

## POLICY NOTE

### THE REPRESENTATION OF THE PEOPLE ACT 1983 REMEDIAL (SCOTLAND) ORDER 2019

SSI 2019/261

1. The above Order was made in exercise of the powers conferred by section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 (the “2001 Act”)<sup>1</sup>.

#### **Purpose of the instrument.**

This Order allows prisoners serving a sentence of 12 months or less to vote in the Shetland Islands Scottish Parliamentary by-election to be held on 29 August 2019. This Order only applies to that by-election.

#### **Remedial Order**

2. Section 12 of the 2001 Act allows Scottish Ministers to make a remedial order where necessary or expedient to ensure compatibility with the European Convention on Human Rights (the “ECHR”).

3. This Order is subject to the urgent procedure set out in section 14 of the 2001 Act, which allows an Order made under section 12 to come into force as soon as it is made (or at another time as specified). This procedure involves the public notice of the contents of the Order and the inviting of comments in writing to be made within 60 days (ignoring Parliamentary recess days) of the Order being made. It also requires to be laid, together with a statement of reasons for making it, before the Scottish Parliament. The Order does not require a vote in the Scottish Parliament.

4. Scottish Ministers are of the opinion that there are compelling reasons (as set out below) to require the making of this Order.

#### **Policy Objectives**

5. The Order will remove the bar on prisoners serving sentences of 12 months or less from voting in the Shetlands Islands by-election to be held on 29 August 2019 (the “by-election”), providing that they can establish eligibility to vote in the by-election. It achieves this through provisions that are closely modelled on the relevant sections of the Scottish Elections (Franchise and Representation) Bill (“the Bill”)<sup>2</sup>, which is currently before the Scottish Parliament.

6. Registration will be achieved by satisfying the Electoral Registration Officer appointed by Shetland Islands Council that the prisoner has a sufficient local connection to the Shetland constituency, such as ordinarily being resident within the constituency (were it not for their

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<sup>1</sup> <http://www.legislation.gov.uk/asp/2001/7/contents>

<sup>2</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/112098.aspx>

incarceration). Once registered, eligible prisoners will be able to exercise their right to vote by post. Although proxy voting by eligible prisoners is envisaged by the Bill, voting by proxy will not be possible under the Order and will not be available at the by-election. This is because the relevant changes required to secondary legislation to effect proxy voting for prisoners have yet to be worked through.

7. The Government is engaging with the Scottish Prison Service and Electoral Registration Officers on how best to ensure that eligible prisoners are made aware of their entitlement to register and vote ahead of the registration deadline for the by-election of midnight on Tuesday 13 August 2019<sup>3</sup>.

8. The Order only applies to the Shetland Islands by-election: this is intended to balance the obligation under the ECHR with the wish to ensure that Parliament can determine the long-term changes required to the franchise.

### **Prisoner voting - background**

9. There has been a longstanding<sup>4</sup> prohibition on convicted prisoners voting in all elections in the UK while they are detained in a penal institution. The Representation of the People Act 1983<sup>5</sup> (“RoPA”) established the current legal basis for the ban. Section 3 of RoPA 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 all UK elections, including Scottish Parliament and local government elections.

10. Prisoners who are held on remand (e.g. persons who await trial or who have not been sentenced) are able to vote, casting their ballots by postal and proxy voting. Those who have been released from prison on parole or home detention curfew are also eligible to vote, since they are no longer “detained”.

11. In 2005 the European Court of Human Rights (“ECtHR”) found in *Hirst v United Kingdom (No 2)*<sup>6</sup> that the UK blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 (right to free elections) of the ECHR. This Article provides that signatory 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 the right to vote and to stand for election.

12. Elections to the Scottish Parliament fall within the scope of Article 3 of Protocol 1 (though local government elections do not). Since the franchise used of Scottish Parliament elections was devolved by the Scotland Act 2016, the Scottish Government and Scottish

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<sup>3</sup> The timetable for the by-election is set out at: <https://www.shetland.gov.uk/elections/current-upcoming-elections.asp>

<sup>4</sup> Historical background on prisoner voting is summarised in this House of Commons Standard Note: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport>

A further paper sets out developments since 2015: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7461>

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/1983/2>

<sup>6</sup> <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

Parliament are required to ensure that the franchise for such elections, including by-elections, is compatible with Article 3 of Protocol 1.

### **The Scottish Elections (Franchise and Representation) Bill**

13. The Bill was introduced on 20 June 2019. One of its aims is to ensure that the franchise in Scottish Parliament elections is compatible with Article 3 of Protocol 1 in relation to prisoner voting.

14. The Policy Memorandum<sup>7</sup> for the Bill set out the Scottish Government's position that it is neither appropriate, nor necessary to ensure compliance with the ECHR, to enfranchise all prisoners, but that the correct balance is to be found in extending voting rights to those prisoners serving shorter sentences. The Memorandum also provides further background on the issue of prisoner voting.

15. The Bill, as introduced, would enfranchise prisoners who are serving a sentence of 12 months or less, in Scottish Parliament and local government elections. The Bill sets out arrangements for postal voting by prisoners, but the detail of arrangements for proxy voting by prisoners has yet to be developed. Prisoners will not be able to vote in person.

16. The Bill will not be in force at the time of the by-election. As a result, Scottish Ministers consider that this Order is required in order to ensure compliance with Article 3 of Protocol 1 in the context of the by-election.

17. The Scottish Parliament's Standards, Procedures and Public Appointments Committee issued its call for evidence<sup>8</sup> in relation to the Bill on Monday 1 July 2019. The deadline for responses is 6 September 2019.

