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House of Commons

Joint Committee on the Draft
Voting Eligibility (Prisoners) Bill

Draft Voting Eligibility (Prisoners) Bill

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Session 2013–14

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The Joint Committee on the Draft Voting Eligibility (Prisoners) Bill

The Joint Committee on the Draft Voting Eligibility (Prisoners) was appointed by the House of Commons on 16 April 2013 and by the House of Lords on 14 May 2013 to examine the Draft Voting Eligibility (Prisoners) Bill and to report to both Houses by 31 October 2013, and subsequently, following an extension (granted by the House of Commons on 9 October 2013 and by the House of Lords on 10 October 2013) by 18 December 2013.

Membership

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Baroness Gibson of Market Rasen (Labour)
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Derek Twigg (Labour)

Powers

The Committee had the power to send for persons, papers and records; to sit notwithstanding any adjournment of the House; to appoint specialist advisers; and to adjourn from place to place within the United Kingdom.

Publications

The Report of the Committee was published by The Stationery Office by Order of both Houses. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/>

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Executive summary

In November 2012 the Lord Chancellor published the Draft Voting Eligibility (Prisoners) Bill, and announced the establishment of a Joint Committee to conduct pre-legislative scrutiny.

At present the law in the United Kingdom is clear: all convicted prisoners are prohibited from voting in parliamentary, local or European parliamentary elections, for the duration of their detention. The draft Bill contains three options: options A and B would give the vote to all those serving sentences of less than 4 years or 6 months or less respectively; option C would re-state the existing complete prohibition on all convicted prisoners voting.

The Government brought forward the draft Bill as a result of the decision of the European Court of Human Rights in the 2004 case of *Hirst v United Kingdom (No. 2)*. In that case the Court found that the UK's complete prohibition on convicted prisoners voting was incompatible with the European Convention on Human Rights.

Underlying our inquiry is a far-reaching debate about the United Kingdom's future relationship with the European Court of Human Rights, the Convention system as a whole and our attachment to the rule of law.

In reaching our conclusions we have taken fully into account the grave implications of a refusal to comply with the Court's judgment for the UK's relationship with the Court and for the future of the entire Convention system. A refusal to implement the Court's judgment, which is binding under international law, would not only undermine the standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human rights and who could regard the UK's action as setting a precedent for them to follow.

We have also considered the implications of failure to comply with the European Court's ruling for the rule of law, which the UK has for so long upheld. The rule of law has been and should remain a fundamental tenet of UK policy. It is not possible to reconcile the principle of the rule of law with remaining within the Convention while declining to implement the judgment of the Court.

In respect of prisoner voting itself, we have sought to present the arguments in a balanced and dispassionate way. In so doing we have reached the following conclusions on points of basic principle, which we hope will inform the continuing debate in Parliament and society:

- In a democracy the vote is a right, not a privilege: it should not be removed without good reason.
- The vote is a presumptive, not an absolute right: all democratic states restrict the right to vote in order to achieve clearly defined, legitimate objectives.
- The vote is also a power: citizens are entrusted, in voting, with an element of power over their fellow-citizens.
- There is a legitimate expectation that those convicted of the most heinous crimes should,

as part of their punishment, be stripped of the power embodied in the right to vote.

- There is an element of arbitrariness in selecting the custody threshold as the unique indicator of the type of offence that is so serious as to justify loss of the vote.
- There are no convincing penal-policy arguments in favour of disenfranchisement; but a case has been made that enfranchisement might assist prisoner rehabilitation by providing an incentive to re-engage with society.
- The enfranchisement of a few thousand prisoners is far outweighed by the importance of the rule of law and the desirability of remaining part of the Convention system.

Taking all these conclusions into account, we recommend that the Government introduce a Bill at the start of the 2014–15 session, which should provide that all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections; and moreover that prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.

1 Introduction

1. On 22 November 2012 the Lord Chancellor, the Rt Hon Chris Grayling MP, in a statement to the House of Commons,¹ announced the publication of the Draft Voting Eligibility (Prisoners) Bill.²

2. The draft Bill sets out three legislative options in respect of prisoner voting. Option 1 would allow all convicted prisoners serving sentences of less than four years to vote in parliamentary and other elections; Option 2 would allow all convicted prisoners serving sentences of six months or less to vote; Option 3 would re-state the existing prohibition on all convicted prisoners voting, which is contained in section 3 of the Representation of the People Act 1983.

3. The Government brought forward the draft Bill as a result of the decision of the European Court of Human Rights (the “ECtHR”), in the 2004 case of *Hirst v United Kingdom (No. 2)*.³ In that case the Court found that the UK’s longstanding prohibition on convicted prisoners voting was incompatible with Article 3 of the First Protocol to the European Convention on Human Rights (“the Convention”), which requires signatory states 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.” Under Article 46(1) of the Convention signatory states are also required to implement judgments of the ECtHR in any case to which they are a party.

4. Following the *Hirst* judgment the previous Government conducted two public consultations on prisoner voting; the present Government also sought to persuade the ECtHR to reverse its decision by intervening in a similar case involving Italy. The consultations were inconclusive, and the attempt to persuade the ECtHR to reverse its decision proved fruitless. On 22 May 2012 the ECtHR accordingly gave the United Kingdom until 23 November 2012 to bring forward legislative proposals to implement the *Hirst* judgment. The draft Bill was published on that day.

5. The House of Commons had in the meantime, on 10 February 2011, voted overwhelmingly in favour of a motion stating the House’s support for continuance of the prohibition on prisoner voting, and affirming that “legislative decisions of this nature should be a matter for democratically-elected lawmakers.”⁴ The inclusion of Option 3 in the Draft Bill is in part an acknowledgement of the clearly expressed views of the elected House.

6. At the same time as announcing publication of the draft Bill the Lord Chancellor announced that a Joint Committee of both Houses would be appointed to conduct pre-legislative scrutiny. But he made it clear that, unlike most committees conducting pre-legislative scrutiny, this Joint Committee would have an open-ended remit:

1 HC Deb., 22 November 2012, cols 745–762

2 Voting Eligibility (Prisoners) Draft Bill, (November 2012), Cm 8499; hereafter referred to as the “draft Bill”.

3 *Hirst v United Kingdom (No. 2)* (2005), ECHR 681, hereafter referred to as *Hirst*

4 HC Deb., 10 February 2011, cols 493–586

“The draft Bill sets out three different potential approaches for the Committee to consider ... However, it will of course be for the Committee, once established, to consider whether approaches beyond those canvassed in the draft Bill should also be considered by Parliament in due course.”⁵

7. Many of our witnesses suggested that the issue of prisoner voting is not, in itself, of utmost significance. But, as this brief summary of the background to our inquiry shows, the ramifications extend far wider than the question of whether a few thousand prisoners should be entitled to vote in general, local or European Parliamentary elections. We have accordingly produced a wide-ranging report, which in places steps back from the specifics of the draft Bill and explores fundamental issues around the nature of rights in the United Kingdom and our place in the international community.

8. Ultimately, UK law can only be changed by an Act of Parliament, and any Bill brought forward either by the present or a future Government will be fully debated. We hope that our Report will inform these debates, and that it will clarify the issues on which Parliament as a whole will, in the end, decide.

2 The history of prisoner voting in the United Kingdom

From civic death to statutory disenfranchisement

9. In the middle ages those found guilty of felony⁶ or treason were subject to “attainder”, entailing the loss of all civil rights—in effect, “civic death”. Attainder was an assertion that those guilty of either treason or felony were so “tainted” by their actions that they could not own or transfer property. Property owned by them was forfeit to the Crown and, since the entitlement to vote prior to 1918 derived from property-based qualifications, there was a legal bar upon those convicted of such serious offences voting.

10. Prisoners convicted of lesser offences (misdemeanours) did not forfeit their property, and were not therefore subject to this legal bar. But they were unable in practice to vote while imprisoned as they could not obtain release to attend the polls. In 1835 a prisoner called Jones, convicted of a misdemeanour, sought to gain his liberty in order to be able to vote, but his arguments were rejected by the court, which held that Parliament had not put in place a mechanism to enable prisoners to vote.⁷

11. In England, Wales and Ireland the Forfeiture Act 1870, while retaining the concept of a felony, removed its practical consequence through the abolition of the confiscation of property on conviction of serious offences. As this reform would have allowed some prisoners to meet the property requirements for the vote, section 2 of the 1870 Act barred any felon sentenced to more than twelve months imprisonment from voting or standing as a candidate in an election. This was the first statutory prohibition on prisoners voting.

12. Under the 1870 Act felons sentenced to less than twelve months, and those convicted of misdemeanours, were not subject to an explicit statutory ban on voting. Such prisoners, however, remained unable to vote, for the same reason Jones had encountered in 1835: what Lord Sumption has described as “the absence of the necessary administrative arrangements.”⁸ Not only did their incarceration prevent them from attending the polls, but judicial rulings prevented them from registering at their home address while incarcerated.⁹ In due course statute also prevented prisoners from designating a prison as their place of residence for the purpose of the electoral register.¹⁰

13. The restrictions imposed under the Forfeiture Act 1870 reflected an era in which the UK was moving towards, but had not yet adopted, the democratic principle of one person, one vote, of equal worth.¹¹ The vote was regarded not as a universal right, but as the

6 In its origins, a felony was, in the words of Sir William Blackstone, any crime “which occasioned at common law the forfeiture of lands or goods”. Over time most felonies became punishable by death, but the link to capital punishment was eroded by successive criminal law reforms in the nineteenth century.

7 *Re Jones* (1835) 111 ER 169

8 *R (on the application of Chester v Secretary of State for Justice) and McGeoch v The Lord President of the Council* (2013) UKSC 63, paragraph 126; hereafter referred to as *Chester and McGeoch*.

9 *Powell v Guest* (1864) 144 ER 367

10 Representation of the People Act 1918, section 41(5)

11 See Philip Norton, *The Commons in Perspective* (1981), p 53

corollary of factors such as property, gender and moral worth.¹² Property qualifications upon the franchise persisted until the Representation of the People Act 1918; women did not gain the vote until the 1918 Act, and were not able to vote on the same basis as men until the passing of the Representation of the People (Equal Franchise) Act 1928. Additional votes for business owners and university graduates in general elections were only removed in 1948.¹³ Nineteenth-century justifications for express removal of the vote from some prisoners should be understood against this background.

The partial enfranchisement of prisoners

14. Whatever its legal basis, it is clear that there was, in practice if not in statute law, a complete bar on prisoner voting in the late nineteenth and early twentieth centuries. David Davis MP said that “there has been a blanket ban since we have had universal suffrage.”¹⁴ The Government’s notes on the draft Bill state that “there has been some form of bar on prisoners voting in UK legislation for most of the past 140 years.”¹⁵

15. The late 1940s saw an overhaul of the UK’s electoral arrangements, which for the first time established a mechanism which some prisoners were able to use in order to vote. Section 8(1) of the Representation of the People Act 1948 introduced postal voting on a limited basis, for individuals “no longer resident at their qualifying address”. Postal voting allowed those prisoners who were not subject to statutory disenfranchisement as a result of the 1870 Act to participate in elections for as long as they remained registered at their home address.

