



OFFICIAL REPORT
AITHISG OIFIGEIL

Standards, Procedures and Public Appointments Committee

Thursday 19 September 2019

Session 5



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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
14th Meeting 2019, Session 5

CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

DEPUTY CONVENER

*Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Neil Findlay (Lothian) (Lab)

Jamie Halcro Johnston (Highlands and Islands) (Con)

*Tom Mason (North East Scotland) (Con)

*Gil Paterson (Clydebank and Milngavie) (SNP)

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Cathy Asante (Scottish Human Rights Commission)

Michael Clancy (Law Society of Scotland)

Professor Antony Duff (Howard League Scotland Committee)

Thomas Halpin (Sacro)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament
Standards, Procedures and
Public Appointments Committee

Thursday 19 September 2019

[The Convener opened the meeting at 10:00]

Decision on Taking Business in
Private

The Convener (Bill Kidd): I welcome members and guests to the 14th meeting in 2019 of the Standards, Procedures and Public Appointments Committee.

Agenda item 1 is a decision on taking business in private. Does the committee agree to consider its approach to the Scottish Elections (Reform) Bill in private at a future meeting?

Members *indicated agreement.*

Scottish Elections (Franchise
and Representation) Bill: Stage 1

10:01

The Convener: Agenda item 2 is evidence on the Scottish Elections (Franchise and Representation) Bill. Joining us today are Professor Antony Duff, board member, Howard League Scotland; Michael Clancy, director of law reform, Law Society of Scotland; Thomas Halpin, chief executive, Sacro; and Cathy Asante, legal officer, Scottish Human Rights Commission.

I will give each of our guests a couple of minutes—which they do not have to take—to give us a wee preamble about their position. We will then take questions from members.

Cathy Asante (Scottish Human Rights Commission): Thank you for inviting us to give evidence. In the simplest sense, the issue can be looked at as a need to ensure compliance with article 3 of protocol 1 of the European convention on human rights—a matter that has been outstanding since 2004. There is no doubt that the law needs to be amended to give some prisoners the right to vote in order to ensure compliance with the ECHR, so the question is about how far to go in terms of providing that right to vote. The European Court of Human Rights has not prescribed exactly how that should be done. It leaves a wide margin of appreciation, which means that it is the job of national legislatures to decide what is most appropriate for the national context.

Our statutory mandate is to protect and promote human rights, so the approach that we have taken in looking at the bill is to think about what human rights standards say about whether prisoners should be given the right to vote and the guiding principles that can be used to determine how that should be done. Looking to what the European court has said about the matter and to international standards at the United Nations level, it is possible to discern some guiding principles that can be used to inform the debate. The first is about the purpose of imprisonment and how that fits with prisoners' human rights; the second is a principle of maximum suffrage; and the third is a need for proportionate rational reasons if the right to vote is to be restricted and what that says about what is in the bill.

On the purpose of imprisonment, it is clear that the deprivation of liberty that comes with imprisonment is a punishment and that other human rights will necessarily be impacted by that—the right to family life, for example, and the right to autonomy—but there should not be additional restrictions where those are not

necessary. That brings us to the question whether the right to vote is one that needs to be restricted alongside imprisonment. It is also clear from looking at the human rights framework that the purpose of imprisonment is more about rehabilitation and less about punishment.

Secondly, the European court has been clear that the starting point is a presumption in favour of maximum suffrage. The starting point is that everybody should be allowed to vote and they should only be excluded when there are rational reasons to do so. In that sense, we need to look at the aim behind excluding prisoners from being able to vote and, if we are going to exclude them, we then need to look at the most proportionate way of doing that.

The aim that is before us is being presented as the legitimate one of preventing crime: if prisoners know that they will lose their right to vote, that will act as a deterrent to crime. We have some questions about whether that is a rational aim, and whether removing the right to vote acts as an effective deterrent.

With regard to the way in which you might go about restricting the right to vote, the proposal is to determine that right by the length of the sentence and whether it is less than 12 months. The question is whether that is the most proportionate way of doing it. We can look at some international comparators that have greater proportionality when identifying which prisoners should be allowed to vote and which should not. For example, we could have judges who make the decision when sentencing or identify offences that have some connection with the operation of the electoral system.

Overall, we see the bill not just as an opportunity to ensure compliance with the ECHR or to ensure that we tick it off because it is something that the European Court of Human Rights has decided needs to be remedied. The bill is an opportunity to look at the situation anew and come up with a principled stance on prisoner voting. If the Scottish Government and Parliament want to show human rights leadership, the best way to do that is to look at the human rights standards and principles and use them to inform the debate about what should be done.

The Convener: Thank you. Would Michael Clancy like to give us a preamble?

Michael Clancy (Law Society of Scotland): I will give a short one.

We at the Law Society come at the bill from a different angle from that of the Scottish Human Rights Commission, principally because the bill is quite an important one—it covers lots of areas of enfranchisement and relates to the competence of the Parliament to legislate.

