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Scottish Elections (Franchise and Registration) Bill Stage 1 Briefing

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Introduction

The Law Society of Scotland is the professional body for 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Constitutional Law sub-committee welcomes the opportunity to comment on the Scottish Elections (Franchise and Registration) Bill. The sub-committee has also considered the Standards, Procedures and Public Appointments Committee Stage 1 Report on the Bill and has the following comments to put forward for consideration.

General Comments

Section 1 Voting by qualifying foreign nationals

Our Comment

Section 1 (8) provides:

“qualifying foreign national” means a person of any nationality who—

- (a) is not a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union, and*
- (b) either—*
 - (i) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or*
 - (ii) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) any description of such leave.”*

This means that whether a person can be defined as a qualifying foreign national depends on a status under the Immigration Act 1971.

The Immigration Act 1971 is reserved legislation and can be amended at any time by UK Ministers and the UK Parliament.

This could result in the register of electors in Scotland being effectively subject to change through an amendment of the 1971 Act. What discussions has the Scottish Government had with the Home Office about such a situation?

Section 2 Scottish parliamentary elections: nomination, election and holding office and Section 4 Local government elections: nomination, election and holding office

Our Comment

Our comments on Section 1 (8) apply equally to Sections 2 and 3.

Section 4 Voting by convicted persons sentenced to terms 12 months or less

Part 2 of the Bill provides for prisoners to have the vote in Scottish Parliament and local government elections.

Section 4 concerns voting by convicted persons sentenced to terms 12 months or less.

Our Comment

Human Rights Law compliance

It is important for the Scottish Government to bring Scottish electoral law into compliance with the ECHR and case law from the European Court of Human Rights (ECtHR).

The European Court of Human Rights ruled in *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 that the blanket ban on British prisoners exercising the right to vote was contrary to the ECHR Article 3 of Protocol 1.

The applicant, John Hirst, served a sentence of life imprisonment for manslaughter until 25 May 2004, when he was released from prison on licence. His tariff (the part of his sentence relating to retribution and deterrence) expired on 25 June 1994. However, he remained in detention, as the Parole Board considered that he continued to present a risk of serious harm to the public.

As a convicted prisoner, the applicant was barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections. He issued proceedings in the High Court, under section 4 of the Human Rights Act 1998, seeking a declaration that section 3 was incompatible with the European Convention on Human Rights. On 21 and 22 March 2001 his application was heard before the Divisional Court; but his claim and subsequent appeal were both rejected.

The applicant alleged that, as a convicted prisoner in detention, he was subject to a blanket ban on voting in elections. He relied on Article 3 of Protocol No. 1, – the right to free elections. Article 14, as well as Article 10 of the Convention.

The body responsible for enforcing judgments of the ECtHR, the Council of Europe's Committee of Ministers, twice called upon the UK to respond to the ECtHR's judgment. In 2018 the UK Government

made some amendments to enfranchise certain categories of prisoner including those on temporary licence. In late 2018 the Committee of Ministers accepted that the UK Government had moved from a blanket ban and that the case was closed.

The Competence of the Scottish Parliament

The powers of the Scottish Parliament were extended by the Scotland Act 2016 which amended Schedule 5 of the Scotland Act 1998 to include powers for the Scottish Parliament to make law about elections. Scottish Election law is therefore subject to the competence provisions of the Scotland Act 1998 and must be compliant with Convention rights in respect of prisoner voting.

A blanket ban on prisoner voting is incompatible with the European Convention on Human Rights. The Scottish Parliament's Equalities and Human Rights Committee published a report in May 2018 advocating lifting the ban. The Scottish Government have considered the report and has taken the view that not all prisoners should be given the vote.

ECtHR case law upholds universal suffrage, but the franchise of prisoners may be restricted, provided that the restriction is proportionate to a legitimate aim. These aims include sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law.

The 12 month period under section 4

The length of the sentence given to the prisoner indicates the seriousness of the offence. Judges take into account various considerations when sentencing, the seriousness of the offence, any criminal record the convicted person may have and other matters.

Section 4 of the Bill limits voting by prisoners to those convicted of less serious offences, who have been sentenced to imprisonment for 12 months or less.

Article 3 of Protocol 1 of the European Convention on Human Rights applies only to elections to a "legislature" which in the devolved context means the Scottish Parliament elections.

Paragraph 36 of the Policy Memorandum indicates that the Scottish Government have decided as the Parliamentary and Local Government franchises are linked, any change should be made equally to both.

Paragraph 60 of the Policy Memorandum sets out that the Bill will give those sentenced to a term of 12 months or less the ability to vote in Scottish local government and Scottish Parliament elections. This applies to all prisoners including those detained in a young offender's institution.

The Presumption Against Short Periods of Imprisonment (Scotland) Order 2019 (2019 Order) affects cases where the offence was committed on or after 4 July 2019. It extended the current presumption against short sentences from three to 12 months in relation to prison sentences.

The legislation is not a ban on short sentences nor are they completely abolished — the legal change creates a *presumption* against such sentences. However, it is likely that the number of convicted offenders being sentenced to short terms of imprisonment will be reduced. Prison will remain an option for those who

are a serious risk to public safety and for whom there is no suitable alternative. Various factors will be considered by judges in deciding that only a custodial sentence can be imposed.

- That means that more persons who have been convicted will be at liberty within the community and eligible to vote in a conventional sense.
- The size of the prison electorate enfranchised to vote will be smaller in the future given the consequences of these changes.

Any prisoner sentenced to a term of imprisonment of 12 months or more will not, for as long as they are detained in prison be entitled to vote. If they are released on early release or otherwise subject to electronic tagging, they would be eligible to vote as they will be at liberty and subject to registration on the electoral register.

The Management of Offenders (Scotland) Act 2019 provisions relating to electronic monitoring may have implications as that may permit more convicted persons to be at liberty as its provisions extend.

We note that the Committee had no clear consensus on the length of sentences to which enfranchisement would apply (paragraph 113). In our response to the Scottish Government consultation we suggested that prisoners serving a sentence of four years or less to be able to vote. This would be in line with the proposal, accepted by the Welsh Government on 25 September 2019 to give Welsh prisoners who are serving custodial sentences of less than four years the right to vote in devolved Welsh elections.

Section 5 Residence of convicted persons in prison etc.: uninterrupted residence

Our Comment

We have no comment to make.

Section 6 Residence of convicted persons in prison etc.: notional residence

Our Comment

We have no comment to make.

Section 7 Method of voting by convicted person at local government elections

Our Comment

We have no comment to make.

Part 3 Final Provisions

Our Comment

We have no comment to make.



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