no direct effect upon equalities within this report.

(a) Has an Equality Impact Assessment been carried out?

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YES (see attached appendix)

X

NO – This report does not introduce a new policy, function or strategy or recommend a substantive change to an existing policy, function or strategy. Therefore, no Equality Impact Assessment is required

(b) Fairer Scotland Duty

If this report affects or proposes any major strategic decision:-

Has there been active consideration of how this report's recommendations reduce inequalities of outcome?

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YES – A written statement showing how this report's recommendations reduce inequalities of outcome caused by socio-economic disadvantage has been completed.

X

NO

5.5 Repopulation

There is no implication for repopulation within Inverclyde.

6.0 BACKGROUND PAPERS

6.1 Scottish Government Consultation on Prisoner Voting December 2018.

Consultation on Prisoner Voting

December 2018

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Ministerial foreword



The Scottish Government is committed to protecting and promoting human rights and will always measure up to that challenge even when it is difficult.

When the Scottish Parliament gained new powers over elections in the Scotland Act 2016, it became necessary to consider how to comply with the European Convention on Human Rights on the issue of prisoner voting.

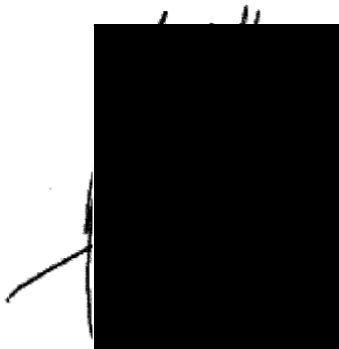
It is clear that the blanket ban on prisoners voting is no longer fit for purpose as it is not compatible with human rights law. The Equalities and Human Rights Committee in the Scottish Parliament took evidence on prisoner voting and published a report in May 2018 advocating lifting the ban. We want to be clear that having considered the report and taken into account international practice, the Scottish Government does not take the view that all prisoners should be given the vote.

There are a number of possible ways to give prisoners the vote and these are explored in this consultation document. We favour allowing only those prisoners serving short sentences to vote. I consider that this approach would strike the appropriate balance between the right to vote and the aims of preventing crime by sanctioning the conduct of convicted prisoners, and of enhancing civic responsibility and respect for the rule of law.

I recognise that for many people giving any prisoners the vote will be an unwelcome change and there will be concerns about the feelings of the victims of crime. This is why restricting voting rights to those with short sentences strikes us as a reasonable and proportionate response.

There may also be concerns about the practical issues involved in enabling prisoners to vote. Prisoners on remand can already vote so this is not brand new territory. Even so, it is an important issue and views are sought on the practicalities in this consultation.

In an open and democratic society, even long-held views need to be reconsidered from time-to-time. I hope that you will respond to this consultation.

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Michael Russell
Cabinet Secretary for Government Business and Constitutional Relations

Introduction

This consultation paper sets out the Scottish Government's suggestions for ensuring compliance with the European Convention on Human Rights (ECHR) on the matter of prisoners voting in elections. It seeks views on a proposal to allow only those prisoners sentenced to short sentences to vote. Views are sought on what the appropriate length of sentence should be. Views are also sought on the practical issues associated with giving some prisoners the right to vote.

Background

There has been a longstanding ban on convicted prisoners voting in all elections in the UK. The Representation of the People Act 1983 established the current legal basis for the ban and section 3 of the 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 Local Government and Scottish Parliament elections. Civil prisoners, such as people committed for non-payment of fines, can already vote as they have not been convicted of an offence and do not fall within the definition of "convicted person" in section 3 of the 1983 Act.

Prisoners who are held on remand are also currently able to vote, casting their ballots by postal and proxy voting. Those who have been released from prison on parole or home detention curfew (HDC) are eligible to vote.