As members will know, in the Scotland Act 2016, responsibility for elections in Scotland was devolved to the Scottish Parliament, and this is the first orderly opportunity for legislation to be made in connection with those additional powers. That is why we think that there is an issue across the bill and with the questions relating to prisoner voting in particular, in terms of the competence of the Parliament to enact legislation. We have no doubt at all that the Parliament has the competence to do what it is being asked to do by the Government with the bill. That is important because of the provisions in the Scotland Act 1998 relating to the general competence of the Parliament. Under section 29 of the 1998 act, if the Parliament enacts legislation that is not in its competence—for instance, if the legislation contravenes or is not in compliance with the European convention on human rights—that legislation “is not law”.

Having the capacity to legislate on elections means that the crunch point of compliance with the ECHR comes into sharp relief. Cathy Asante identified that issue in terms of the way in which it affects prisoner voting, compliance with the trail of court decisions from *Hirst v United Kingdom* in 2005 to the present day and the way in which other jurisdictions in the United Kingdom have approached the matter. Of course, up until devolution, we were bound by the approach that the UK Parliament and UK Government took towards the extension of enfranchisement to prisoners.

That is where we are coming from. I am happy to take questions as we go along.

Professor Antony Duff (Howard League Scotland Committee): We strongly agree that it is important to go beyond the minimum requirements of the European convention on human rights. We see the bill as an important first step towards the far more ambitious aim that we would like to see of giving all prisoners the right to vote.

We think that the central issue is one of citizenship. Do we see prisoners as citizens and members of the polity with rights to engage in its affairs, or do we see them as outsiders with no part to play? For reasons of both democratic recognition and rehabilitation, we feel strongly that prisoners should still be seen, understood and treated as citizens. They are in prison and they are being punished, but still they are members of the polity and therefore should have the right to vote at elections and vote for their own future. In the end, we would like the right to vote to be extended to all prisoners, not just those who are serving sentences of less than 12 months.

My second point concerns practicalities. It is important that the right to vote is more than just a formal right that is not really used. It matters that prisoners are able to use that right, which means

that they need to be assisted and encouraged to do so. That will involve resources of various kinds to ensure that it is possible for them to get the information that they need to engage in debates so that they can use the right to vote fruitfully.

Of course, the Scottish Prison Service is under heavy pressure all the time, so if the right to vote is extended, and if it is to be a serious right, we need resources to make its implementation practicable for the SPS.

Thomas Halpin (Sacro): Thank you for the opportunity to present to the committee. At the start, I will not outline the facts of the legislation, which my colleagues have already touched on, but instead discuss the people on whom it will impact. Prisoners are, as I am sure that members will understand, largely a group of people who have been excluded and deprived throughout their lives in all sorts of circumstances. The decisions that are made around them have been very much driven by emotion and the values base of others, who very often will not have had the same experiences. We need to ensure that the system is proportionate and fair but also rational. We can look at the progressive approach from the Parliament in recent years with regard to the presumption against short sentences and so on. There are loads of examples of people who have been convicted of the same crime being sentenced differently at different diets, with one being excluded while another is not. There is a randomness there.

We can also look at people who are in prison for a long time for much more serious crimes. There is an emotional argument for excluding them—the term “civic death” has often been used to describe that exclusion. However, to take a rational view, those people still have a stake in society. They have families outside who may be impacted in the education system, for instance, and they have a right to have an interest in their children or spouses.

There are examples of people who have been absolutely written off in newspapers throughout Scotland and the UK. There are columnists who have been long-term prisoners—they are now out of prison and are playing a meaningful part in society. In previous discussions, they would have been written off through civic death and seen as not worthy of having the right to vote, but they are now out there.

This is my plea: please do not fudge this. The right to vote is a human right. If we want an inclusive Scotland, we should provide all prisoners with the right to vote.

The Convener: The witnesses have all intimated that they are ready to answer questions.

We will start with questions from Gil Paterson MSP.

Gil Paterson (Clydebank and Milngavie) (SNP): I want to ask a general question that might assist the general public. It is a Brexit question. The bill is being driven by the European Court of Human Rights. If we were to come out of the European Union having already implemented the provisions in the bill, what would be the effect? Is there a likelihood or possibility that either the Scottish Government or the UK Government could default back to the current situation and take the right to vote away from prisoners?

Cathy Asante: I am happy to answer that question, as it is really important to clarify the point for public understanding in particular. The European Union is completely separate from the Council of Europe under which the European convention on human rights sits, so we are actually dealing with two separate European systems here. When, or if, we come out of the European Union under Brexit, that would not have any automatic impact on our membership of the Council of Europe. We will remain signed up to the ECHR, which will remain embedded in our law through the Human Rights Act 1998 and the Scotland Act 1998. There is no automatic correlation between those things. There have been debates about changing the Human Rights Act 1998 or our membership of the Council of Europe, but those are separate debates and currently there are no plans on the table to change the legal position.

