Liberty’s response to the Ministry of Justice’s Second Stage Consultation on the Voting Rights of Convicted Prisoners Detained within the United Kingdom

September 2009
About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at

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1. It is now four years since the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the UK’s current laws disenfranchising all people serving prison sentences at the time an election is held were in breach of the right to vote under the European Convention on Human Rights. Yet, although a General Election is now imminent the Government has still made no change to the impugned law. In March 2007 Liberty responded to the first consultation on the voting rights of convicted prisoners. We are now responding to another consultation on the same issue that raises the same questions and concerns as the 2007 consultation. Unsurprisingly, our position has not changed. We remain firmly of the view that full enfranchisement is right in principle and in practice. We are disappointed that the Government has yet again declared its opposition to full enfranchisement and is offering only a fig leaf to seek to comply with the ECtHR judgment—the options being that people serving between one to four years imprisonment may retain the right to vote.

2. It is clear from the length of time the Government has taken in responding to the ECtHR judgment, and in the very limited options put forward, that it does not want to change the present law. Under the current law almost all prisoners are denied the right to vote if detained on the day of the election. This is an arbitrary ban applying to both anyone imprisoned for a short period of time or for life and in many cases enfranchisement depends on when an election happens to be called. It also depends on the sentence imposed by a sentencing judge—one person could be sentenced to a term of imprisonment (and thus lose the right to vote) for committing the same offence as someone sentenced to community work or electronic tagging (who retains the right to vote). The 2004 ECtHR judgment held that the UK law is a blunt instrument, indiscriminate and a breach of the right to vote under Article 3 of Protocol 1. In their judgment the Court reiterated that the right to vote was not a privilege but that “prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty”. While the right to vote is not an absolute right any limitations on it must “reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral

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1 *Hirst v The United Kingdom*, ECtHR, application no. 74025/01, 6 October 2005.
3 See section 3 of the *Representation of the People Act 1983*.
4 *Hirst* at para 69.
procedure aimed at identifying the will of the people through universal suffrage.\(^5\) In particular the Court noted that the severe measure of disenfranchisement must not be resorted to lightly and the “principle of proportionality requires a discernible and sufficient link between the conduct and circumstances of the individual concerned” and that an independent court provides a strong safeguard against arbitrariness.\(^6\)

3. It is arguable that the Government’s proposed response does not comply with this ruling. The proposals are simply to disenfranchise either everyone serving a sentence of more than one, two or four years imprisonment or for those sentenced between two to four years to have to make an application to a court to be enfranchised. In addition, anyone convicted and imprisoned of certain unspecified electoral offences will be denied the right to vote regardless of the length of sentence. The consultation states that the Government is inclined towards “setting the threshold toward the lower end of the spectrum” so effectively meaning anyone sentenced to imprisonment for more than one year will be denied the right to vote if an election happens to occur during their term of imprisonment (but not, of course, if an election is not called during that period). The Government fails to state how this removes the problem of arbitrariness. It also does not appear to address the ECtHR’s concern about the link between the sanction and the circumstances of the individual concerned and its recommendation that an independent court provides strong safeguards against arbitrariness.

4. The main argument put forward by the Government as to why prisoners should be disenfranchised is that removing the right to vote is somehow additional punishment for committing an offence. Yet, this notion of punishment conflicts with the basic notion that all citizens are to be regarded as political equals. “Disenfranchisement may punish prisoners, but it does so by undermining the goal of universal suffrage and the principle of political equality upon which that goal is based.”\(^7\) As we set out in our response to the first consultation, universal suffrage strengthens democracy and ensures that everyone counts. Liberty believes that for principled and practical reasons a sentence of any term of imprisonment should not lead to the loss of the right to vote.\(^8\) As Susan Easton has argued:

\(^5\) *Hirst* at para 62.
\(^6\) *Hirst* at para 71.
\(^8\) See Liberty’s response to the first consultation which sets out in greater detail our principled and practical opposition to prisoner disenfranchisement.
To further punish prisoners by disenfranchisement is excessive and irrational and in most cases, bears no relation to the nature of the offence. Denial of the right to vote undermines respect for the law, and the principles of equality and inclusion. Conversely, allowing prisoners to vote affirms the legitimacy of the values of democratic society. The right is not a privilege but a fundamental civil right… Voting would give prisoners a much-needed voice in the democratic process.⁹

5. As well as being punitive, the Government’s proposals on prisoner voting are also not consistent. The consultation states that the Government does not intend to differentiate between tariff and post-tariff parts of a sentence (i.e. punitive and preventative) and do not propose to extend voting rights to post-tariff prisoners. The only reason given for this is that it is not ‘appropriate’ to do so because of the seriousness of the original offence and the danger the prisoners pose to the public. One wonders how exercising the right to vote might be considered a danger to the public at large. Clearly someone detained for preventative reasons has served their period of punishment – why such a person should continue to be ‘punished’ with the removal of their voting rights is illogical and inconsistent with the aim the Government states it is trying to achieve.

6. We disagree fundamentally with the conclusions already drawn by the Government and maintain all prisoners should retain the right to vote. If, as seems likely, this is not adopted, we would of course urge the adoption of the least restrictive option. However, we do not agree with one of the proposals in the consultation of requiring a prisoner to apply to a court to be entitled to vote. This places an unduly heavy burden on the prisoner and in effect strips the person of their fundamental right to vote, putting the onus on them to regain such a right. As to how the mechanics of the voting are to take place, as long as it is fair, confidential and respects the usual electoral process there seems little else left to say.

7. We are extremely concerned that the time taken to respond to the ECtHR’s judgment will mean that tens of thousands of prisoners will remain disenfranchised in the upcoming General Election. In order to comply with the judgment changes must be made to primary legislation before the election is called, which will certainly be

within the next seven months. We therefore echo the concerns set out by the UK Parliament’s Joint Committee on Human Rights in its 2008 report:

A legislative solution can and should be introduced during the next parliamentary session. If the Government fails to meet this timetable, there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised.¹⁰

8. The Government’s failure to implement the ECtHR’s decision reflects a lack of political will which has been manifested in a series of delaying tactics, including the flawed and protracted consultation exercise. Successive Justice Ministers have seemed preoccupied with political considerations of this case rather than fairness or the rule of law. It is ironic that the same Government has stated that it cannot present primary legislation to Parliament in relation to the National DNA Database because it has limited time within which to respond to an ECtHR ruling made less than a year ago. Conversely four years has now lapsed without any clear guidance as to how the Government intends to change the law in respect of prisoner voting. The consultation does not say what legislative vehicle will be used to effect this proposed change. Amendments need to be made to section 3 of the Representation of the People Act 1983 which contains the current prohibition. At the very least the Government must explain its proposed timetable in relation to this matter. The consultation itself just states that a paper summarising the responses to the consultation will be “published in due course”, which does not seem to reflect a sense of urgency. If amendments are not brought into force prior to the General Election, over 63,000 people will remain unlawfully disenfranchised, leaving the UK open to further legal challenges.

9. Liberty wrote to the Council of Europe Committee of Ministers in April this year highlighting the Government’s staggeringly slow response to implementing this judgment. On 5 June 2009 the Committee expressed its “concern about the significant delay in implementing the action plan and recognised the pressing need to take concrete steps to implement the judgment particularly in light of upcoming United Kingdom elections which must take place by June 2010 at the latest.” It also stressed the need “to take the procedural steps following the consultation without

¹⁰ Joint Committee Human Rights, 31st Report, 7 October 2008; para 63.
delay in order to adopt the measures necessary to implement the judgment".\textsuperscript{11} We urge the Government to follow this advice and promptly and properly respond to the ECtHR judgment.

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