The European Court of Human Rights (ECtHR) found in 2005 that the UK's blanket ban on convicted prisoners voting in elections is in breach of Article 3 of Protocol 1 of the ECHR. The Scotland Act 2016 devolved responsibility for the franchise at Local Government elections to the Scottish Parliament. The franchise for Scottish Parliament elections is derived from the Local Government franchise. Accordingly, the Scottish Parliament now has the competence to legislate on all matters relating to the Scottish Parliament and Local Government franchise, and therefore the responsibility for ensuring compliance with the ECHR in relation to these matters.

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

Having taken evidence from a wide range of stakeholders and interested parties, the Committee published a report on Prisoner Voting in Scotland on 14 May 2018¹. The Committee's recommendation was that the Scottish Government "legislate to remove the ban on prisoner voting in its entirety."

¹<https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/5/14/Prisoner-Voting-in-Scotland/EHRiC-S5-18-3.pdf>

The Committee also asked the Scottish Government to consider a wide range of views on this issue going forward, and to consult as many stakeholders as possible, including groups representing the interests of victims of crime and the general public.

This consultation paper gives interested groups and members of the public the opportunity to examine and give their views on the Scottish Government's proposals.

The Scottish Government's proposal

The Scottish Government recognises that there are strongly held views on whether or not prisoners should be able to vote. Factors that need to be considered include the rights of victims and the public interests in sanctioning criminal conduct and in enhancing civic responsibility and respect for the rule of law, as well as the rights of prisoners as members of society and the needs of rehabilitation.

It is clear, however, that the current blanket ban on voting by convicted prisoners in custody (but not those on remand, parole or HDC) is not consistent with the ECHR. The question, therefore, that faces the Scottish Parliament is what arrangements should be put in place to replace the blanket ban.

We acknowledge the thorough work that the Equalities and Human Rights Committee has undertaken on this issue, and the range of evidence from stakeholders on this topic. The evidence provided to the Committee, alongside other sources, has been used to help develop policy on this topic.

In the light of the range of evidence and arguments, the Scottish Government's view is that it is neither appropriate, nor necessary to ensure compliance with the ECHR, to enfranchise all prisoners. Having considered the Equalities and Human Rights Committee's report, the case-law of the ECtHR and international practice, the Scottish Government proposes that the right balance will be struck by enabling prisoners serving short sentences (which would be defined as a sentence of imprisonment for a length of time which is below a specified maximum threshold) to vote. Views are sought on what length of sentence would be an appropriate threshold.

The Scottish Government plans to bring forward legislation on the franchise for Scottish Parliament and Local Government elections². Following consultation earlier in 2018³, that will include proposals to extend the right to vote to citizens of all nationalities resident in Scotland.

Hirst (No 2) and the ECHR

The ECHR is an international treaty intended to safeguard human rights and political freedoms in Europe. It was approved and signed by the founding members of the Council of Europe in November 1950, including the UK. It was ratified by the UK

²<https://beta.gov.scot/binaries/content/documents/govscot/publications/publication/2018/09/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/documents/00539972-pdf/00539972-pdf/govscot:document/>

³<https://beta.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2017/12/consultation-electoral-reform/documents/00529431-pdf/00529431-pdf/govscot:document/>

Parliament in 1951 and it came into force in September 1953. All member states of the Council of Europe are party to the ECHR.

The Council of Europe is a different international organisation from the European Union and therefore any outcome of Brexit does not alter the legal effect of the ECHR in the UK. The ECHR also established the ECtHR. Any person who feels that their rights under the ECHR have been violated by a state party signatory may take their case to the ECtHR.

In 2005, in the case of *Hirst v United Kingdom (No 2)*, the Grand Chamber of the ECtHR noted the differences in electoral law relating to prisoner voting throughout Europe. The Court stated that member states should be afforded a significant degree of discretion (known as the “margin of appreciation”) on how to deal with this issue. However, it ruled that the UK Government’s blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 of the ECHR⁴. Whilst the UK’s ban pursued the legitimate aim of disenfranchising prisoners as a means of encouraging responsible citizenship, the ECtHR found that the provisions employed in meeting that aim were not proportionate because the ban applied across the board, regardless of the nature of the offence or the length of the sentence.