10:15

Michael Clancy: That is correct. Leaving the European Union under Brexit would have no effect on our membership of the Council of Europe. As members know, however, there has been a long, grumbling debate about the relationship between the United Kingdom and the European convention on human rights, which may at some point in the future crystallise around a Government deciding what it wants to do about membership of the Council of Europe and the European convention on human rights.

I say that with one proviso about the crossover points in connection with the European Union. The Charter of Fundamental Rights of the European Union contains certain provisions that are relevant to this debate, but only in connection with matters relating to the European Union—for example, the restrictions on people being capable of voting in a European election. That was helpfully litigated on in the case of *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* a few years ago, in 2015. In that case, the Court of Justice of the European Union ruled that French law, which deprived certain convicted persons of

the vote, was not an unlawful breach of the right of European citizens to vote in elections for the European Parliament.

There is a crossover, but I wish to advance the idea that we may have experienced the last vote for the European Parliament that this country will hold—at least for the meantime. Therefore, the matter might not crop up again. However, I do not need to tell you that that is a highly contentious area, and it is probably not up to me to pontificate too much on it.

The Convener: Would you like to pontificate a wee bit on that, Gil?

Gil Paterson: That raises one question in my mind. If a UK Government decided that it would introduce legislation to take us out of the jurisdiction of the European court and out of the ECHR, would Scots law still stand? Would Scottish law need to be changed also, or is there an overarching factor in the explanation that you have given?

Michael Clancy: In using the phrase “European court”, which European court are you referring to?

Gil Paterson: The European Court of Human Rights.

Michael Clancy: If a future Government withdrew the UK from the Council of Europe, the court would not have jurisdiction over the UK. If a future UK Government repealed the Human Rights Act 1998, domestic litigation in connection with the convention would not apply. Those are two possible outcomes of an approach to human rights that a future Government may adopt. Beyond that, we are getting into the realms of significant speculation.

Professor Duff: It would be a shame to focus only on compliance with the convention on human rights. That is a minimum requirement that we need to meet. Here is a chance to think beyond that and to think for ourselves about how we should treat prisoners when it comes to voting. Should we do rather more than what is required, minimally, under the convention? The Howard League Scotland is saying that we should go beyond that and think about enfranchising all prisoners, but not just because that brings compliance with the requirements of the convention. It means going beyond that and thinking for ourselves about how we should see and treat those people. I would not want to focus only on what is required to comply with the convention on human rights.

Gil Paterson: I will develop a question on that very point, but I will first ask you for your view on the approach that has been taken under the bill, whereby the right to vote is linked to the length of sentence.

Thomas Halpin: In my opening statement, I explored whether, separate from the bill, it is right or wrong to exclude people. We expect parliamentarians—lawmakers—to have a rational and mature view that is about the good of all communities. Arguments can be made one way or the other about the exclusion of people, but the fundamental thing is that people are part of a positive and thriving society in Scotland. Other than a very small number of prisoners, those on long sentences will return to their communities one day and they have a stake in them. They are denied their vote at this time for reasons of punishment. It is not about risk or because they pose a threat to wider communities. It is a value-based judgment. We want people to have a positive reason to rejoin their communities.

Neil Findlay (Lothian) (Lab): I have a fundamental point, which is linked to that. How are the public protected and how are prisoners rehabilitated by the removal of prisoners’ right to vote? Does anybody believe in that?

The Convener: There is a lot of shaking of heads.

Cathy Asante: I did not raise my hand because I believe in it. I struggle to see what the connection is and why that particular right is seen as the one that has an impact on victims or is a deterrent to crime. I am quite confused about the rational connection there.

Conversely, there are rational reasons for allowing prisoners to vote as that would contribute to their rehabilitation by enhancing civic participation and inclusion, and maintaining prisoners’ connection with their communities and their investment in society. That argument appears to stand up to rigour better than the argument about the removal of the vote deterring crime.

Neil Findlay: In any research that has been done or in your experience of working with people in prisons, have you ever heard of an offender saying something along the lines of, “Yes, I was gaun tae ram-raid the bank and steal the money, but I realised that I wouldn’t be able to vote for Bill Kidd or Neil Findlay, so I didnae bother”?

The Convener: Does anybody have that knowledge?

Professor Duff: If we think about the standard aims that punishment might be thought to have—retribution, deterrence, incapacitation and rehabilitation—and ask whether losing the right to vote serves any of those aims, it is hard to see how it does. It does not do that for retribution; we believe that it does not deter; it does not help to incapacitate; and, if anything, it works against rehabilitation, because having the vote helps to rehabilitate. Therefore, losing the right to vote does not serve any of the standard aims of

punishment and it works against at least one of them.