16. The UK agreed to Protocol 1 of the European Convention on Human Rights in 1952, and there is evidence that, in the preceding general election in 1950, prisoners did indeed vote: an article in *The Times* reported that “among the postal votes to be returned in Manchester were a number from prisons in Cardiff, Lincoln, Preston and Manchester.”¹⁶ Robert Walter MP told us that “when the UK signed up to the European Convention, it did so against a legal framework in which sentence-based prisoner voting rights were present, accepted and exercised.”¹⁷ The early 1950s also saw questions in the House of Commons on the issue.¹⁸

17. The 1870 Act had not extended to Scotland, where the ancient concept of “outlawry”, analogous to attainder in its effects, lingered until the mid-twentieth century. The abolition of outlawry in Scotland under section 15 of the Criminal Justice (Scotland) Act 1949, combined with the introduction of postal voting under the 1948 Act, removed any express limitation on prisoners voting in Scotland.

12 Written evidence from Colin Murray

13 A remnant of this system in place to this day sees business owners, in addition to residents, maintain a vote in the context of City of London elections (see Part II of the City of London (Various Powers) Act 1957).

14 Q 106

15 Draft Bill, p 3

16 *The Times*, 24 February 1950

17 Written evidence from Robert Walter MP

18 See HC Deb., 25 July 1950, cols. 380-381 and HC Deb., 6 December 1951, col. 2544

18. Under section 1 of the Criminal Law Act 1967 the distinction between felonies and misdemeanours was abolished. The effect of Schedule 3 of the Act, alongside Schedule 2 of the Criminal Law Act (Northern Ireland) 1967, was to amend section 2 of the Forfeiture Act 1870 by removing any reference to felony, with the result that the disqualifications set out in the 1870 Act now apply only to those convicted of treason. These changes accordingly had the effect of removing any express limitation on prisoner voting, bringing the law in England, Wales and Northern Ireland into line with Scottish law. During debate on the 1967 Act the Parliamentary Under-Secretary of State of the Home Office, Lord Stonham, stated that:

“By Section 2 of the Forfeiture Act 1870, conviction of felony resulting in imprisonment for over twelve months disqualifies the offender from holding office under the Crown, or various other offices; from membership of either House of Parliament; from voting at elections ... and the Government agree with the Criminal Law Revision committee that these automatic disqualifications should not be continued.”¹⁹

19. These changes meant that from 1967 to 1969 there was no statutory restriction on the right of prisoners to vote. However, administrative restrictions deriving from the rules governing the preparation of the electoral register and the use of postal ballots remained in force. As we have noted, under the 1948 Act electors were entitled to apply for a postal ballot if they were “no longer resident at their qualifying address”, that qualifying address being their normal home address. Since prisoners were not authorised to register their place of detention as a “qualifying address”, they could in practice vote only until a new electoral register was published (a maximum of one year after the start of their sentence), which would no longer list them at their previous home address.

The prohibition on prisoner voting

20. A comprehensive statutory prohibition on convicted prisoners voting was introduced under section 4 of the Representation of the People Act 1969. This change in the law followed a recommendation by the Speaker’s Conference on Electoral Law, which met between 1965 and 1968. No record of the Conference’s deliberations has been made public, but under the leadership of the then Speaker of the House of Commons, Horace King, the Conference produced its interim recommendations in March 1966, ahead of the General Election scheduled for that month. Among these was the recommendation that “a convicted prisoner who is in custody should not be entitled to vote”,²⁰ a recommendation which would be repeated in the Conference’s final report.²¹

21. The ban contained in the 1969 Act was subsequently replaced by section 3(1) of the Representation of the People Act 1983, which remains in force today:

“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 election.”

19 HL Deb., 1 November 1966, col.508

20 *Letter Dated 7th March 1966 from Mr. Speaker to the Prime Minister* (1966), Cm 2932, p 1

21 *Final Report of the Conference on Electoral Law* (1968), Cm 3550, p 4

22. Apart from the remarks Lord Stonham, during the passage of the Criminal Law Act 1967, there seems to have been no debate on prisoner voting in Parliament during either the late 1960s or during passage of the 1983 Act. As Lord Sumption has noted in his judgment in *Chester and McGeoch*, this may reflect both “the attention which had already been given to the issue by the Speaker’s Conference, and the complete consensus on the appropriateness of the voting ban.”²² In comparison with the historic moves to lower the voting age at general elections to 18 contained within the Representation of the People Act 1969, the provisions barring prisoners from voting may well have been regarded as a minor issue.

Modifying the prohibition on prisoner voting

23. The first important reconsideration of the prohibition on prisoner voting took place with the enactment of the Representation of the People Act 2000, which amended the 1983 Act to allow prisoners held on remand to vote. Although the prohibition contained in section 4 of the 1969 Act had been formally limited to convicted prisoners (as had been the recommendation of the preceding Speaker’s Conference) administrative restrictions around the designation of a place of residence had in practice prevented all prisoners, including those held on remand, from voting. The changes introduced in 2000 were therefore presented to Parliament not as restoration of a right, but as a means to enable remand prisoners to exercise an already existing right. In the words of the minister, George Howarth MP, “remand prisoners ... already have the right to vote. The Bill’s provisions will simply make it easier for them to register and thereby gain access to the vote.”²³ This was achieved by inserting section 7A into the 1983 Act, which permitted a remand prisoner to be regarded “as resident at the place at which he is detained” for the purposes of the electoral register.

24. The removal of restrictions upon remand prisoners voting in 2000 meant that the United Kingdom’s prohibition could be directly connected to the concept of punishment for a convicted criminal whose crime was serious enough to warrant imprisonment. Mr Howarth accordingly affirmed that “absence of rights, including the right to vote, is part of the punishment of a convicted prisoner.”²⁴ This has, in essence, remained Government policy ever since.

Summary

25. The historical record shows that:

- Under the Forfeiture Act 1870, which extended to England, Wales and Ireland, prisoners convicted of a felony and sentenced to more than 12 months were expressly prohibited from voting. Those serving sentences of 12 months or less were disenfranchised not by an express prohibition, but by the simple fact that they could not register to vote or access the polls while in prison.

22 *Chester and McGeoch*, paragraph 136

23 HC Deb., 15 December 1999, col. 300

24 *Ibid*

- In the years following the Second World War the express statutory restrictions on prisoner voting were progressively relaxed. In Scotland, following the abolition of the status of “outlaw”, no express prohibition on voting applied to any prisoners between 1949 and 1969. Following passage of the Representation of the People Act 1948 convicted prisoners in England, Wales and Northern Ireland who were not subject to the partial prohibition in the Forfeiture Act 1870 were also able to vote by postal ballot as long as they were still registered at their home address.
- Though there is evidence that prisoners did vote by post in general elections in the 1950s, prisoners were only able to exercise their right to vote until such time as the electoral register for their home district was re-published. This meant that convicted prisoners lost the right to vote after spending a maximum of one year in custody.
- Following the abolition of the express restrictions of the Forfeiture Act 1870 by means of the Criminal Law Act 1967 and the Criminal Law Act (Northern Ireland) 1967, all prisoners in England, Wales and Northern Ireland, like prisoners in Scotland, were able to vote by postal ballot, subject to the administrative restriction outlined above.
- The current prohibition on UK prisoner voting dates from the enactment of the Representation of the People Act 1969, which gave effect to the recommendations of the Speaker’s Conference on Electoral Law.
- The first explicit consideration of prisoners’ rights in the context of prisoner voting came in 2000, with the passage of the Representation of the People Act 2000, which established an administrative mechanism whereby remand prisoners could exercise their already existing right to vote.

3 The history of prisoner voting and the European Convention on Human Rights

The drafting of the First Protocol

26. A significant part of the evidence received by the Committee related to the intention of the drafters of Article 3, Protocol 1 of the European Convention on Human Rights. The First Protocol, which was signed in 1952, provided for three additional rights: the right to property, the right to education and the right to free and fair elections to the legislature. The AIRE Centre told us that the United Kingdom negotiators had excluded these three rights from the original Convention “primarily owing to difficulties it foresaw in the status of some of those rights in the British colonies”²⁵—though it is clear that in the case of Article 3 other factors also came into play.

27. The wording of Article 3, Protocol 1 is as follows:

“The High Contracting Parties 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.”

28. The Article does not state, in terms, that there is a “right to vote”, and some witnesses, including Jonathan Fisher QC, Martin Howe QC, Anthony Speaight QC, and Dominic Raab MP, David Davis MP and Jack Straw MP in their joint submission, told us that the European Court of Human Rights, in interpreting the Article as providing a right to vote, had ignored the intention of its original drafters. Mr Raab, in a paper published in 2011, in which he analysed the Convention’s *Travaux Préparatoires* (the official records of the negotiation of the Convention and its Protocols), drew the following conclusion:

“It is ... clear that Britain did not sign up to giving prisoners a right to vote. In fact, British negotiators successfully precluded such a right from the inclusion in the text of the ECHR.”²⁶

29. Other witnesses, including the AIRE Centre and its founder, Nuala Mole, and Lord Lester of Herne Hill QC, presented a different interpretation of the *Travaux Préparatoires*. Lord Lester, for example, told us that “there is nothing there to indicate any intention by the framers to exclude voting rights.”²⁷

30. There is agreement on both sides of this debate that UK negotiators successfully objected to inclusion of the term “universal suffrage” during the drafting of this provision; it is also clear that in so doing the negotiators did not directly refer to prisoners voting. The UK’s principal negotiator, Sir Oscar Dowson, noted that in “no State is the right to vote enjoyed even by citizens without qualifications”,²⁸ but the specific concerns he raised related to the potential impact of the term “universal suffrage” within the colonies, its

25 Written evidence from the AIRE Centre. The Convention initially extended to the UK’s remaining colonies.

26 Dominic Raab MP, ‘Strasbourg in the Dock: Prisoner voting, human rights & the case for democracy’ (2011), p 6

27 Q47. See also written evidence from the AIRE Centre and Nuala Mole’s comments at Q 32.

28 *Travaux Préparatoires*, III, p 182

impact upon the legitimacy of the unelected House of Lords, and its compatibility with the first-past-the-post voting system used in UK general elections.²⁹

The doctrine of the “living instrument”

31. A second issue that has been raised by critics of the judgment in *Hirst* is that the ECtHR has ignored the basis of its jurisdiction by engaging in an unwarranted extension of the rights contained in the Convention under the “living instrument” doctrine. This doctrine was established by the Court in a 1978 case, *Tyrer v United Kingdom*, which related to the use of judicial corporal punishment (“birching”) in the Isle of Man. The plaintiff alleged that the practice of birching was contrary to Article 3 of the Convention, which states that “No-one shall be subjected to torture or to inhuman or degrading treatment or punishment”. While there was no reason to believe that the drafters of Article 3 were in any way concerned with birching, the judgment stated that:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”³⁰

The Court accordingly concluded that birching was a “degrading ... punishment”, and therefore contrary to Article 8.