Article 3 of Protocol 1 provides that member states:

“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 rights, including the right to vote and to stand for election.

In *Moohan v. Lord Advocate*, the United Kingdom Supreme Court considered the case law of the ECtHR on prisoner voting. The Supreme Court found that Article 3 of Protocol 1 of the ECHR does not extend to referendums. This was later confirmed by the ECtHR in *Moohan and Gillon v United Kingdom*. The ECtHR has also confirmed, in the case of *McLean and Cole v United Kingdom*, that local authorities in the United Kingdom are not part of the “legislature” and therefore fall outside the scope of Article 3 of Protocol 1. Article 3 of Protocol 1 only applies to elections to a legislature held “at reasonable intervals”. Therefore in the devolved Scottish context, this means Scottish Parliament elections.

In *Moohan*, the Supreme Court observed that the ECtHR has, on several occasions since the decision in *Hirst (No 2)*, ruled that the blanket ban on prisoner voting is incompatible with the ECHR. The overarching principles which can be identified in the case law of the ECtHR since the decision in *Hirst (No 2)* are:

- (i) that the basic principle which underpins Article 3 of Protocol 1 is universal suffrage;

⁴ The right to vote is also outlined in Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

(ii) that the right to vote may, however, be limited, provided that the limitations are imposed in pursuit of a legitimate aim and the means employed are not disproportionate;

(iii) that restrictions on the right of prisoners to vote may be justified in order to pursue the legitimate aims of preventing crime by sanctioning the conduct of convicted prisoners and of enhancing civic responsibility and respect for the rule of law; but

(iv) that the automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences, is incompatible with Article 3 of Protocol No. 1 of the ECHR.

Within the margin of appreciation allowed to them, it is for individual States party to the ECHR to determine whether or not the right to vote of prisoners should be restricted, and, if so, what restriction would be appropriate having regard to the aim pursued.

Other Council of Europe Member States

The situation with regards to prisoner voting differs across Europe. Of the member states of the Council of Europe, a limited number have a blanket ban on prisoner voting; these are: Andorra, Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and San Marino. 21 of the remaining member states allow all prisoners to vote, while 18 allow some prisoners to vote, with each member state determining its own rules on this matter. A table containing this information is shown below:

Council of Europe states with blanket bans on convicted prisoners voting	Council of Europe states where all prisoners can vote	Council of Europe states where some prisoners can vote
Andorra Armenia Bulgaria Estonia Georgia Hungary Russia San Marino	Albania Austria Azerbaijan Croatia Czech Republic Denmark Finland Ireland Latvia (<i>excluding local elections</i>) Lithuania FYR Macedonia Moldova Monaco Montenegro Netherlands Norway Serbia Slovenia Spain	Belgium Bosnia and Herzegovina Cyprus France Greece Germany Iceland Italy Liechtenstein Luxembourg Malta Poland Romania Portugal Slovakia Turkey Ukraine United Kingdom

	Sweden Switzerland	
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A full summary of the arrangements regarding prisoner voting in Council of Europe member states can be found in the appendices of the following House of Commons briefing paper, starting on p.52:

<http://researchbriefings.files.parliament.uk/documents/SN01764/SN01764.pdf>

Elections to the UK Parliament

Successive UK Governments have explored a number of approaches to resolve the issue identified in the *Hirst (No 2)* case 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.

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 (No 2)* that there had been no substantive debate by the UK Parliament on the issue and stated that decisions of this nature should be a matter for democratically-elected lawmakers.

A draft Voting Eligibility (Prisoners) Bill was published in November 2012 and pre-legislative scrutiny was undertaken by a joint committee of the House of Commons and the House of Lords. The committee reported in December 2013⁵. 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 consideration⁶, but no final bill was brought forward.