Mark Ruskell (Mid Scotland and Fife) (Green): Are there any examples of a situation in which a civic death would be appropriate? I am thinking of examples such as when somebody has committed a crime against a democratic institution or been part of a democratic institution and shown gross criminality or misconduct. Again, that shifts the issue around risk to the public, because that person would not stand for election, but they would vote in elections. That is one example. Are there any situations for which a civic death would be appropriate and proportionate?

Professor Duff: That is the best case. The question is how we see the right to vote.

Let us compare it to driving. A driver can lose the right to drive because, if they drive badly enough, they will lose their licence. Driving is not a basic right; it is not quite a privilege, but it is a fungible right. If we see citizenship as basic to someone's identity as a person, the right to vote is crucial to their civic being. The argument then is that they should not lose that right, even if they misuse it. That might invite monitoring or warnings, but they should not be able to lose it, even through electoral malpractice.

Perhaps another case, in the extreme, would be a self-avowed terrorist whose aim was precisely to destroy the political community. We might say that that person has ruled themselves out from taking part, so perhaps that might be a case.

However, even in the case of electoral malpractice, it is important that the person preserves the right to vote and is encouraged to use it appropriately.

Mark Ruskell: In that example, it could almost be a restorative element if somebody had acted against democracy but they were given the right to vote so that they valued democracy.

Professor Duff: That is why it is important that the right to vote be made a real right by prisoners being encouraged to use it properly. That involves making sure that they have the information that they need to use the vote, room for political debate and so on. That is important if we want to make the right to vote a genuine rehabilitative measure.

Michael Clancy: In response to Neil Findlay's earlier question, I can say that I have never been present at a conversation in Barlinnie at which the convener's name came up, or indeed Neil Findlay's name.

On the point about civic death being applied to certain types of crime, we have seen that in legislation in other countries. For example, in the case of *Scoppola v Italy*, the court came to the conclusion that someone being excluded from the

vote was not a violation of article 3 of protocol 1 of the European convention on human rights because, under Italian law, only prisoners who were convicted of certain offences against the state or the judicial system or who were sentenced to at least three years' imprisonment lost the right to vote. Offences against the state or the judicial system would be in the category that Mr Ruskell was talking about.

I would contrast that example with the case of *Murat Vural v Turkey*. In 2005, the applicant was convicted under the Law on Offences Committed Against Atatürk because he had poured paint over statues of Kemal Atatürk. He was given an extraordinary sentence of 23 years and that sentence also excluded him from voting. That was a violation of article 3 because it was disproportionate.

It is a question of balance—one needs to deal with the issues of the margin of appreciation and proportionality. Since we have moved away from applying the death penalty in any circumstance, issues relating to civic death do not really apply in the same way as they might have done some time ago.

Tom Mason (North East Scotland) (Con): I am trying to understand the logic behind this. Why is voting specifically separated out from other losses of rights that happen with imprisonment? Prisoners lose the right to family life as well as all sorts of other things. Voting is just one of several rights that are lost with imprisonment. What is the logic of separating out voting? There is a long list of things that people are deprived of in prison.

Professor Duff: Imprisonment is essentially loss of liberty. Along with that, inevitably, go other kinds of loss. If someone is imprisoned, they cannot maintain an ordinary family life so, inevitably, there is an impact on family life. However, the right to vote is not an inevitable loss when someone is imprisoned—it can be maintained. The starting point is that imprisonment is loss of liberty. We then need to ask what other rights must be constrained or can be maintained once someone is imprisoned. That seems to be the way forward. From that point of view, the right to vote can be maintained, even while someone is imprisoned.

Tom Mason: But many other things could be maintained in prison, if we think of open prisons—for example, the right to access newspapers and television and all sorts of things.

Professor Duff: All those rights should be maintained—unless there is a good reason to do with punishment, incapacitation or deterrence to suspend them—if we start from the position that every right should be maintained as far as that is consistent with imprisonment and its purposes.

Thomas Halpin: The rights that Tom Mason mentioned may be curtailed or restricted, but they are not lost when someone is imprisoned. The connection with family is so significant that the Scottish Prison Service has created family facilities in visiting centres, for example. The issue is whether withdrawing the right to vote is the right thing to do.

There is an emotional question in separating out crimes that are so serious or so abhorrent that we should take away the right to vote. However, it is very difficult to make that distinction. There are many people in our prisons who have been convicted of homicide but whose cases have circumstances around them. They are not evil people; they have made very bad decisions in their lives, or maybe there were not even decisions and they are there due to the circumstances. The idea that we can be rational in separating out prisoners in a judgmental way is questionable.

10:30

The Convener: Neil Findlay has a quick question before we go back to Gil Paterson.

Neil Findlay: I just want to confirm that prisoners still have the right to stand for election. Famously, Bobby Sands stood for election and was elected, and I believe that the situation has not changed. Prisoners have the right to stand, but not the right to vote. Is that correct?

Michael Clancy: I believe that that is the case.