32. Since the 1970s the “living instrument” doctrine has been held by the Court to mean that the Convention should not be set in stone (and read in accordance with prevailing standards when its core provisions were accepted in the 1950s), but that it should keep pace with emerging “common” European standards.³¹

The “right to vote” under Article 3, Protocol 1

33. Article 3, Protocol 1 is not phrased in terms of a right to vote, but since 1987 the Court has taken the view that when this provision speaks of the responsibility of signatory states to “ensure the free expression of the opinion of the people in the choice of the legislature”, it is the Court’s duty to clarify the limits of these obligations in terms of individual rights.³² This development seemed to attract little controversy at the time, possibly because the Court placed such emphasis in its judgment on the wide “margin of appreciation” enjoyed by states in interpreting this right.

34. The ECtHR has used the term “margin of appreciation” in hundreds of rulings and decisions to take account of the room for manoeuvre that national authorities may be allowed in fulfilling some of their main obligations under the Convention. The term was defined in the case of *Handyside v United Kingdom*, where the Court explained that “the machinery of protection established by the Convention is subsidiary to the national system

29 A.W. Brian Simpson, *Human Rights and the End of Empire* (2001) pp 765-766

30 *Tyrer v UK* (1978) 2 EHRR 1, paragraph 31

31 See E. Bates, ‘British Sovereignty and the European Court of Human Rights’ (2012) 128 LQR 382, 397

32 *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1

safeguarding human rights.” The Court observed that although national authorities enjoyed a “margin of appreciation”, this went “hand in hand with ... European supervision.”³³

35. Certain Articles of the Convention give examples of specific matters that a state may take into account when placing restrictions on a Convention right: for example Article 10(2) provides that the right to freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.” Qualifications of this sort have also been extended, by analogy, to other Articles which are not restricted explicitly by the terms of the Convention—the Court then inevitably goes on to consider what it describes as the “proportionality” of the measure (see chapter 7). This presents a difficulty, in that the “margin of appreciation” as a general concept, rather than as an explicit qualification of specific rights, is not strictly defined, with the result that its application is at the sole discretion of the Court.

36. In its developing Article 3, Protocol 1 jurisprudence, the ECtHR has not imposed a requirement for universal suffrage, recognising that the right to vote is not absolute. Instead it has proceeded on the basis that “in the twenty-first century, the presumption in a democratic state must be in favour of inclusion.”³⁴ But this approach, while acknowledging limitations on the right to vote, demonstrates that it is open to the Court to develop rights over time—a right that was not stated in terms in the twentieth century has become, in the twenty-first, a clear “presumption”. The Court has acknowledged that this presumption can be overridden in the case of reasoned and proportionate exceptions,³⁵ but the margin of appreciation allowed to states in applying such exceptions has not been defined, and the case-law is inconsistent.³⁶

37. The Court’s jurisprudence on prisoner voting is explored in more detail below: the fundamental issue for Parliament, and potentially for other national parliaments, is that the “living instrument” doctrine not only underpins the development of Article 3, Protocol 1 jurisprudence since the 1980s, but will presumably underpin future jurisprudence, with uncertain and far-reaching consequences. In simple terms, there is a risk that the goal-posts will continue to move, as the Court’s jurisprudence moves further from what was agreed by the signatory states in 1950.

Hirst v United Kingdom (No.2)

38. The United Kingdom’s current difficulties over the issue of prisoner voting can be traced back to the decision of the ECtHR in the case of *Hirst v United Kingdom (No. 2)*.³⁷ The background to the case is as follows: Mr Hirst, who had killed his landlady, pleaded guilty in 1980 to manslaughter on the grounds of diminished responsibility, and was sentenced to life imprisonment. While in prison, he brought legal proceedings in the domestic courts, seeking a declaration that section 3 of the Representation of the People

33 *Handyside v United Kingdom* (1976) 1 EHRR 737, paragraph 49

34 *Hirst*, paragraph 59

35 *Scoppola v Italy (No. 3)* (2012) 56 EHRR 5, paragraph 104

36 See below, paragraphs 49–53

37 Part of Mr Hirst’s original application, lodged in 2001, was deemed inadmissible by the Fourth Section of the ECtHR on 8 July 2003, with the result that the remaining elements of his application were taken forward under the title “No. 2”.

Act 1983 was incompatible with Article 3, Protocol 1 to the European Convention on Human Rights.

39. Mr Hirst’s application was heard by the Divisional Court in 2001.³⁸ It was refused and he was also refused permission to appeal. Lord Justice Kennedy concluded, among other things, that:

“There is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts.”³⁹

40. Mr Hirst then brought an application before the European Court of Human Rights. His case was allocated to the Fourth Section of the Court, and following a hearing on 16 December 2003, the Court held unanimously that there had been a violation of Article 3, Protocol 1. On 23 June 2004 the Government made a request for the case to be referred to the Grand Chamber of the European Court of Human Rights. In a judgment delivered on 6 October 2005, the Grand Chamber held by 12 votes to 5 that there had been a violation of Article 3, Protocol 1 to the Convention.

41. The Court ruled, *inter alia*, that the right to vote was “not a privilege.” It concluded:

“In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle.”

It went on to add that:

“The severe measure of disenfranchisement was not to be undertaken lightly and the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.”⁴⁰

42. The Court acknowledged that the disenfranchisement of convicted prisoners “may be considered to pursue the aims of preventing crime and enhancing civic responsibility and respect for the rule of law.” But while acknowledging that these might be “legitimate aims”, the Court determined that the means whereby they were pursued, what it described, though without defining the term, as a “blanket ban”⁴¹ on convicted prisoners voting, was a general, automatic and indiscriminate restriction on a vitally important Convention right, which fell “outside any acceptable margin of appreciation.” It stated that although the

38 His case was heard together with the application for judicial review of two other prisoners (*Hirst v Attorney General; Pearson and Martinez v Secretary of State for the Home Department* (2001) EWHC Admin 239).

39 *Hirst v Attorney General*, paragraph 41

40 *Hirst v United Kingdom (No. 2)*, paragraphs 59, 71

41 The phrase is used several times in the judgment, initially quoting the terms of Mr Hirst’s application (paragraph 3), though it appears to have been adopted by the Court thereafter.

Representation of the People Act 2000 had granted the vote to remand prisoners, it remained a “blunt instrument.” Moreover, it said that the prohibition applied to prisoners:

- Irrespective of the length of their sentence;
- Irrespective of the gravity of their offence;
- Irrespective of their individual circumstances.

43. The Court considered the weight to be attached to the position adopted by the legislature in the United Kingdom and stated that “there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.” It added: “it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.” It dismissed that Government’s argument that that the ban was proportionate in that it was restricted to those “convicted of crimes serious enough to warrant a custodial sentence.”⁴²

44. The Court considered an application for £5,000 in damages which was made by Mr Hirst for “suffering and distress caused by the violation.”⁴³ The UK Government contended that a finding of a violation should in itself constitute just satisfaction for the applicant. If, alternatively, the Court were to make an award, it considered the amount should not be more than £1,000.

45. The Court concluded that “it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with this judgment. In the circumstances, it considers that this may be regarded as providing the applicant with just satisfaction for the breach in this case.”⁴⁴ It refused to award any monetary compensation. Nor did the Court give any significant guidance as to what, if any, restrictions on the right of convicted prisoners to vote would be compatible with the Convention.

46. Five members of the panel (including the Court’s President and a future President of the Court) dissented. They noted that “unless restrictions impair the very essence of the right to vote or are arbitrary, national legislation on voting rights should be declared incompatible with Article 3 only if weighty reasons justify such a finding.”⁴⁵ The dissenters also noted that the Court should be very careful not to assume legislative functions and that there was little consensus in Europe about whether or not prisoners should have the vote. They took note of the multi-party Speaker’s Conference on Electoral Law (mentioned in Chapter 2), indicating that it had unanimously recommended that convicted persons should not be entitled to vote. They also recognised that the Representation of the People Act 1983 had been amended in 2000 to enable remand prisoners and un-convicted mental patients to vote.

42 *Hirst*, paragraph 79

43 *Hirst*, paragraph 91

44 *Hirst*, paragraph 93

45 Joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, paragraph 5

47. Following the decision in *Hirst*, the most notable case in the domestic courts (until 2013) was that of *Smith v Scott*,⁴⁶ a decision of the Scottish Registration Appeal Court. That court recognised the incompatibility of section 3 of the Representation of the People Act with Article 3, Protocol 1 of the Convention and made a “declaration of incompatibility” under the Human Rights Act 1998.⁴⁷ This would have authorised the Government to use the “remedial order provisions” contained in section 10 of the 1998 Act, under which the Secretary of State may by order (subject to affirmative procedure in both Houses) amend any provisions in primary legislation found to be incompatible with the Convention. The Government declined to use these powers. The domestic courts refused to make any further declarations in a series of subsequent cases, and the issue eventually reached the UK Supreme Court in the summer of 2013 (discussed further below).

Subsequent developments in Strasbourg

48. Further judgments by the European Court of Human Rights have involved not only the United Kingdom but a number of other countries maintaining complete or partial bans on prisoner voting. Unfortunately some of these have muddied the waters, making it less clear what changes to the law were required to achieve compliance with the Convention.

49. In the case of *Frodl v Austria*, decided by the First Section of the Court, but never substantively considered by the Grand Chamber, the Court appeared to narrow the margin of appreciation open to States almost to vanishing point, finding that the Austrian law that all those convicted of crimes involving intent and sentenced to more than one year in prison should lose the right to vote was also in breach of Article 3, Protocol 1. The Court concluded that:

“Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of law but by the decision of a judge following judicial proceedings.”⁴⁸

50. The decision in *Frodl* became final in October 2010. As the UK Government’s submission to this Committee observed, the judgment, though directly binding only on Austria, was significant to the UK since it formed part of the wider body of Strasbourg case law.⁴⁹

51. The case of *Greens and M.T. v United Kingdom*,⁵⁰ brought by two prisoners who, under the provisions of the Representation of the People Act 1983, had been ineligible to vote in either the 2009 European parliamentary elections or the 2010 general election, was also heard in 2010. The Court again held that there had been a violation of Article 3, Protocol 1 to the Convention, as the United Kingdom had failed to implement the Grand Chamber’s

46 *Smith v Scott*, 2007 SC 345

47 The Human Rights Act does not permit the domestic courts to strike down primary legislation, even where it is in breach of the European Convention on Human Rights. Instead they may make a “declaration of incompatibility”, in the expectation that Parliament will then take steps to address the incompatibility.

