

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

Comments If the right to vote is to be extended to some but not all prisoners, there are a number of ways in which this could be done. The four most obvious options are set out in the Consultation Paper. The Faculty considers that the best approach would be to link entitlement to vote to length of sentence. It does not favour any of the other options, essentially for the same reasons as are set out in the Consultation Paper.

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: If any restrictions are to be applied (on which matter, see the Comments (General) section, below), the Faculty considers that there is much to be said for setting the eligibility threshold at four years. The main reason for that suggestion is that four years is already recognised as the appropriate point at which to differentiate between prisoners, marking as it does the boundary between "short term" and "long term" prisoners. That distinction represents an

important difference in the treatment of prisoners (for example, in terms of access to home detention curfew and automatic release provisions). In the Faculty's view, it marks an obvious point at which to differentiate also between those prisoners who are entitled to vote and those who are not and would be consistent with the overall structure of the management of offenders in Scotland at the present time.

Having said that, the jurisprudence of the European Court of Human Rights ("ECtHR") indicates that member states enjoy a wide margin of appreciation in deciding what restrictions on prisoner voting are appropriate, having regard to the aims being pursued. Where to draw the line on prisoner disenfranchisement is a matter on which reasonable people can and do differ (as is reflected in the range of positions adopted by Council of Europe Member States). While, for reasons outlined above, it is inclined to favour four years, the Faculty recognises that other periods (for example, the 6 and 12 month periods specifically mentioned in the Consultation Paper) would probably also result in compliance with the Convention jurisprudence. Where the line should be drawn is ultimately a policy decision for the legislature.

That last observation comes with one caveat. While the ECtHR has stated that the margin of appreciation is wide, it has indicated that it has a role to ensure that any limitations do not impair the very essence of the rights, that limitations are imposed in pursuit of a legitimate aim and that they are proportionate (*Hirst v United Kingdom* (No. 2) (2006) 42 EHRR 41 at §62). The wider the scope of any continuing ban on prisoner voting, the more scope there may be for arguing that it impairs the essence of the right and/or is disproportionate. It has recently been suggested that a strong presumption should be introduced against sentences of less than one year. If the introduction of such a presumption were to mean that an extension of the franchise to prisoners serving sentences of less than a year would have very little practical impact, a colourable argument might be made that such a limited alteration to domestic law would not cure the Convention incompatibility of the current arrangements.

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

Comments: If the enfranchising of a section of the prison population is to be effective, it is important that those prisoners who have the right to vote can exercise it in a practical and effective way. To that end, steps will plainly have to be taken to ensure that they are made aware of their right to vote and of the

steps, by way of registration etc, which they require to take in order to exercise that right. Moreover, they will need to have meaningful access to news and information which will allow them to cast their votes on an informed basis. Given the increasing use of online campaigning and news distribution, that may pose some practical challenges.

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

Comments:

General. The question whether there should be any restriction on prisoner voting is one on which strong views are held on either side. The Faculty notes that persuasive arguments can be made in support of removing the ban on prisoner voting in its entirety. Reference is made in this regard to, for example, the report of the Scottish Parliament Equalities and Human Rights Committee on Prisoner Voting in Scotland (SP Paper 315 dated 14 May 2018). However, the Faculty considers that this is ultimately a question for the Scottish Parliament.

It is some years now since the ECtHR held that the blanket ban disenfranchisement of prisoners was incompatible with the individual rights arising from Article 3 of Protocol 1 (“A3P1”) to the Convention. The Faculty welcome the steps which are now being taken with a view to removing that incompatibility as far as Scottish parliamentary elections are concerned. Although the ECtHR has not interpreted A3P1 as giving rise to individual rights to vote in local government elections (see *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8), it seems sensible that a consistent approach be taken as between national and local elections.

The ECtHR has not interpreted A3P1 as giving rise to individual rights to vote in referenda (see *Moohan & Gillon v United Kingdom*, Applications nos. 22962/15 and 23345/15). If the right to vote in local elections is extended to prisoners to the same extent as is done in respect of parliamentary elections, maintaining a blanket ban on prisoners voting in any future referendum would seem increasingly anomalous. It would seem sensible that prisoners’ right to vote in any such referendum should be co-extensive with their right to vote in parliamentary and local elections.

While the ECtHR has been clear that a blanket ban is incompatible with Convention rights, it has also emphasized that member states enjoy a wide margin of appreciation in this area. In other words, it is for individual states to determine whether or not prisoners’ right to vote should be restricted at all and,

if it should be restricted, what restriction would be appropriate. There is a considerable degree of divergence in the arrangements pertaining across the member states of the Council of Europe. As the table on pages 7-8 of the Consultation Paper illustrates, if the small number of states maintaining blanket bans is disregarded, a narrow majority of the remaining members allow all prisoners to vote, but a sizeable minority impose some restrictions.