May I comment on the difference between taking away, in the ordinary course of events, the right to a family life and taking away the right to vote?

The Convener: Yes, of course.

Michael Clancy: I have not studied this in depth, but I suspect that there is still a sort of shadow of the franchise being something that is given rather than something that is inherent. Throughout this year, we are celebrating 100 years of women having the vote. We are very close in time to a period when women did not have the vote, and the shift from 21-year-olds to 18-year-olds having the vote happened within the lifetime of those who are seated round the table—unless there is someone here who is very young.

I think that the difference is that the right to a family life has always been considered to be inherent in a person, and the removal of that right if someone commits a crime means that society is showing them the element of punishment, or retribution. I think that that is where the issue comes about.

Cathy Asante: It is difficult to discern how we arrived at the position and how we make the connection. It is interesting to look at other countries across Europe where the connection is not made. I believe that there are 21 European countries in which there is no ban on prisoners being able to vote, so there seem to be completely different approaches to the question of prisoners and this specific right.

Michael Clancy: We do not have a written constitution in this country, although people are interested in debating that. A right to vote might be expected to be part of that concept if it ever comes to any kind of fruition. However, there are examples of constitutions of countries that are signatories to the Council of Europe that exclude the right to vote for prisoners, such as the Russian constitution and, until recently, the Ukrainian constitution. We need to be cautious about assuming that, because countries have constitutions that bestow the right to vote on prisoners, that is necessarily the way that constitutions will always be. Constitutions can be used to entrench the idea that certain people who are convicted should not have the vote, as well as to ensure that they should have it.

Gil Paterson: I have another fundamental question. The bill proposes a 12-month time bar as the definitive factor in prisoners qualifying for the right to vote, but I wonder whether a better measure, particularly for women, would be what the crime was. I watched a programme on television that was apt. Two women were put in prison for non-payment of the council tax. The circumstances that got them into that situation were emotional. Is it a crime against society if a woman steals to feed her family or steals to pay the bill because she has spent the bill money feeding herself and her family? Is it a crime against society to put someone like that in prison?

Do you have a view on the measure—the length of time in prison, rather than the crime that took place—that we are using? Should the measure be different from what is suggested in the bill?

Thomas Halpin: You raise an important point. Along with partners, my organisation delivers a significant public social partnership in Scotland, which supports every woman who leaves Scotland's prisons having served a sentence of less than four years. We provide the women with mentoring. Therefore, we have extensive knowledge of the individual circumstances of a large cohort of women. The data is all there in the background.

The personal circumstances that relate to offending are as varied as you can imagine. For instance, women disproportionately go to prison because of their circumstances. They are not able to comply with the justice process and the

administration of justice. They do not comply with bail and they end up on remand. The personal circumstances that cause them to get involved in addiction and, as Gil Paterson said, theft, in order to maintain their families, are disproportionate in women compared with men.

A large number of those women are victims of domestic abuse, deprivation and, when they were children, neglect. Therefore, if we separate them out on the basis of crimes and say, "This crime takes you into this cohort and that crime takes you into that cohort", that does not reflect the reality of life's circumstances for those women. We are saying to them, "Not only are we treating you like that as you go through your life experience, but we're going to make you suffer civic death."

We cannot separate just on the basis of crime or length of sentence. When we start doing that, the decision becomes emotional and judgmental. We want every citizen to be rehabilitated and to play a full part in a successful Scotland, and the right to vote is a fundamental building block of that.

The Convener: You have stirred something up, because everybody wants to speak. We will hear from Professor Duff, then Michael Clancy and then Cathy Asante.

Professor Duff: I suppose that the 12-month limit was set as an attempt to say crudely, "Okay—for the more serious crimes, you lose the right to vote; for minor crimes, you don't." Thomas Halpin has a good way of capturing the distinction between minor and serious crimes. Those who are in prison for more than 12 months could still, by virtue of their crime or their circumstances, not be the figure of the hardened career criminal that people have in mind when they talk about losing the right to vote.

If we say that some people should lose the right to vote and some should not, we need to look carefully at what picks out those who should lose the right to vote. Is it the content of their crime? Is the crime somehow against the political system? Is it just the fact that it is a serious crime? If so, how serious does it need to be before someone loses the right to vote? There is no true answer to that question. That is one reason why we think that prisoners should all get the right to vote.

However, 12 months seems a mean-minded way of allowing some prisoners the right to vote. That would let in a few prisoners but it would still disenfranchise many prisoners, who, when we look at their cases, are not serious core criminals.

Michael Clancy: Section 4 makes amendments to section 3 of the Representation of the People Act 1983. That is the nub of the issue. The 1983 act, which contains a blanket ban, says:

"A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election."

That is the basis on which the Hirst case was taken to the European Court of Human Rights. Mr Hirst felt that that blanket ban contravened—as Cathy Asante said—article 3 of protocol 1 of the European convention on human rights.