48 *Frodl v Austria* (2011) 52 EHRR 5, paragraph 28

49 Written evidence from Her Majesty’s Government

50 *Greens and M.T. v United Kingdom* (2010) ECHR 1826

decision in *Hirst*. In those circumstances, and having received in excess of 2,000 similar applications, the Court decided to adopt its pilot judgment procedure.⁵¹ The Court gave the United Kingdom a six-month deadline to bring forward legislative proposals in this area. This deadline originally expired in October 2011. Following the judgment in a further case, *Scoppola v Italy (No.3)*,⁵² in which the United Kingdom intervened, the deadline for bringing forward legislative proposals was extended to November 2012. Consideration of the cases outstanding against the UK was adjourned to 30 September 2013.

52. In *Scoppola v Italy* the Grand Chamber of the ECtHR again considered prisoner voting. The rules governing disenfranchisement in Italy are, in outline, that those sentenced to five or more years in prison are disenfranchised for life (but with the possibility of applying for re-enfranchisement following release), and that those given sentences of between three and five years are disenfranchised for five years. The UK Government took the opportunity to intervene, but in the event the court confirmed the judgment in the case of *Hirst*, that a general and automatic disenfranchisement of all serving prisoners was incompatible with the Convention. At the same time, the Court found in favour of the Italian approach, while accepting that Council of Europe States should have a wide discretion as to how they regulate prisoner voting, both as regards the type of offence that should result in the loss of the vote, and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from the application of a general law.

53. Thus it can be seen that the Court in *Scoppola* rowed back from the position adopted in *Frodl*. In particular, the Grand Chamber indicated that it did not agree with the decision of the lower chamber in *Frodl* that the decision on disenfranchisement had to be left to a judge.⁵³ It also made clear that the rights enshrined in Article 3, Protocol 1 were not absolute; that there was room for “implied limitations”; and, that “the Contracting States must be afforded a margin of appreciation in this sphere.”⁵⁴ The Grand Chamber concluded that the Italian law was not a disproportionate interference with the applicant’s Convention rights. In reaching that decision, it had regard to the fact that:

“in Italy there is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years’ imprisonment or more, regard being had to the circumstances in which they were committed and to the offender’s personal situation.”⁵⁵

51 The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address these problems. The idea is that the ECtHR decides a ‘leading’ case or cases. The other cases are then expected to be returned to the domestic system to make use of the remedy created in response to the lead, or pilot, judgment, rather than be adjudicated by the ECtHR itself.

52 *Scoppola v Italy (No. 3)* (2012) 56 EHRR 663

53 The Strasbourg Court observed that “while the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge”.

54 *Scoppola v Italy*, paragraph 83

55 *Scoppola v Italy*, paragraph 108

54. The fact that the Italian system allows convicted persons who have been permanently deprived of the right to vote to recover that right was also a significant factor in the Court's decision.⁵⁶

55. The decision in *Scoppola* marked the end of the road in the United Kingdom's attempts to make the Grand Chamber reconsider its principal conclusion on the issue of prisoner voting, and it is now clear that the ECtHR will not accept what it considers to be a "blanket ban."⁵⁷ It said that:

"When disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3."⁵⁸

56. In two recent cases involving Russia and Turkey the Court has confirmed that general prohibitions on prisoner voting are contrary to Article 3, Protocol 1.⁵⁹ These cases, while not affecting the UK directly, confirm the growing body of case-law on this issue.

57. A further case, which is directly applicable to the UK, is the 2013 decision in *McLean and Cole v United Kingdom*, which addressed the scope of the right in question in terms of the elections to which it applied. The Court noted that the wording of Article 3, Protocol 1 "is limited to elections concerning the choice of legislature and does not apply to referendums." The Court also confirmed that the UK's Convention obligations did not extend to local government elections, as local authorities are "the repositories of powers which are essentially of an administrative nature."⁶⁰

58. Finally, in October 2013 the Committee received evidence that the cases outstanding against the UK (now referred to as *Firth and others v United Kingdom*) had been reactivated and would be heard by the Court in due course. The Attorney General told us that the United Kingdom government was "not clear" why the Court had reopened the "clone cases" in view of the publication of the draft Bill and this Committee's consideration of it. He said:

"We have written to the Court to enquire of the Court as to why these have currently been reactivated. Clearly those cases may well be amenable to damages being awarded if the UK does nothing and, of course, thereafter there may well be fresh cases brought each time we come to an election at which people argue that they had the right to vote."⁶¹

56 Under Italian law, three years after having finished serving a sentence, a person can apply for rehabilitation, which is conditional on a consistent and genuine display of good conduct and extinguishes any outstanding ancillary penalty. The Court indicated that this ensured that the Italian system was not "excessively rigid."

57 See above, footnote 40

58 *Scoppola v Italy*, paragraph 96

59 *Anchugov and Gladkov v Russia* (ECHR 203 (2013)) and *Söyler v Turkey* (ECHR 260 (2013))

60 *McLean and Cole v United Kingdom* (2013), Application Nos. 12626/13 and 2522/12, paragraphs 32, 29

61 Q 195

Conclusions of the Committee

59. The European Court of Human Rights has not provided the United Kingdom with specific guidance as to what is considered necessary for compliance with Article 3, Protocol 1 of the European Convention on Human Rights. Having identified that the current prohibition on convicted prisoners voting breaches the right to vote, the Court maintains that it is up to the UK to make use of its margin of appreciation to find a solution that reflects national circumstances, while complying with the fundamental principles set out in the Court's judgments.

60. We note that the Court's approach has developed unpredictably in recent years. We also note the concerns expressed by some witnesses over the "living instrument" doctrine, and the uncertainty implicit in that doctrine.

61. With these provisos, we derive the following conclusions from the Court's recent jurisprudence:

- A measure disenfranchising all convicted prisoners in detention is not considered to be acceptable, and any modified prohibition, if it is to satisfy the European Court of Human Rights and avoid being seen as "automatic and indiscriminate", will have to be seen to discriminate between less serious and more serious offences and may be expected to have some regard to individual circumstances.
- The Court has partially retreated from the position that appeared to be adopted in *Frodl v Austria*, that the decision on prisoner disenfranchisement must be taken by a judge; nor does there need to be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement.

62. The unfreezing on October 2013 of 2,354 cases on prisoner voting by the European Court of Human Rights, due to the United Kingdom's failure to implement the decision of the Court in the case of *Hirst v United Kingdom (No. 2)*, means that finding a resolution to this issue has become particularly pressing. We are concerned that, at a time when this Joint Committee is actively considering legislative proposals responding to the ECtHR's judgment, the Court should have seen fit to re-start judicial proceedings.

The approach of the domestic courts

63. As well as taking cases to the ECtHR, prisoners have sought to bring cases before the domestic courts. Following the declaration of incompatibility in *Smith v Scott*,⁶² the UK courts have refused to make any further such declarations.⁶³ The domestic courts have also refused to interpret the provision in section 3 of the Representation of the People Act 1983 in such a way as to remedy the incompatibility.⁶⁴ In 2013 the appeals of *R (on the*

62 See above, paragraph 47

63 See, for example: *R v Secretary of State, ex parte Toner and Walsh* (2007) NIQB 18; *Chester v Secretary of State for Justice and another* (2009) EWHC 2923 (Admin) and (2010) EWCA Civ 1439

64 Section 3 of the Human Rights Act 1998 provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

application of Chester) v Secretary of State for Justice and McGeoch v The Lord President of the Council were heard by the Supreme Court.

64. The cases both related to prisoners who had been convicted of murder and sentenced to life imprisonment. Before the Supreme Court the Attorney General sought to re-open the question of prisoners' entitlement to vote under the Convention. In addition to arguments raised under the Human Rights Act and the ECHR, the prisoners also sought to rely on European Union law (in particular, in respect of the general prohibition on voting in European Parliamentary and municipal elections).

65. The Supreme Court declined the Attorney General's invitation not to apply the principles in *Hirst*. It also declined to make any further declaration of incompatibility (as it would serve no purpose to do so) and concluded that the prisoners were not granted any right to vote under European Union law. Lord Mance noted that in response to the Strasbourg Court's deadline for action, a draft Bill had been published and was being considered by this Committee.

66. Although Lord Mance gave the leading judgment, Lord Sumption took the opportunity to provide a helpful and detailed history of objections to prisoner voting. He described the position of the ECtHR as "curious." This was because the Strasbourg Court had accepted that it was "open to a Convention State to fix a minimum threshold of gravity which warrants the disenfranchisement of a convicted person"; that "the threshold beyond which he will be disenfranchised may be fixed by law by reference to the nature of the sentence"; and, that disenfranchisement may be automatic once a sentence above that threshold has been imposed. But Lord Sumption noted that the Court nonetheless refused to permit the threshold for disenfranchisement to correspond with the threshold for imprisonment. Despite this inconsistency, he saw "no realistic prospect that further dialogue with Strasbourg will produce a change of heart". He also re-stated the fundamental principle underlying UK adherence to the ECHR:

"It is an international obligation of the United Kingdom under article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute."⁶⁵

4 Parliamentary sovereignty and the European Court of Human Rights

Introduction

67. The previous Government’s initial response to the judgment of the European Court of Human Rights in the *Hirst* case was summarised by Jack Straw in his autobiography, *Last Man Standing*, in this way:

“In my last ministerial post as Justice Secretary I’d made many decisions about many things; but I’d also spent three years ensuring that the government took no decision in response to a judgment by the European Court of Human Rights that the UK’s ban on convicted prisoners being able to vote was unlawful. I’d kicked the issue into touch, first with one inconclusive public consultation, then with a second.”⁶⁶

68. These delays meant that no firm steps were taken until after the 2010 election, when Mr Straw, along with Mr David Davis, made use of the new mechanism of the Backbench Business Committee to initiate a debate in the House of Commons. In the course of the debate on 10 February 2011 many Members expressed their strong opposition to the *Hirst* judgment. The resolution that was then agreed, by an overwhelming majority of 234 votes to 22, stated “that legislative decisions of this nature should be a matter for democratically-elected lawmakers”. The resolution also expressed support for “the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.”⁶⁷

69. The motion was passed on a free vote in which frontbenchers from both sides chose not to participate. But both the Prime Minister and the Labour Shadow Justice Minister, Sadiq Khan MP, have made their feelings plain. At Prime Minister’s Questions, in October 2012, the Prime Minister said:

“The House of Commons has voted against prisoners having the vote. I do not want prisoners to have the vote, and they should not get the vote—I am very clear about that ... no one should be in any doubt: prisoners are not getting the vote under this Government.”⁶⁸

70. In a press release the following month, Sadiq Khan stated:

“Labour’s policy is, and always has been, that prisoners shouldn’t be given the vote. Committing a crime so serious that a judge has deprived you of your liberty means you should also lose the ability to vote in elections.”⁶⁹

71. We note that there has been no opportunity for the House of Lords to debate or express a view on the issue of prisoner voting, and that until both Houses have come to a view it

66 Jack Straw, *Last Man Standing: Memoirs of a Political Survivor* (2012), pp 538–539

67 HC Deb., 10 February 2011, col. 586

68 HC Deb., 24 October 2012, col. 923

69 Labour Party Press Release, *Labour’s policy is that prisoners should not be given the vote*, 22 November 2012

will not be possible to confirm the will of Parliament as a whole. Nevertheless, the clearly expressed views of the elected chamber, and of both major political parties, have led us to consider the relationship between democratically elected national legislatures and the European Court of Human Rights. This has in turn led us to consider the two constitutional principles of the rule of law and parliamentary sovereignty.