In 2017, David Lidington MP, then Lord Chancellor and Secretary of State for Justice, made a statement to the House of Commons setting out the UK Government's response to the ECtHR's judgment in *Hirst (No 2)*. In it, he outlined a package of administrative measures⁷ which would have the effect, in relation to elections which are reserved to the UK Parliament, that:

(a) Those who are in the community on temporary licence would be able to vote. Temporary licence is a form of discretionary and temporary parole aimed at the resettlement and rehabilitation of offenders.

(b) It would be made clear to those given custodial sentences that they will lose the right to vote in prison. The statement argues that this addresses a

⁵ HL Paper 103; HC 924.

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

⁶ <https://www.parliament.uk/documents/joint-committees/Draft-Voting-Eligibility-Prisoners-Bill/Grayling-letter-to-Chair.pdf>

⁷ Full details of the proposals, as presented to the Committee of Ministers of the Council of Europe are at: <https://rm.coe.int/1680763233>

concern of the judgment in *Hirst v United Kingdom (No 2)* that UK offenders are not informed with sufficient clarity that they cannot vote while serving a prison sentence.

These proposals came into effect across the UK in summer 2018.

A prisoner released on temporary licence or on HDC has never been prohibited from voting under the terms of section 3 of the Representation of the People Act 1983 which restricts voting rights for a prisoner “during the time that he is detained in a penal institution in pursuance of his sentence.” However, as set out in the UK Government’s policy statement⁸, previous prison guidance had led to an anomaly that offenders who are released back in the community on licence using an electronic tag under the HDC scheme could vote, but those who are in the community on Temporary Licence could not. The UK measures outlined addressed this and will allow around 100 prisoners to vote in elections reserved to the UK Parliament.

The Scottish Government proposal seeks to comply with the ECHR whilst also taking into consideration length of sentence which reflects, among other considerations, the seriousness of the case. To allow for a compatible solution, proposals aim to set a threshold length of sentence, below which prisoners should be entitled to vote.

A further key factor in developing a proposal that differs from the UK Government to ensure ECHR compliance for devolved elections in Scotland is the consideration of the Scottish Parliament Equalities and Human Rights Committee. In addition to the commitment to consider a plurality of views on the issue of prisoner voting as soon as possible, the Scottish Government has taken into account the recommendations of the Committee to legislate and examine the proportionality of a particular restriction on the right to vote for Local Government and Scottish Parliament elections.

Elections in Wales and Northern Ireland

The Welsh Government has consulted on a package of proposals for electoral reform for Local Government elections and is exploring the options for extending the rights of prisoners to vote in Local Government elections.

The National Assembly for Wales Commission consulted on a package of proposals for reform of the Assembly’s electoral and internal arrangements in spring 2018, including whether either the UK Government’s or Welsh Government’s proposals for prisoner voting should also apply to Assembly elections. Following the consultation, the Llywydd announced that further consideration of the democratic and human rights issues relating to prisoner voting was required. The Commission has invited the Assembly’s Equality, Local Government and Communities Committee to consider holding an inquiry to examine the issue of whether prisoners in Wales should be allowed to vote in elections to the National Assembly.

⁸ <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>

The changes brought forward by UK Government have been implemented for all elections in Northern Ireland.

Options for Scottish Parliament and Scottish Local Government Elections

As set out above, the Scottish Parliament gained new powers over elections as a result of the Scotland Act 2016. Consideration must now be given as to how to comply with the ECHR in relation to prisoner voting.

There are various factors, including the rehabilitation of prisoners, which the Scottish Government has considered when determining a suitable, ECHR-compliant approach to prisoner voting.

The starting point, as indicated by the ECtHR caselaw, is the principle of universal suffrage. While certain Convention rights cannot be restricted by the state (for example, the Article 2 right to life and the Article 3 prohibition on torture) there are some Convention rights that can be restricted in prison (for example the Article 5 right to liberty and the Article 8 right to private and family life). The ECtHR caselaw makes clear that the franchise of prisoners may also be restricted, provided that the restriction is proportionate to a legitimate aim. Legitimate aims include sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law.