The court's decision in that case talked about the support for universal suffrage, but it said that the franchise of prisoners may be restricted, provided that the restriction is proportionate to a legitimate aim. Such aims include the sanctioning of the conduct of convicted prisoners and enhancing civil responsibility and respect for the rule of law. Crucially, the length of the sentence that is given to the prisoner indicates the seriousness of the offence. That is where we get the tension between the length of the sentence and the seriousness of the offence.

The bill has landed on sentences of 12 months or less. You might remember that, following the consultation that the Scottish Government ran in March last year, we were on the cusp of talking about the presumption against short sentences. That presumption was crystallised in the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019, on which the Parliament voted before, or during, the summer. The fact that Parliament has already decided on that order indicates that the presumption against short sentences relates to the seriousness of the offence. I think that that answers Mr Paterson's point.

The question is whether 12 months is right. The Law Society's response to the consultation said that perhaps a landing point of four years would be more appropriate, if we are taking an incremental approach. Clearly, our advice was not heeded.

Cathy Asante: Basing the right to vote on whether the length of a person's sentence is less than 12 months appears to be quite a crude way of distinguishing, which does not allow for consideration of an individual's personal circumstances. An alternative approach, which is taken in other countries and seems to win favour with the European Court of Human Rights, is for voting rights to be determined by a judge when they give their sentence, so that they can take into account everything that they know about the circumstances of the case. That maintains a link between the measure of depriving someone of the right to vote and what has taken place. It is fair to say that that is a more proportionate way of doing things than simply having a cut-off point at 12 months.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): I want to follow up on the

issue of short sentences. Scotland has one of the highest prison populations in the world, so we are already locking up more people than other countries are. Are a lot of those people serving short sentences? I am not just talking about sentences of 12 months. Is there a contradiction in having the rules on short sentences and implementing the bill's proposals?

Cathy Asante: I know that the Faculty of Advocates pointed out that there might be some contradiction. It is difficult to say whether that could be the cause of a further human rights case; that is untested. There is an argument that enfranchising a smaller and smaller number of people is not in the spirit of providing the right to vote. That points to the need to future proof the bill. If we apply only the minimum of what is required by the European Court of Human Rights at the moment, we might need to return to and review the issue a number of times in the future, if anything else arises. A better approach would be to think about the right reasons for making the changes and determining the measures around those, rather than thinking only about what we can do to get over a legal hurdle for the time being.

Maureen Watt: I get the sense from the witnesses that they do not think that 12 months is appropriate. Michael Clancy said that the Law Society alighted on four years. Do the rest of the witnesses think that the vote should be available to all prisoners, regardless of the length of their sentence? I see several people nodding.

10:45

Michael Clancy: That was how we responded to the consultation. Now that we are dealing with the bill, it is really for Parliament to decide on the best landing point. The Scottish Government has taken the view that people with a sentence of 12 months or less should be able to vote, but if they have more than 12 months, they should not.

I do not have the kind of statistics that you are looking for about what sort of crimes get what sort of penalties. I am sure that the Crown Office or the Scottish Prison Service will be able to provide those.

On whether judges should be able to add disenfranchisement at the point of sentencing, we rightly give our judges significant discretion in sentencing, but when it comes to civic rights, the Lord Justice General has already indicated that the judiciary is not in favour of that addition to judges' powers, and we have to trust the judiciary in that regard.

Mark Ruskell: Why did the judiciary come to that view?

Michael Clancy: You would have to ask the Lord Justice General.

Professor Duff: Ideally, we would like all prisoners to have the right to vote. Failing that, we strongly believe that 12 months is much too low a limit. Although I do not agree with it, I can see the argument for people who commit really serious crimes that display a contempt for or hostility to society not being allowed to vote while they are in prison. I think that that argument is wrong, and, in any case, it involves really serious crimes committed by really serious criminals, and a 12-month sentence does not begin to capture that kind of crime.

We need to ask what kind of crime and what kind of person should lose the right to vote while they are in prison. I am not sure I can get to a simple four, five or six-year cut-off point. You could take a crime-by-crime approach, in a more nuanced way. However, in any case, 12 months seems much too low.

Maureen Watt: If you take it crime by crime, you go back to Michael Clancy's point about the judge making a decision.

Professor Duff: You could have a list of crimes for which the sentence is so many years in jail and the loss of the right to vote. You could just list the crimes that disqualify someone. That would be feasible, although it is hard to see how you would do that, because it is not clear what the criteria would be. However, it could be a slightly more nuanced way of limiting the franchise among prisoners rather than just saying that a sentence of anything above 12 months means losing the right to vote.

Neil Findlay: I cannot quite understand the logic of the cut-off point being a year. It appears to be a minimal fudge rather than a principled position. We would have great difficulty with it if a minister was sitting in front of us and saying that this was their position. Can you explain why a year is the most relevant time? Can any of you help us to understand the relevance of 12 months as opposed to six months or 24 months? I do not understand it at all.