Parliamentary sovereignty

72. The classic summary of the constitutional principle of the sovereignty of Parliament was given by A. V. Dicey in 1885: “The principle of Parliamentary sovereignty mean neither more nor less than this, namely that Parliament ... has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”⁷⁰ For Walter Bagehot, parliamentary sovereignty was demonstrated by the fact that “the ultimate authority in the English Constitution is a newly-elected House of Commons.”⁷¹

73. What this means in practice is that Parliament is generally held to enjoy complete legislative supremacy. As Dicey said, “there is no law which Parliament cannot change”⁷². The first edition of Thomas Erskine May’s *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, published in 1844, described this supremacy in the following terms:

“The legislative authority of Parliament extends over the United Kingdom, and all its colonies and foreign possessions; there are no other limits to its power of making laws for the whole empire than those which are incident to all sovereign authority—the willingness of the people to obey, or their power to resist. Unlike the legislatures of many other countries, it is bound by no fundamental charter or constitution; but has itself the sole constitutional right of establishing and altering the laws and government of the empire.”⁷³

Sir Robert Rogers and Rhodri Walters, in a contemporary discussion of Parliament’s legislative supremacy, note that “the courts of law are under a duty to apply legislation, even if that legislation might appear to be morally or politically wrong.”⁷⁴

International legal obligations

74. Some writers on constitutional theory have argued that Dicey’s view of parliamentary sovereignty now needs to be qualified by reference to the increasing number of international law obligations which bind the United Kingdom.⁷⁵ Parliament itself has, in many cases, entered into these obligations—for instance, by passing the European Communities Act 1972, setting out the terms of the UK’s membership of the European Union. The effect of these obligations is, in the words of the current edition of *Erskine May*,

70 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885)

71 Walter Bagehot, *The English Constitution* (1867)

72 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885)

73 Quoted in Robert Rogers and Rhodri Walters, *How Parliament Works*, 6th Edition (2006), p 80

74 *Ibid*, p 81

75 See for instance Nevil Johnson, *Reshaping the British Constitution* (2004), pp 129–133

that while “the authority of Parliament over all matters and persons within its jurisdiction was formerly unlimited ... in the twentieth century, however, Parliament accepted that its unlimited legislative authority should be qualified.”⁷⁶ Of the UK’s membership of the European Union, *Erskine May* states:

“Accession of the United Kingdom to membership of the European Communities (now the European Union) on 1 January 1973 qualified the exclusive legislative authority of the United Kingdom Parliament ... Although the primary obligations created by [section 2 of the European Communities Act 1972] are susceptible of amendment by Parliament, by virtue of the doctrine of the supremacy of Parliament, the courts have on a number of occasions had to consider the relative priority of United Kingdom statute law and law which has effect by virtue of the Treaties and the Act of 1972. It has been decided that European law takes priority over inconsistent United Kingdom law, not because the former supplants the latter, but because European law is part of United Kingdom law.”⁷⁷

Thus in respect of EU law Parliament remains sovereign, in that it can at any time amend or repeal the European Communities Act 1972—in an extreme case, terminating UK membership altogether. But on a day-to-day basis EU law has priority over domestic law.

75. These consequences of EU membership are generally acknowledged, but the significance of the international law obligations arising out of UK ratification of the Convention is less clear. The United Kingdom entered into an obligation to abide by the terms of the Convention; Parliament could, as in the case of EU membership, formally “denounce”⁷⁸ the Convention, in whole or in part, thereby bringing to an end international law obligations arising out of membership.

76. However, as long as the UK remains party to the Convention certain legal obligations arise out of it. In particular, the UK has ratified Article 25, which provides for a right of individual petition to the Court, and Article 46, under which it is obliged to comply with any judgment of the Court in any case to which it is party. Lord Bingham of Cornhill, in *The Rule of Law*, argued that “the rule of law requires compliance by the state with its obligations in international law as in national law.” He suggested that:

“Although international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so.”⁷⁹

Lord Bingham did not specify what he meant by the “state”, which is required to comply with its obligations under international law. The obligation upon the UK Government is

76 *Erskine May*, 24th Edition (2011), pp 183–184

77 *Ibid*, pp 184–185. Sir Robert Rogers and Rhodri Walters argue that the sovereignty of Parliament has also been limited in practical ways in recent years by the passing of the Human Rights Act and devolution to Scotland and Wales, and, with some qualifications, to Northern Ireland (see R. Rogers and R. Walters, *How Parliament Works*, 6th Edition, (2006), p 82).

78 That is to say, to make a formal announcement of the ending of the UK’s adherence to the Treaty.

79 Tom Bingham, *The Rule of Law*, (2010), p 110

clear, but can such an obligation also attach to a sovereign Parliament, which enjoys complete domestic legislative supremacy? Whereas there are mechanisms for EU law automatically to find its way onto the UK statute book by virtue of the European Communities Act 1972, there is no such mechanism so far as the Convention is concerned. The Convention leaves it to member states to implement judgments of the Court, and when changes to domestic law are required it is for member states to decide how to implement them.

The developing role of the European Court of Human Rights

77. These constitutional questions need to be seen against the backdrop of the ECtHR’s adoption, since the 1970s, of the doctrine of the “living instrument”, which we have touched on in Chapter 3. With the support of this doctrine the Court has interpreted the Convention in such a way as to allow it to intervene in areas which were not anticipated by those who drafted the Convention in the late 1940s—areas which have hitherto fallen under the sole jurisdiction of national parliaments.⁸⁰

78. Interpretation of the Convention as a living instrument has, in some cases, led to outcomes that have ultimately been welcomed by national parliaments, even if they were controversial at the time. The Secretary General of the Council of Europe, Mr Thorbjørn Jagland, cited the Court’s decisions on “the rights of homosexuals in the military.”⁸¹ In cases involving the UK just over a decade ago, the Court held that dismissal from the armed forces on the sole basis of homosexuality was contrary to Article 8 of the Convention (which guarantees the right to private and family life) read together with Article 14 (which prohibits discrimination in the enjoyment of Convention rights).⁸² Yet at the time the UK Government, in its submissions before the Court, had argued that “admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale of armed forces’ personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces”⁸³. Moreover, the House of Commons had itself voted against any change to the Government’s policy, by a majority of 188 votes to 120.⁸⁴ But following the Court’s judgment, the Government acted quickly to end the ban on homosexuals in the military, and today it seems inconceivable that the Government or Parliament would seek to reinstate it. Indeed, Mr Jagland told us that “the rights of LGBT people,” and concern over infringement of these rights in some member states, was now one of the issues raised most frequently and forcefully by the UK Government within the Committee of Ministers.⁸⁵

79. Lord Mackay of Clashfern, while describing the doctrine of the “living instrument” as “quite nebulous”, suggested that it was in practice consistent with the normal conventions governing judicial interpretation of statute law:

80 Q 211

81 Q 179

82 *Smith and Grady v United Kingdom* (1999), 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (2000), 29 ECHR 548

83 *Lustig-Prean and Beckett v UK*, paragraph 71

84 HC Deb., 9 May 1996, cols. 510–511

85 Q 179

“The other option is to think of the convention and the protocols as dead letters. They are alive in the sense that they have effect today. Lord Hoffmann has analysed the idea of the living instrument as a banner under which they have gone fairly far. There is always a question of interpreting the law. The courts interpret the law, but usually in present circumstances. If the law has not been repealed or changed, it is supposed to work in present circumstances.”⁸⁶

The Equality and Human Rights Commission also argued in favour of an element of flexibility and interpretation: “the Convention must be interpreted in the light of its ‘objects and purpose’, central to which is promotion of the ideals and values of a democratic society.”⁸⁷

80. Yet concerns remain over other aspects of the expansion of the Court’s jurisprudence. Lord Hoffmann, in his 2009 lecture to the Judicial Studies Board on ‘The Universality of Human Rights’, claimed that the European Court had been “unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States.”⁸⁸ Lord Hoffmann also argued that the Court lacked “constitutional legitimacy” and suggested that “the proposition that the Convention is a ‘living instrument’ is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by ‘European public order’.”⁸⁹

81. For some of the witnesses to this Committee the issue of prisoner voting was a symptom of far deeper concerns about the expanding jurisdiction of the Court. David Davis MP told the Committee that the issue:

“Highlighted the problem of the effect of the living instrument doctrine in the European Court of Human Rights, which was leading it to intervene in a whole series of areas, not just this one, that we and the original signatories to the convention would not have conceived of. The general concern was that there was no clear democratic mechanism for correcting it. Unlike any national court or court system, international courts do not have a proper democratic override.”⁹⁰

82. Lord Faulks QC tied the issue into the question of the “margin of appreciation”⁹¹ that should be allowed to Council of Europe states when interpreting the Convention:

“The margin of appreciation is something which, in the course of the negotiations over the Council of Europe and the Brighton declaration, it was hoped would be reaffirmed in wider terms. I do not think that was really achieved ... My own view is that, in a number of different fields and not just prisoner voting, there has been a failure by the Strasbourg court to acknowledge the margin of appreciation in the way that it should.”⁹²

86 Q 118

87 Written evidence from the Equality and Human Rights Commission

88 Lord Hoffmann, ‘The Universality of Human Rights’, Judicial Studies Board Annual Lecture, 19 March 2009

89 *Ibid*

90 Q 93

91 See above, paragraph 34

92 Q 36

83. The Lord Chancellor went further, describing the Court as “an institution that has strayed too far from its core purpose to be acceptable”, and suggesting that the Court was “trying to rewrite itself into virtually being a Supreme Court for Europe”⁹³. He said that his concerns were not simply bound up in the question of whether prisoners should get the vote, citing in addition the recent case of *Animal Defenders International v United Kingdom*,⁹⁴ in which the Court upheld the UK’s law restricting expenditure on political advertising by a margin of just 9 to 8:

“The issue around the European Court of Human Rights and the application of the Convention is clearly an evolutionary jurisprudence. It is a jurisprudence without limit; it is able to expand its remit into almost any area that it can justify under the terms of the Convention, which is quite vaguely worded. It has done so extensively over the years. I think that, if we set aside this particular case, my view is that it is now treading too far away from the original intentions of its creators to be acceptable.”⁹⁵

84. It was also suggested that the expansion of the Court’s jurisdiction had led to a ‘democratic deficit’. Dr Pinto-Duschinsky therefore argued for the introduction of a democratic override: “a right to permit national parliaments to override judicial lawmaking by the Strasbourg court. In other words, we should try to negotiate with regard to the European Convention on Human Rights and the Strasbourg court exactly the pattern that exists for the Human Rights Act, namely that if there is a declaration of incompatibility by the judges it goes back to Parliament, which then has the last word.”⁹⁶ Similar concerns have expressed by Lord Sumption, in a recent speech delivered in Malaysia, in which he argued that “the Strasbourg court’s approach to judicial lawmaking gives rise ... to a significant democratic deficit in some important areas of social policy,”⁹⁷ and by the former Lord Justice of England and Wales, Lord Judge, in a speech on 4 December 2013.⁹⁸