As noted previously, the Scottish Government considers it to be neither appropriate, nor necessary to ensure compliance with the ECHR, to extend the right to vote to all prisoners. The length of the sentence given to the prisoner is an indication of the seriousness of the case. While those sentencing take into account various considerations, the more grave offences typically attract longer sentences, and other factors – such as the record of the accused – which are relevant on sentencing may also be regarded as relevant to an assessment of the seriousness of the case.

The ECtHR in *Hirst (No 2)* emphasised the wide margin of appreciation given to member states in terms of developing a compliant solution on prisoner voting. This reflects the wide variety of approaches on prisoner voting across Council of Europe member states.

The following section of the consultation paper explores the different options available, and sets out factors to consider in the Scottish context. The Scottish Government has considered the scope of Article 3 of Protocol 1 and its different application to Scottish Parliament and Local Government electoral franchises. Currently, these franchises are linked and it is intended that the proposal which will ultimately be adopted following this consultation will apply to both Scottish Parliament and Local Government elections.

In broad terms, the options are:

- To link disenfranchisement to the length of a prisoner's custodial sentence.
- To make disenfranchisement an additional sentencing option, to be applied at the discretion of the sentencing judge.
- To link disenfranchisement to the type of crime committed.

- To link a prisoner's regaining the right to vote to the length of time remaining on their custodial sentence.

A fuller summary of the options is provided below. Having carefully considered the requirements of the ECHR, the Equalities and Human Rights Committee's report and international practice, the favoured approach is to enfranchise only those prisoners serving a sentence of imprisonment for a length of time which is under a defined threshold. This proposal seeks to strike an appropriate balance, taking into account the nature, gravity and circumstances of the offending.

In all of these options prisoners would be registered to vote in a home constituency or ward, not at the address of the prison.

Option 1: Enfranchisement based on Length of Sentence

The Scottish Government's favoured option is to remove the right to vote only from prisoners who have been sentenced to a longer sentence of imprisonment. Views are sought on the threshold length of sentence, below which prisoners should be entitled to vote. Although sentencing judges take various factors into account, the length of the sentence imposed is, generally speaking, a reflection of the seriousness of the case – having regard to all the circumstances, including the nature of the offence, the circumstances in which it was committed, and the offender's previous criminal record. Accordingly, this approach strikes an appropriate balance between removing the right to vote only where the circumstances are serious enough to justify such a longer sentence⁹ and the promotion of the rule of law and responsible citizenship, as well as wider objectives of the rehabilitation and reintegration of prisoners in order to reduce reoffending.

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, gravity and circumstances of their offence. Such a blanket restriction was central to the ECtHR's finding of a disproportionate interference with Article 3 of Protocol 1 in the case of *Hirst (No 2)*.

It is an approach which is implemented among other member states of the Council of Europe. An approach based on sentence length is used in Austria, Belgium, Greece, Italy, Luxembourg, Romania, Slovenia and Turkey. A cut-off of 12 months is used in Malta where most prisoners lose their right to vote (for the duration of their sentence) except those serving a sentence of 12 months or less or those serving a sentence as a result of their failure to pay a fine.

Relying on the length of sentence in this way would be consistent with approaches elsewhere in the justice system. For example, depending on the length of sentence received, different rules apply in terms of disclosure of previous convictions. The longer the custodial sentence received, the longer an individual is required to disclose the conviction when, say, applying for a job or seeking home insurance. Similarly, different rules apply on the eligibility of prisoners for parole or HDC depending on the length of sentence received.

⁹ Prisoners will not be eligible to stand as candidates at Local Government or Scottish Parliament elections. No changes are proposed to existing rules on disqualification.

Sentences of determinate length in Scotland are split into two categories: short-term sentences which are for less than four years and long-term sentences which are for four years or more. A short-term prisoner is automatically released from prison into the community after serving half of their sentence.

A long-term prisoner sentenced prior to February 2016 will be released automatically on licence at the two-thirds stage of their sentence but can be released from the halfway stage on Parole Board recommendation. A long-term prisoner sentenced after February 2016 can be released from the halfway stage of their sentence on Parole Board recommendation which failing, they will be released automatically for the final 6 months of their sentence.