Thomas Halpin: I have been involved in this discussion with Parliament and the consultation for some years now. I used the word "fudge" in my opening statement. We initially had a presumption against short sentences because people worried about how it would be accepted, but there was no crime wave because of it. Crime is actually going down, and we are now looking at a presumption against sentences of 12 months.

The 12 months for voting is the same. It is about an emotional fear of how the provision will be received. We have made the arguments. We expect parliamentarians to make a rational and

proportionate judgment about what is needed. There is no reason for the limit being one year, other than the fear of how it will be received.

Professor Duff: One argument was that, as 12 months is the longest sentence that a sheriff can impose in a summary case, that is a way of marking out crimes that are so minor that they would not go to the High Court for sentencing. Therefore a sentence of 12 months is thought to mark out clearly the line between non-serious and more serious crimes. It is a very crude way of doing that, but it might be one rationale for it.

Neil Findlay: But your view of what is a serious crime might be very different from someone else's.

Professor Duff: Yes.

The Convener: We will move on a wee bit. Tom Mason wants to come in.

Tom Mason: Some of my questions have already been answered, but I would like to know what is happening on the international scene. Who is doing what and where? Will you distinguish between the franchise to vote and the right to stand in elections, which we have not yet discussed very much? What is the international perspective? Are we out in front on that, are we falling behind or are we catching up?

Cathy Asante: I had a look at some comparators across the Council of Europe area. There is a wide spectrum that ranges all the way from a total ban to total enfranchisement.

To break that down slightly, 21 European countries, including Ireland, Finland, Denmark, Norway and Switzerland, do not restrict at all the right of prisoners to vote. Interestingly, the law in Ireland was changed in response to the ruling in 2005 in *Hirst v United Kingdom*, which enfranchised all prisoners. There was not a great deal of controversy about that and it passed without much public or media concern. Another 18 European countries allow some prisoners to vote, with their right to do so being determined in different ways. For example, in France judges are allowed to determine whether the right to vote should be removed, and removal is mandatory in cases involving very serious crimes. However, even then, a judge can choose to disapply that rule. Germany bans only prisoners whose crimes targeted the integrity of the state—for example, terrorist offences. The list of countries that have a total ban is much shorter: it consists of only eight countries, including Russia, Armenia and Hungary.

From that breakdown, we can see that other European countries have some restrictions on prisoners' right to vote, but a lot of them appear to be much more tailored and proportionate than a simple cut-off for a period of time.

Tom Mason: What is the situation in places such as America and South America?

Cathy Asante: I have not looked at South America, so I am afraid I do not know about the position there. In America, it varies from state to state. In addition, some prisoners—such as felons—are not allowed to vote for the rest of their lives, even after they have come out of prison, which is right at the other end of the spectrum. I believe that some Australian states allow prisoners to vote, but that is in the context of laws that mean that voting is mandatory for everyone, so they would be required to do so anyway.

Michael Clancy: At the risk of intruding upon the incipient US election, I point out that Bernie Sanders is currently going round the stumps saying that he would like all prisoners to be able to vote. However, currently, only two states—Maine and Vermont—allow that. The other 50 states allow it to varying degrees. As Cathy Asante has said, in Australia there is a distinction between the prohibitions at federal and state levels. At the state level it affects those with sentences of three years or more, I think, while at the federal level prisoners can vote if they are sentenced to less than five years.

If we look closer to home, in England and Wales the total ban was modified by an agreement between the UK Government and the Council of Ministers so that prisoners on temporary licence would be able to vote. The council indicated its contentment with that agreement in December 2018. In Wales, there is an on-going debate and consultation on the issue of prisoner voting, which I believe has not yet reached any firm conclusion.

Tom Mason: What about standing for elections?

Michael Clancy: I do not have any information on that.

The Convener: That could be looked into and brought back to the committee, if that is all right with you, Tom.

Tom Mason: The issue of standing for election opens up a spectrum of issues.

The Convener: It does; you are quite right. I think that a few of Maureen Watt's questions about the 12-month cut-off have been covered.

Maureen Watt: Yes. I do not have anything else to ask at the moment.

The Convener: Thank you.

Mark Ruskell: Has rehabilitation and subsequent reintegration back into communities been studied? Are there particular examples that you can give from the UK or abroad of places where it has been beneficial?

Thomas Halpin: There are a number of studies, including a publication by the Scottish Government's analytical services, about what works in rehabilitation and reducing reoffending. It is not possible to give the actual causation, but there are correlations around the protective factors that help someone in their journey to desisting from committing offences. That is a complex area, and it involves multiple needs that people have, such as those around housing, family, motivation, health and addictions—you can imagine them all. The sense of belonging is extremely important in supporting those protective factors when someone is moving into rehabilitation. There is no doubt in my mind that a number of evaluation studies over a long period of time have provided evidence about the importance of all of that with regard to supporting rehabilitation.