85. Lord Mackay, on the other hand, recalling the events of the 1930s and 40s, noted that even democratically elected governments could be guilty of the gravest crimes: “The arrangement that was made by the European powers after the war was intended to deal with that situation, and, if necessary, stand up against public opinion that might be misled or misleading.”⁹⁹ Sir Francis Jacobs QC also highlighted the limitations on the authority even of democratically elected legislatures: “Convention rights and their limitations are safeguarded by national law, which is underpinned by a democratic system of government. However that does not of course entitle even a democratically elected legislature to override human rights.”¹⁰⁰

86. A process of reform of the Council of Europe is already under way, not least thanks to the efforts of the United Kingdom Government during its recent 6-month chairmanship of

93 Q 211

94 *Animal Defenders International v United Kingdom* (2013) ECHR 362

95 Q 211

96 Q 58

97 Lord Sumption, ‘The Limits of Law’, 27th Sultan Azlan Shah Lecture, 20 November 2013

98 Lord Judge, ‘Constitutional change: unfinished business’, 4 December 2013, paragraph 47

99 Q 110

100 Written evidence from Sir Francis Jacobs QC

the Committee of Ministers. This led to the Brighton Declaration of April 2012, which confirmed a number of reforms designed to make the Court work more effectively, in particular by reducing the backlog of cases.¹⁰¹ Mr Jagland also referred to the introduction of a new process of appointment for judges of the ECtHR, and emphasised that, as a result of these reforms, “We need to get the best judges and we need to see to it that governments nominate their best judges.”¹⁰²

87. Plainly it is beyond the remit of this Committee to consider further reforms to the Convention system, but equally it is clear to us that concern remains about how the Court interprets the Convention and whether further reform is required.

Can Parliament ignore international law obligations?

88. Announcing the draft Bill, the Lord Chancellor, Chris Grayling, noted that “it remains the case that Parliament is sovereign” citing in support of that statement a judgment by Lord Hoffmann in the case of *ex parte Simms*. In that case, Lord Hoffmann observed that:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal.”¹⁰³

89. The *ex parte Simms* case, as the Lord Chancellor acknowledged, addressed domestic law (the Human Rights Act 1998), rather than the UK’s international law obligations under the Convention itself. This distinction was set out in a 2011 lecture delivered by the current President of the Supreme Court, Lord Neuberger of Abbotsbury:

“It is true that membership of the Convention imposes obligations on the state to ensure that judgments of the Strasbourg court are implemented, but those obligations are in international law, not domestic law. And, ultimately, the implementation of a Strasbourg, or indeed a domestic court judgment is a matter for Parliament. If it chose not to implement a Strasbourg judgment, it might place the United Kingdom in breach of its treaty obligations, but as a matter of *domestic law* there would be nothing objectionable in such a course. It would be a political decision, with which the courts could not interfere.”¹⁰⁴ [emphasis added]

90. Accordingly, if Parliament enacts legislation which does not comply with the *Hirst* judgment, or decides not to legislate to bring UK law into compliance with that judgment, it will put the United Kingdom in breach of its international law obligations. At the same time, there is no legal or other obligation that can require Members of either House of Parliament to vote in a particular way.

¹⁰¹ The Brighton Declaration included agreement to add two new protocols to the Convention, which are currently open for signature. The first of these (Protocol 15) provides for the inclusion of a new recital in the preamble to the Convention, “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”. Protocol 16 provides for non-binding advisory opinions, to be sought by states from the Grand Chamber, in the context of a case before a domestic court or tribunal.

¹⁰² Q 186

¹⁰³ *R v Secretary of State for the Home Department Ex parte Simms* (1999) 3 WLR 328

¹⁰⁴ Lord Neuberger of Abbotsbury, ‘Who are the Masters Now?’, 6 April 2011

91. Lord Neuberger, in his 2011 lecture, described parliamentary sovereignty as “fettered so long as Parliament is required to implement a decision of the Strasbourg court”. At the same time, he acknowledged that:

“Any such fetter remains only so long as the Treaty obligation itself remains valid, but any country can withdraw from the Treaty, and that demonstrates that whatever limit membership imposes on legal sovereignty, it is a fetter which endures only whilst our membership endures—i.e. only while Parliament wants it to endure.”

92. Lord Mackay advanced a similar view, saying that the principle of parliamentary sovereignty “is not an argument against giving effect to the judgment ... It may be a good reason for changing the arrangements, if you can think about a way of doing it, but, as I see it, it does not affect the present situation.”¹⁰⁵ When pressed on whose will should prevail, that of the UK Parliament or the judges of the ECtHR, Lord Mackay said: “I am absolutely clear that Parliament has an obligation, in terms of the treaty to which we are still party, to give effect to the judgment of the Strasbourg court ... That is what we have agreed to, not subject to anything about whether the court will come to the right decision.”¹⁰⁶

93. Nuala Mole, of the AIRE Centre, agreed with Lord Mackay: “The UK is bound, under Article 46 ... to comply with the judgment ... It is the rule of law.”¹⁰⁷ Aidan O’Neill QC, recalling an ancient adage,¹⁰⁸ said that “the law is above you, no matter what, and we have to abide by the law.”¹⁰⁹ Lord Faulks QC agreed, albeit more reluctantly: “I do not think that we have any choice. I think that we should go for minimal compliance ... but, for the moment, we have run out of road in terms of choice.”¹¹⁰

94. Lord Goldsmith QC said that “we signed up in Article 46 to an obligation to respect judgments of the court in cases to which we were party ... the nature of courts is that from time to time they reach decisions with which parties disagree ... [but] the rule of law requires that when you have signed up to an obligation to respect that judgment, you must do so.”¹¹¹ Lord Lester of Herne Hill QC was still more explicit in stating that Parliament, as a constituent part of the United Kingdom state, was under an obligation to comply with the judgment: “Parliament, as well as the Executive, as well as the judiciary, are under an international law obligation that was accepted on behalf of the United Kingdom. This Committee and Parliament as a whole have an obligation.”¹¹²

95. In contrast, Lord Judge, in his speech on 4 December 2013, affirmed that the final decision rested with Parliament:

“In our constitutional arrangements Parliament is sovereign. It can overrule, through the legislative process, any decision of our Supreme Court. In relation to the

105 Q 114

106 QQ 110–111

107 Q 43

108 Attributed to Dr Thomas Fuller, in 1733: “Be you never so high, the law is above you”.

109 Q 43

110 *Ibid*

111 Q 49

112 *Ibid*

Strasbourg Court, and the Convention, is this principle negated by our accession to the treaty obligation contained in Article 46? Do we, can we, accept the obligation ... that when a UK case arises, our Parliament must take 'general measures in its domestic legal order to put an end' to the violations found by the European Court? Can that possibly be required if Parliament disagrees? For me the answer is, of course not."¹¹³

96. The Attorney General, while linking UK compliance with the *Hirst* judgment to the rule of law, used terms that emphasised the moral duty upon all members of the legislature to reflect upon the consequences of non-compliance: "Seeing as, on the whole, the rule of law matters, it must matter to this Committee and should matter to this parliament, as indeed it matters to the government, as to whether you decide to ignore your international legal obligations or find a way of meeting them."¹¹⁴

97. Ultimately, Members of both Houses are free to vote according to their conscience. There are two possible qualifications. The first is the reference in the Ministerial Code to "the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice."¹¹⁵ The second relates to the specific duty placed upon the Lord Chancellor, as part of his oath of office (as amended by section 17 of the Constitutional Reform Act 2005), to uphold the rule of law.

98. The Lord Chancellor was careful to distinguish between these two qualifications, noting that "the Prime Minister is the arbiter of the Ministerial Code and can decide when and how it is applied, whereas, in the case of the Lord Chancellor, I have sworn an oath to uphold the law."¹¹⁶ He therefore indicated that he would seek legal advice before deciding which way to vote:

"I will very carefully listen to what the advice to me is about my obligations, having sworn the oath, and I will uphold the obligations under the oath ... If I were not the Lord Chancellor, you can probably work out which way I would be inclined to vote, but I am Lord Chancellor. I take that very seriously, and therefore my approach as Lord Chancellor has to be carefully judged in the context of what my obligations are."¹¹⁷

Non-compliance and withdrawal from the Convention system

99. We have also considered what would happen if Parliament decided not to abide by the UK's international law obligation to comply with the *Hirst* judgment? One view was expressed by Mr Davis, Mr Straw and Mr Raab:

"If the UK retained its current ban on prisoner voting ... the sanctions at the Council of Europe level would be primarily political. There might be some mild diplomatic

113 Lord Judge, 'Constitutional change: unfinished business', 4 December 2013, paragraph 47; see also the remarks of Lord Justice Laws on the obligation imposed under Article 46, in his lecture 'The Common Law and Europe', given on 27 November 2013.

114 Q 204

115 Cabinet Office, Ministerial Code, May 2010, para 1.2

116 Q 209

117 Q 226

criticism from the Council of Europe’s Committee of Ministers in Strasbourg. However, expulsion from the Council of Europe is utterly implausible. The Council of Europe has not expelled Bulgaria for breaches of the right to life (cases of fatal police brutality), Moldova for the torture of prisoners and Russia for atrocities committed by its armed forces in Chechnya. If the Government refuses to change the law on prisoner voting, the matter will remain on the list of unenforced judgments kept by the Council of Europe.”¹¹⁸

100. This is a plausible assessment of political realities in the Council of Europe. Human rights abuses are indeed widespread in many Council of Europe member states, and the governments of those states frequently drag their feet—sometimes for many years—in complying with judgments of the ECtHR against them. But that is not the situation in which the UK finds itself: rather than simply leaving the *Hirst* judgment to drift the Government, in Option 3 in the draft Bill, has invited Parliament to consider enacting legislation re-stating a law that has been found to be in breach of the Convention. To the best of our knowledge, such a course of action would be without precedent in the history of the Council of Europe. Mr Jagland confirmed that he was not aware of any case in which “any country has said that they do not have the will to execute a judgment ... we have never had anyone say, ‘We will not execute the judgment.’”¹¹⁹

101. Some witnesses therefore argued that the fundamental choice for Parliament was not whether or not to comply with the judgment of the ECtHR in *Hirst*, but whether or not to denounce the Convention—in Lord Neuberger’s phrase, to break the fetter linking us to the Convention system. Dr Pinto-Duschinsky said: “If you are in the game, you play by the rules of the game. If those rules are so burdensome and if the sacrifice is so great ... if you are sacrificing the basis of our democracy, one must not continue to play.”¹²⁰

Legal effects of non-compliance and withdrawal

102. We have also explored some of the practical legal consequences in respect of the *Hirst* judgment that would flow from a decision either not to comply with the *Hirst* judgment, or to denounce the Convention.