Under section 27(5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, consecutive or concurrent terms of imprisonment are to be treated, for the purposes of Part 1 of the 1993 Act, as a single term. For example, if the eligibility threshold for prisoner voting is set at 12 months and an offender receives a 6 month sentence, that prisoner would be eligible to vote. If that prisoner receives an additional 7 month sentence for another offence and that sentence is to be served consecutively to the previous sentence, that prisoner will be serving a single-term of 13 months which will take them past the prisoner voting threshold.

Fixing the threshold at 12 months or less would be consistent with the distinction within the Scottish criminal justice system between the sentencing powers of courts of summary jurisdiction and courts of solemn jurisdiction. A court of summary jurisdiction (which may comprise a sheriff, a summary sheriff or a justice(s) of the peace sitting alone without a jury) deals with less serious offending. On summary complaint, a sheriff can impose a sentence of imprisonment up to 12 months or a fine up to £10,000. In solemn proceedings, a sheriff can impose a sentence of imprisonment up to 5 years or an unlimited fine while there are no limits on the length of prison sentence or fine which can be imposed by the High Court. As can be expected, solemn courts deal with the most serious cases. The proposal would be consistent with what was proposed by the UK Parliament Joint Committee in the Voting Eligibility (Prisoners) Draft Bill in 2013.

It should be noted, however, that a prisoner serving a sentence of 12 months or more could be serving several shorter sentences imposed on summary conviction (which have been single-termed under section 27(5) of the 1993 Act) rather than one sentence imposed following conviction on indictment.

Option 2: Disenfranchisement applied as an additional penalty

Another option would be to empower courts to impose the loss of the right to vote as a sentence in itself. This would mean that a judge could impose disenfranchisement at their discretion when sentencing a person convicted of a crime.

This method is intended to be more precise than others. In theory, by leaving the decision on disenfranchisement to the sentencing judge, it can be more precisely applied. This is because the judge will be in full possession of the facts of a case, and so able to fit the punishment (i.e. disenfranchisement) to the crime more accurately.

This approach has been adopted by several Council of Europe member states. In France, for example, the removal of the right to vote is an additional penalty that judges can apply at their discretion for a certain period of time. It is also a mandatory part of the sentence for certain serious crimes. However, even where it is a mandatory part of the sentence, judges can choose to not apply this penalty if they feel that it would not be appropriate in a particular case.

However, this approach has been criticised by the Scottish judiciary. In a letter to the Scottish Parliament's Equalities and Human Rights Committee¹⁰, provided as part of their investigation on prisoner voting, Lord Carloway, the Lord President of the Court of Session, said:

"I have consulted the senior judiciary (the High court judges). All are opposed to such a course of action."

Lord Carloway stressed that, after "due democratic consultation", the key principles of the prisoner voting issue should be decided by Parliament and not be left to be developed on a case by case basis by individual judges.

The Scottish Government is persuaded by the arguments put forward by the Lord President and so does not favour this option.

Option 3: An approach based on type of crime

A further option would be to link the disenfranchisement of convicted prisoners to the type, or severity, of crime committed. With this option, prisoners convicted of crimes deemed to be more serious would lose their right to vote. An approach based on the type of crime rather than length of sentence would require to specify the offences or broad types of offences which would carry a loss of the right to vote.

This approach to the issue aims to make the punishment proportionate. Disenfranchisement is a serious penalty; it should be applied to people convicted of serious crimes. Another approach taken by some countries has been to tie disenfranchisement to crimes against the state or electoral system. In Italy, certain specified crimes attract disenfranchisement, all related to dishonesty. These cover various abuses of public office and crimes of dishonesty committed while exercising a public office.