### **Consultation**

18. Since the changes to legislative competence in relation to the electoral franchise made by the Scotland Act 2016 came into force, Scottish Ministers have been considering the best approach to ensure that the franchise for Scottish Parliament elections will be exercised in a manner compatible with the ECHR.

19. As part of its work programme, the Scottish Parliament's Equalities and Human Rights Committee took evidence over 2017-18 on the current UK legal position on prisoner voting, the practical issues around voting in prisons and the arguments for and against allowing prisoners to vote.

20. Having taken evidence from a wide range of stakeholders and interested parties, the Committee published a report on Prisoner Voting in Scotland<sup>9</sup> on 14 May 2018. The Committee concluded (at para. 144) that "*there is a strong argument that Scotland should aim*

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<sup>7</sup>[https://www.parliament.scot/S5\\_Bills/Scottish%20Elections%20\(Franchise%20and%20Representation\)%20\(Scotland\)%20Bill/SPBill51PMS052019.pdf](https://www.parliament.scot/S5_Bills/Scottish%20Elections%20(Franchise%20and%20Representation)%20(Scotland)%20Bill/SPBill51PMS052019.pdf)

<sup>8</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/112304.aspx>

<sup>9</sup><https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/5/14/Prisoner-Voting-in-Scotland#Introduction>

*for a higher standard than recently established at UK level and should therefore legislate to remove the ban on prisoner voting in its entirety.”*

21. In making that recommendation, the Committee also recommended that the Scottish Government should consider a wide range of views on this issue going forward, and should consult as many stakeholders as possible, including groups representing the interests of victims of crime and the general public.

22. In response to this latter recommendation, the Scottish Government held a public consultation which concluded on 8 March 2019. The consultation paper rehearsed the legal background, actions taken by other UK administrations and provided information on prisoner voting arrangements in other Council of Europe member states. The consultation paper made clear that Scottish Ministers consider that the blanket ban on prisoner voting is not fit for purpose as it is not compatible with human rights law as it applies to Scottish Parliament elections. The consultation paper noted that there was a difference in application of Article 3 of Protocol 1 of the ECHR which only applies to elections to a “legislature.” In the devolved Scottish context, therefore, the Article applies only to Scottish Parliament elections; local government elections fall outside its scope.

23. Responses were sought on the favoured proposal to link voting rights to length of sentence: specifically, to prisoners serving six or 12 month sentences. The consultation paper also sought views on the practicalities of prisoner voting.

24. The paper also explained (at pages 8 and 9) the steps taken to date by the UK Government in response to the ECtHR caselaw.

25. Responses were received from 35 organisations and 230 individuals. The responses were independently analysed and a report published online<sup>10</sup>. Respondents to the consultation were split fairly evenly across three main positions. Around 3 in 10 thought that prisoners’ right to vote should be linked to the length of their sentence (Option 1). Of the remaining respondents, those who went on to comment generally preferred one of two approaches: allowing no prisoners to vote (around 1 in 3 of all respondents); or extending the franchise to all prisoners (around 3 in 10 of all respondents). Of those respondents that engaged with the question about an appropriate threshold, around 20% favoured a threshold of 6 months or less, one third of respondents favoured a threshold of 12 months or less, and almost half favoured ‘another duration’.

26. A full list of those consulted and who agreed to being identified is attached to the consultation report published on the Scottish Government website. It includes the Electoral Commission, the Electoral Management Board for Scotland and the Scottish Human Rights Commission.

27. Under section 14(2) of the 2001 Act, persons wishing to make observations on this Order can do so, in writing, within the period of 60 days beginning with the day on which it was made. As the Order was made on 1 August, and days when the Scottish Parliament is in recess are not taken into account, the period for written representations will end on 16 November 2019. Representations should be submitted to [ElectionsTeam@gov.scot](mailto:ElectionsTeam@gov.scot).

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<sup>10</sup> at <https://www.gov.scot/publications/consultation-prisoner-voting-analysis-responses/>

## Impact Assessments

28. Impact assessments have been undertaken in respect of the Bill and are published on the Scottish Government website<sup>11</sup>. The same potential impacts and issues arise in relation to the enfranchisement of certain prisoners at the by-election.

## Financial Effects

29. The Financial Memorandum<sup>12</sup> for the Bill makes clear the financial implications of enabling voting by some prisoners. It explains that the cost of delivering elections, e.g. for postage and printing of electoral materials are (on average) around £3 per voter, so the additional costs would be minimal in respect of the Shetland Islands by-election. Shetland is a small constituency in population terms (18,696 people of voting age according to 2011 Census data). The number of prisoners with a sufficient connection to Shetland, who are serving sentences of up to a year, will vary from time to time, but is unlikely to be more than about 5 persons.

30. There will be a one-off need to publicise the ability of enfranchised prisoners, who are eligible to register and vote in the Shetland Islands Scottish Parliamentary by-election, within all Scottish prisons but all costs will be met from existing resources.

Scottish Government  
Directorate for Constitution and Cabinet

*August 2019*

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<sup>11</sup> <https://www.gov.scot/publications/scottish-elections-franchise-representation-bill-eqia/>  
<https://www.gov.scot/publications/scottish-elections-franchise-representation-bill-bria/>  
<https://www.gov.scot/publications/scottish-elections-franchise-representation-bill-crwia/>

<sup>12</sup>

[https://www.parliament.scot/S5\\_Bills/Scottish%20Elections%20\(Franchise%20and%20Representation\)%20\(Scotland\)%20Bill/SPBill51FMS052019.pdf](https://www.parliament.scot/S5_Bills/Scottish%20Elections%20(Franchise%20and%20Representation)%20(Scotland)%20Bill/SPBill51FMS052019.pdf)