103. If the United Kingdom were to continue to enforce its prohibition on prisoner voting, one issue that would arise is whether the Court would seek to award claimants any form of monetary compensation. Though the Court has yet to award claimants compensation in any of the claims relating to the disenfranchisement of prisoners that have been brought before it, this could change. Nils Muižniek, the Commissioner for Human Rights at the Council of Europe, warned the Committee that “the expiry of the deadline for execution, which has already been extended several times, means that the Court may now examine all of the UK cases on an individual basis and award compensation to each of the applicants.”¹²¹ The Government told us, in respect of the existing 2,354 cases, that “if the ECtHR resumed consideration of the adjourned clone cases and decided to award £1,000–£1,500 in each, the total liability in relation to those cases would be approximately £2.4m–

118 Written evidence from David Davis MP, Jack Straw MP and Dominic Raab MP

119 Q 178

120 Q 61

121 Written evidence from Nils Muižniek

£3.5m”. In addition to direct compensation to prisoners, there is also the possibility of legal costs being awarded to lawyers acting on behalf of claimants. Moreover, these cases may prove to be the tip of the iceberg, since new liabilities will arise in respect of every successive election.

104. When we put this risk to the Lord Chancellor, he told us:

“As we stand at the moment, the Court has expressly not awarded damages to any prisoner who has gone to Strasbourg over this issue, and it is not possible for the UK courts to apply compensation in such a situation. Therefore, I am afraid that that question is theoretical. I will cross that bridge if we come to it.”

When he was pressed on the question of whether the Government would pay any compensation awarded by the Court, he replied: “Then you get into further interesting territory, because the fines are not actually enforceable, and Parliament might choose to say to the executive, ‘You cannot pay them’”. The Lord Chancellor acknowledged that “if Parliament votes [to retain the existing -prohibition], I am absolutely certain that the clone cases will be reopened.”¹²²

105. We have also considered whether, if the UK were to take the more radical step of denouncing the Convention, it would remove the UK’s existing obligation to comply with the judgment in *Hirst*. The answer appears to be that it would not.

106. Under Article 65(2) ECHR, “Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.” In other words, denunciation has no retrospective effect, and Mr Giakoumopoulos accordingly argued that “the judgments of the Court that have already been taken need to be executed and implemented, even after the possible denunciation.”¹²³ This view was endorsed by Lord Mackay: “There is provision ... for denunciation of the convention, but the provision appears to me to say that you cannot get out of an obligation that you have already incurred by denouncing the convention after matters have occurred.”¹²⁴

107. In practice, were the UK to decide to leave the entire Convention system, these two issues, of compensation claims and of the continuing obligation to comply with the *Hirst* judgment, could become largely academic, politically if not legally. If the UK decided either to defy the Court or to leave the entire Convention system, it is hard to envisage any future Government abiding by any residual legal obligations arising out of membership.

Political consequences of withdrawal from the Convention system

108. Finally, we have touched on some of the political consequences of non-compliance and, in the most extreme scenario, UK withdrawal from the entire Convention system. We agree with Mr Davis, Mr Straw and Mr Raab that expulsion is unlikely. More significant is that non-compliance would represent a major departure from the UK’s longstanding

122 Q 231

123 Q 180

124 Q 111

approach to its international obligations. This was forcefully stated by the Attorney General, Dominic Grieve MP: “It has been the settled policy of successive United Kingdom governments that we adhere, or seek to adhere—it does not mean we do not sometimes breach our obligations, but that we seek to adhere—to our international legal obligations.” Mr Grieve acknowledged that the “reputational consequences to the United Kingdom” of non-compliance would be “a very serious consideration.”¹²⁵

109. More direct consequences could be felt by the Council of Europe itself. As Mr Jagland said, the UK, as well as being a founder member of the Council of Europe, is commonly regarded as “the best pupil in class”. He feared that a “bad example” set by the UK would encourage others: “Many others will say, ‘If the United Kingdom is doing that, we can also do it’ ... It may be ... the beginning of the weakening of the Convention system and probably after a while there may also be dissolution of the whole system.”¹²⁶ While acknowledging that the difficulties faced by the UK, given its good record of compliance, might suggest that there were problems with the approach being adopted by the ECtHR,¹²⁷ he also pointed out that “for millions of people out there in Europe, this Court and Convention system is protecting their rights,”¹²⁸ and highlighted investment and reform programmes in countries such as Ukraine and Turkey. The UK, he argued, could not insulate itself from such countries: “what happens in Ukraine or Russia influences us and the whole continent.”¹²⁹

110. Mr Jagland’s final point was supported by the Attorney General, who highlighted the recent case of Greenpeace activists, some of them UK citizens, imprisoned in Russia: “potentially some of their best arguments on proportionality may lie with the European Convention on Human Rights and the protection which the Convention may afford them. This is not a dialogue that just concerns the UK; it has a much wider remit.”¹³⁰

Conclusions of the Committee

111. We agree with the evidence of Lord Mackay of Clashfern, that the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights.

112. Parliament remains sovereign, but that sovereignty resides in Parliament’s power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking.

113. A refusal to implement the Court’s judgment would not only undermine the international standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow.

125 QQ 193, 199

126 Q 178

127 Q 185

128 Q 179

129 Q 178

130 Q 193

5 Is there a rational basis for disenfranchisement?

The right to vote and the “social contract”

114. In this chapter we consider whether or not voting is a “right”, and, if it is, whether there is a rational justification for removing the right to vote from prisoners.¹³¹

115. John Locke, in his *Second Treatise of Government of 1690*, described the state of nature as one of “perfect freedom” and “equality”. In combining to form society, Locke argued, people gave up this freedom:

“Because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto, punish the offences of all those of that society; there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it.”

116. Locke accordingly proposed that an implied contract underlay all social obligations; the criminal, by breaking the laws of society and breaching the terms of the social contract, became in effect an outlaw: he “may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security”. William Cobbett, writing more than a century later in 1829, echoed this argument: while acknowledging that “The great right ... of every man, the right of rights, is the right of having a share in the making of the laws”, he argued that “Men stained with indelible crimes are excluded, because they have forfeited their right by violating the laws, to which their assent has been given.”¹³²

117. The existence of a “social contract” has been questioned repeatedly over the centuries, on both philosophical and empirical grounds. David Hume, for example, while conceding that there might have been some “original contract” between rulers and the governed in primitive societies, noted that its application to more advanced societies was “not justified by history or experience in any age or country of the world.”¹³³ In evidence to this Committee, Professor Jeremy Waldron echoed Hume’s scepticism, commenting that “I think it is the case that the social contract is mainly used these days as a convenient fiction, with some opinions differing as to how convenient it is.”¹³⁴

118. Nevertheless, to this day the social contract is cited as a key justification for depriving convicted prisoners of the vote: as the ECtHR noted, one of the planks of the Government’s defence in the *Hirst* case was that “Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.”¹³⁵

131 This chapter uses the term “rights” broadly, without seeking to create a distinction between “rights” and “human rights”. For an alternative approach see the written evidence from Jonathan Fisher QC.

132 William Cobbett, *Advice to Young Men* (1829), Letter VI; Cobbett also excluded women, minors and the insane.

133 David Hume, *Of the Original Contract* (1748)

134 Q 119

135 *Hirst*, paragraph 50

119. In his judgment in *Chester and McGeoch*, Lord Sumption criticised lazy assumptions that UK rules about prisoner voting imposed some form of “civil death” which is justified solely on the basis of the social contract. Citing Locke's account of the social contract, he said that “It is tempting to regard the present British rule about prisoners’ voting rights as a distant reflexion of this view, and plenty of commentators have succumbed to the temptation. But like most rhetoric, this is misleading.”¹³⁶

120. The “social contract”, as described by Locke, is more easily understood by reference to individual “freedoms”, rather than “rights”—he envisaged the perfect freedom of a state of nature being reined in, by common consent to the rule of law, in order to promote the common good. It follows that, in common law countries, citizens have historically been presumed to enjoy all freedoms which have not been explicitly removed or limited by law. In the words of Thomas Hobbes, “A free man ... is he that is not hindered to do what he has a will to do.”¹³⁷ As Lord Hoffmann claimed in 2009, even in the eighteenth century there was a perception across Europe “that England was a free country; that there was, for example, freedom of speech although there was no law which expressly said so.”¹³⁸

121. This principle—that freedoms are enjoyed unless and until they are taken away by law—has deep roots in the common law and in our shared political and constitutional history. The founding texts of the UK constitution, such as the Magna Carta of 1215, the Petition of Right of 1628, the English Bill of Rights of 1689 and the Scottish Claim of Right of 1689,¹³⁹ were drawn up to prevent unwarranted encroachment by the sovereign upon the “liberties” of the English or Scottish people. In each case those concerned by the potential for royal abuse of power sought to reaffirm ancient liberties, rather than seeking to identify and formulate an exhaustive list of “rights” as such. They affirm that the consent of the governed is needed if the state is to encroach upon individual freedoms. Over the centuries the courts, by a narrow construction of statute where necessary, and by developing common law principles of fairness and reasonableness to constrain executive action, have also played a key role in defending the liberties of the subject.

122. One effect of this tradition of “negative liberty” was to make it almost impossible for individuals to enforce “rights” or “freedoms” in the abstract (in other words without an established cause of action), with the result that basic freedoms or rights were on occasion lost or regained by inadvertence rather than design. Voting rights for prisoners, as we have outlined in Chapter 2, were a case in point. For almost a century, the Forfeiture Act 1870 expressly prevented some prisoners from voting. But the restriction on the prison franchise outstripped these express provisions for long periods. For Aidan O’Neill QC, these consequences “happened accidentally”, with little consideration by Parliament: “What happened ... was that voting was tied to residence. If you were no longer in your place of residence, as a matter of fact you could not vote.”¹⁴⁰

136 *Chester and McGeoch*, paragraph 126

137 Thomas Hobbes, *Leviathan* (1651), chapter 2, quoted in Isaiah Berlin, ‘Two concepts of liberty’ (1958)

138 Lord Hoffmann, ‘The Universality of Human Rights’, Judicial Studies Board Annual Lecture 2009

139 See the report of the Commission on a Bill of Rights (December 2012), volume 1, pp 54 ff.

140 Q 34

123. Such accidents worked both ways: the effective re-enfranchisement of many prisoners following enactment of the Representation of the People Act 1948 was also inadvertent, a by-product of the introduction of postal voting.