The Convener: Before Mark Ruskell comes back in, I point out that we are going to run on a wee bit further than we thought we would, because we are getting a lot of really good responses, which will help us a lot in our deliberations. By the looks of it, we will go on well past 11 o'clock. If anybody needs to go, they are perfectly free to do so; we are not locking anybody up in here.

Mark Ruskell: I hear what Thomas Halpin says on the general approach to rehabilitation, but I am thinking specifically in terms of participation in democracy and in wider society. Is there any evidence around that? I am thinking even about those who are being held under terrorist offences, and their reintegration and rehabilitation into society and how the proposals fit with that.

Professor Duff: As we have the blanket ban in Britain, we could not find evidence of the right to vote helping to rehabilitate, at least in this country. I do not know of evidence from elsewhere; I am a philosopher rather than an empirical scientist, so I theorise rather than investigate empirically.

If you think about it, imprisonment is bound to cut various ties that people have with their community. It cuts you off in various ways. Rehabilitation involves trying to maintain such ties as you can and trying to build up ties again as you are released. One such tie is a connection to the political life in your community, in so far as you can maintain that tie. That includes the right to vote. It also includes the right to take part in debates and to engage politically. That connection certainly cannot hinder rehabilitation. It is one way in which you can try to maintain a person's ties with their community. It seems a matter of common sense rather than empirical evidence that that must be the way to go if you are seriously interested in rehabilitation, as it is one way to maintain a person's important connections with the life of the community to which they belong.

Mark Ruskell: Are there any international examples of that in places where there is either a limited or full extension of the franchise? Is there positive evidence of people reintegrating, and maybe even becoming politically active or involved once they have been reintegrated back into wider civic society, through participation and confidence building and all those kinds of things?

Thomas Halpin: I suspect there will not be many such studies, although it is an area that would lend itself to a good study, as you recognise. However, there are loads of examples of people who have entered into political life after imprisonment, including political prisoners. One of the very positive experiences we have is of peer mentoring in and out of prison. That is an example of people who are moving into active citizenship. Those are individuals who are definitely motivated within the prison system.

The Convener: Professor Duff, do you have an answer?

11:00

Professor Duff: I do not know—I can try to find out whether there is any international research on the matter and get back to the committee on that.

The Convener: Thank you. We move to our final round of questions, on voter education and political engagement.

Maureen Watt: Is there any evidence to show that, if prisoners get the right to vote, they will in fact use it? What has the situation been in other countries, for example?

Cathy Asante: The only evidence that I am aware of is from Ireland. I believe that the finding was that prisoners voted in about the same proportion as the general population.

Professor Duff: Much would depend on how the right was introduced and how it was treated. If prisoners were simply told that they could vote formally, and that was all there was to it, it is plausible that the uptake would be rather low. If there was a genuine campaign to encourage prisoners to vote, to show them how to do so and to help them to engage with political debate, I think that the rate of uptake would be higher, with beneficial effects beyond that. A lot would depend on the resourcing and how it was organised.

The Convener: I have a question for Thomas Halpin. You spoke about peer mentoring and so on. Do you think that that has encouraged more people to engage?

Thomas Halpin: There is absolutely no doubt in my mind that it has encouraged people to take part in positive, purposeful activity in the prison system, so one would follow the other. The

question would be whether the way in which the right to vote was introduced would make it difficult for people to vote and so on. The experience of peer mentoring in the prison system definitely suggests that voting would be a hot topic among that population group, in the positive sense of giving them something purposeful to do.

Maureen Watt: Will prisoners have a choice in where they register to vote? Would they be registered where they lived prior to going into prison, or in the ward or constituency where the prison is?

Professor Duff: The bill proposes that, where there is a place that they can say that they live, they should register and vote there. Where there is no such place, they would vote in the prison constituency. If the aim is for people to maintain connections with the community, they should if possible vote where their home is. If they have a home to which they will return after prison, that is where they should vote. If they have no home, they will by default have to vote where the prison is. That seems right.

Maureen Watt: How can candidates who are standing for election interact with prisoners?

The Convener: A bit of guesswork is needed there.

Professor Duff: If a prisoner is registered to vote in their home area, they cannot plausibly attend meetings there. Candidates cannot all go round all the prisons to see the prisoners. It would need to be done largely by post, I guess. One can imagine a more complex system of online debate, but that would be very expensive to organise. Plausibly, it would be done primarily by mailing electoral literature to prisoners. They would need to have a chance somehow to at least put questions to candidates, either online or by mail, in order to engage with them. There are technologies that can be used for that purpose.

The Convener: This has been one of the best rounds of questioning that the committee has had for a very long time, in terms of giving us a range of views and in-depth evidence. I thank all our guests for attending, and we will keep you engaged in what we go on to do.

11:04

Meeting continued in private until 11:15.

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