A number of Council of Europe states have taken this path. In Germany, for example, prisoners that have committed crimes targeting the 'integrity of the state' or the 'constitutional protected democratic order', such as political insurgents, lose their right to vote. This disenfranchisement continues until the full sentence has been served. However, many states that take this approach limit disenfranchisement linked to specific offences to a small number of crimes.

A clear disadvantage of this option is that there are different levels of seriousness within the definition of a specific crime. For example, defrauding a pensioner of their

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http://www.parliament.scot/S5_Equal_Opps/Inquiries/LordCarlowaytoConvener.pdf

life savings might be viewed more seriously than defrauding a business of a few thousand pounds. Indeed, a key factor in determining the seriousness of a particular crime is reflected by the length of sentence imposed by the Court.

It should also be noted that the Representation of the People Act 1983 already makes provision for a person found guilty by an election court of “corrupt or illegal practices” at an election to be barred from:

- Registering to vote or voting.
- Being elected to Parliament.
- Holding any elective office.

This is temporary, and can last for either 3 or 5 years. As these provisions reflect a specific punishment which is directly linked to electoral offences, we propose that these provisions are retained as they apply to devolved elections.

Option 4: Enfranchisement towards end of sentence

Another possibility would be to give each prisoner the vote for a specified period before the end of their sentence. A prisoner would lose the right to vote upon being sentenced to time in prison. They would then regain the right to vote upon reaching a point where they had a defined amount of their sentence remaining. The period before the end of sentence during which a prisoner would regain the right to vote would need to be determined by the Scottish Parliament.

This approach aims to aid the rehabilitation of convicted prisoners by allowing them to be reintegrated into society as preparation for their full release. The object would be to demonstrate to prisoners that they still have a stake in the society to which they will soon return, encouraging a greater sense of social responsibility. However, this approach would enfranchise people who have committed serious offences whilst they are still serving their sentence which may cause understandable distress to the victims of crime.

None of the other member states of the Council of Europe have adopted this approach.

In addition, the complex nature of sentencing and prisoner release arrangements would mean that this approach would be difficult to implement.

Where and how should prisoners vote?

It is estimated that around 1000 prisoners would be enfranchised if the threshold sentence length was 12 months or less. A threshold for 6 months or less would allow around 480 prisoners to vote.

Prisoners will not be entitled to vote in person. Instead, they will need to register for a postal or a proxy vote, in a similar way to remand prisoners who are currently eligible to vote.

Prisoners would be registered to vote by declaration of local connection to a previous address or local authority, rather than the prison address. This would avoid the potential for large numbers of prisoners, registered to the prison, to cause distortion to voter numbers and electoral results, especially for Scottish local elections given the smaller sizes of wards. This approach would also avoid the impracticalities of having to deal with ballots from wards and constituencies all over the country in one polling station located in a prison.

Prisoners wishing to register to vote will need to submit a paper form to an Electoral Registration Officer (“ERO”) to register. Prisoners do not currently have internet access. Phone registration would also be impractical due to the inability to check whether the information provided is accurate.

Postal votes would be sent to the prison address which prisoners have provided to EROs. Postal vote packs would be treated as privileged correspondence, and so Scottish Prison Service (“SPS”) staff would not open the packs when they enter or leave the prison.

Consultation questions

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?

Yes

No

Question 2: If your answer to Question 1 is 'no', what would be your preferred approach to extending prisoners' voting rights?

Comments:

n/a

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

Question 4: If your answer to the above is 'another duration', please specify this here.

Comments:

Question 5: Do you have any comments on the practicalities of prisoner voting?

Comments:

No. It is noted that prisoners will need to register for a postal or proxy vote. It is also noted that prisoners would be registered to vote at their home address for their constituency or ward rather than the prison address and this is of relevance to those local authorities in which HM Prison premises are located.

Question 6: Do you have any other comments that have not been captured in the responses you have provided above?

Comments:

None.

Responding to this consultation

We are inviting responses to this consultation by 8 March 2019.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/elections/prisoner-voting>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 8 March 2019.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Elections Team
Scottish Government
Area 2W
St Andrew's House
Edinburgh
EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.