The emergence of “human rights”

124. The emergence of the modern concept of “human rights” can be traced to the late 1940s, after the events of the Second World War exposed the fragility of the notion that the legitimacy of the state rests upon an unspoken contract between rulers and those they governed. In the late 1940s the fundamental and inalienable quality of individual human rights was affirmed not just in the European Convention on Human Rights, but in a range of other international declarations and instruments,¹⁴¹ which used a new language of universalism. Mr Jagland pointed out that the UK was at the forefront of developing these new international safeguards:

“During the war and after the war the United Kingdom stood up, took the responsibility after the war and said clearly, ‘We have to have a human rights protection system in Europe, because one of the reasons why the Second World War came was a total breakdown of rule of law and human rights on this continent.’ There was clear leadership coming from London.”¹⁴²

125. The ECHR is unique among these international declarations in being more than just a Convention, or paper document. It is the foundation stone of what Mr Jagland described as the “Convention system”, which permits individuals to petition the ECtHR on the basis of their Convention rights. The key issue for this Committee has been whether the UK’s adherence to the Convention signifies an irreversible shift away from its long-standing tradition of negative civil liberties, which may be limited as part of an implicit “social contract”, and towards a more prescriptive system of rights, enforced through the courts.

Is there a right to vote?

126. Within the ECHR certain rights are expressed without qualification, while others are explicitly subject to the requirements of public safety, public order, and so on. For instance, Article 3 states simply that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” On the other hand, paragraph 2 of Article 9 (which guarantees the right to freedom of thought, conscience and religion) states that:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

127. Some witnesses, drawing on the different ways rights are described within the Convention, sought to distinguish between those rights that are “fundamental”—that is, inalienable under any circumstances—and those that are of a lesser status. David Davis MP, for instance, said that “The Chairman started out by asking whether [the right to vote]

¹⁴¹ Notably the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in December 1948.

is a fundamental right, and we said that it is a civic right. It is part of a contract”¹⁴³; Jack Straw MP also described the vote as a “civic right which is part of the contract for citizenship.”¹⁴⁴ Lord Mackay of Clashfern, on the other hand, found formal distinctions between “fundamental” and “civic” rights unhelpful: “I do not know that I understand exactly what is meant by ‘fundamental’. A human right is a human right, and some may be more important than others.”¹⁴⁵

128. In Chapter 3 we have traced the process whereby the ECtHR determined that voting was a human right under the Convention. But we have also asked ourselves whether, regardless of the meaning of the Convention, voting should be considered a “right”; and, if so, how important a right it is, and how far it may legitimately be limited or qualified.

129. Jonathan Fisher QC argued that the “right to vote” was not properly to be considered a “human right”. His argument was based upon the principle that if a right is not found in positive law, it is not a right at all, and his reading of Article 3, Protocol 1 accordingly distinguished between “the guarantee to hold free elections on the one hand, and the manner in which free elections are to be held on the other.” Underlying this analysis was a more fundamental challenge to the philosophical basis for recognising “rights”:

“Theories based on John Locke’s social contract and/or the existence of natural law rights have given way in modern times to a positivist approach, by which human rights are recognised in circumstances where a broad section of society acknowledges this to be the case. Applying the positivist and self-sustaining approach to the recognition of legal norms, I believe it is clear that the right to free elections which guarantee the democratic process is protected as a fundamental freedom whereas an individual’s ability to participate in the process is not.”

130. It is clear that Mr Fisher’s argument is not accepted by the ECtHR, which, as we have described in chapter 3, has since 1987 consistently interpreted Article 3, Protocol 1 as establishing an individual right to vote. At the other end of the spectrum, Dr Daniel Viehoff and Dr Christopher Bennett, of Sheffield University, posited a three-fold rationale as to why the right to vote deserves its place in human rights instruments:

“First, universal enfranchisement improves the quality of our political decision-making, by protecting individual interests from unjust violations, by holding accountable office holders, and by fostering discussion and deliberation that yield better solutions to the complex political problems we face. As such, it benefits all citizens. Second, the right to vote benefits the person whose right it is in particular, mainly because it symbolically asserts that she is someone who counts, someone to whom equal concern and respect is owed. Third, under circumstances where the state’s legitimate authority cannot rest on the actual consent of its subjects, the opportunity for equal political participation in the democratic process provides an alternative basis for the moral legitimacy of our political institutions.”¹⁴⁶

143 Q 99

144 Q 96

145 Q 112

146 Written evidence from Daniel Viehoff and Christopher Bennett

131. Of these three propositions, the third, that the right to vote underpins democratic legitimacy and thus what Dr Viehoff and Dr Bennett called the state’s “moral right to exercise power over its subjects”, carries particular weight: the presumption, in any democracy, must be that all citizens have a right to vote. To put it another way, universal suffrage underpins any democracy and cannot be guaranteed unless each citizen possesses a presumptive right to vote. But that right is presumptive, not absolute. In the words of Angela Patrick, of JUSTICE:

“In a democratic society, the starting point is universal suffrage. The right to vote exists and it is not absolute. But, if you are going to shift away from the notion of absolute suffrage, that shift requires serious thought and appropriate justification.”¹⁴⁷

Limitations on the right to vote

132. Given the presumption in favour of universal suffrage, it follows that if any group of citizens (including prisoners) is to be disenfranchised, there needs to be a robust and principled justification for that disenfranchisement. In the language of ECtHR case-law, this means that the right to vote may be only be limited in pursuit of the “legitimate aims” of democratic states. These aims encompass various limitations on the right to vote that are deemed necessary to protect the integrity of the electoral process, including age limits, since children and younger adolescents “lack the intellectual and emotional maturity necessary to make good use of the power over our fellow citizens each of us exercises by voting;”¹⁴⁸ nationality and residence requirements;¹⁴⁹ and restrictions based on mental incapacity.¹⁵⁰ In the latter regard, long-standing common law restrictions upon voting relating to mental state were abolished in the UK by means of section 73 of the Electoral Registration Act 2006. In the UK one further restriction remains, the peculiar product of our constitutional history: peers who sit in the House of Lords, being members of the legislature for life as of right, are disqualified from voting in elections to the House of Commons.¹⁵¹

133. The question for this Committee, therefore, has been whether a case can be made for maintaining a ban on voting by some or all convicted prisoners. In particular we have considered whether the current ban is justified and necessary, as part of penal policy (i.e. as part of the punishment imposed on those receiving custodial sentences). Finally we consider the symbolic value of the ban in promoting civic responsibility.

Prisoner voting and penal policy

134. The loss of certain rights is a necessary consequence of imprisonment. Most obviously, loss of liberty is the key element of any custodial sentence. This is acknowledged in Article 5 of the Convention, which states that “Everyone has the right to liberty and security of person”, before listing six cases in which persons may be deprived of liberty “in accordance with a procedure prescribed by law”, including “the lawful detention of a

147 Q 35

148 Written evidence from Daniel Viehoff and Christopher Bennett

149 Written evidence from Her Majesty’s Government

150 See the guidelines on Electoral Law endorsed by the Venice Commission in July 2013, 1.1.d.

151 This rule derives from a resolution passed by the House of Commons in 1699.

person after conviction by a competent court.” The argument that loss of the right to vote is part and parcel of the loss of liberty was summarised by the Archbishops’ Council of the Church of England in the following terms: “imprisonment constitutes a loss of liberty and, as a corollary of that, a range of opportunities to participate in civil society, as well as in normal social patterns of activity, are forfeited, including the right to vote.”¹⁵²

135. The ECtHR has held that liberty is the only Convention right to be automatically forfeited as a consequence of lawful detention,¹⁵³ though the exercise of other rights may be curtailed where the Convention so specifies. For example, interference by public authorities in the right to “respect for ... private and family life” contained in Article 8 ECHR is permitted to the extent that is “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, [or] for the prevention of disorder or crime.” Prisoners may therefore be subject to inspection regimes and restrictions on their ability to associate, which are necessary to the running of a prison but would not be generally acceptable outside the prison context.

136. Similar principles exist in domestic case law. In 1983 the Judicial Committee of the House of Lords affirmed that “under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.”¹⁵⁴ The vote is, at present, expressly removed from all prisoners under section 3 of the Representation of the People Act 1983.

137. The Government’s defence of section 3, as summarised in the judgment in *Hirst*, is that loss of voting rights pursues the twin aims of “preventing crime by sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law.”¹⁵⁵ The first of these arguments (that the loss of voting rights is a part of the punishment handed down to convicted prisoners) echoed statements made in the domestic case that preceded John Hirst’s application to the ECtHR. Lord Justice Kennedy quoted the following defence of the Government’s policy, made in February 2001 by the then Home Secretary, Mr Jack Straw MP:

“By committing offences which by themselves or taken with any aggravating circumstances including the offender’s character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period.”¹⁵⁶

138. Any punishment, to be justified, must serve one or more purposes. These purposes are conventionally grouped under the four headings: retribution, deterrence, rehabilitation and public protection.¹⁵⁷ Section 142 of the Criminal Justice Act 2003, which sets out the “purposes of sentencing”, adds a fifth, reparation:

152 Written evidence from the Archbishops’ Council, Church of England

153 See also *Hirst*, paragraph 75

154 *Raymond v Honey* (1983) 1 AC 1, paragraph 10

155 *Hirst*, paragraph 74

156 Quoted in *R (on the applications of Pearson and Martinez) v The Secretary of State for the Home Department* (2001) EWHC Admin 239, paragraph 9.

157 The terminology and order may vary: some witnesses referred to “incapacitation” rather than “public protection” (written evidence from Daniel Viehoff and Christopher Bennett, the Catholic Bishops’ Conference of England).

142(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

139. The Government’s reference in the *Hirst* case to “sanctioning the conduct of convicted prisoners” suggests that deprivation of the right to vote is essentially an act of retribution, part of “the punishment of offenders”. Indeed, retribution was described by Dr Viehoff and Dr Bennett as the only purpose of punishment which could offer “a plausible philosophical basis for disenfranchising a significant portion of the prison population.”¹⁵⁸

140. The interpretation of disenfranchisement as an act of retribution is open to a number of objections, chief among which is the lack of an obvious “fit” between the crime and the punishment: the same punishment is applied (albeit for a different length of time) to someone imprisoned for dangerous driving and to someone imprisoned for rape, and in neither case is it self-evident that loss of voting rights (as opposed to loss of liberty) is fitting retribution.

141. Moreover, there is no evidence to suggest disenfranchisement is perceived by prisoners themselves as a significant component of retributive punishment. As Paul McDowell, of NACRO, said, “The idea that, somehow, removing the right to vote or not providing the right to vote for prisoners would be perceived by those prisoners as a punishment is not reality.”¹⁵⁹ We see no reason to question this statement.

142. While some prisoners may not perceive the loss of the vote as punishment, many of our witnesses commented on the negative impact of disenfranchisement on the prisoner. Dr Susan Easton told us that disenfranchisement was a “degrading punishment” that reinforced offenders’ social exclusion.¹⁶⁰ SORCHA DALY, Specialist Contracts Manager for Women in Prison, told us that women found the experience of prison “incredibly dehumanising” and that the continued ban on voting would cause further damage “by saying that they are not citizens or persons within society.”¹⁶¹ JULIET LYON, Director of the Prisoner Reform Trust, argued that enfranchisement was important in affirming “that you remain a person even if you are serving time behind bars.”¹⁶² She also argued that that a punishment of “civic death” was “completely out of step with a modern prison system”,¹⁶³ devaluing prisoners and reinforcing the societal view that prisoners are worthless.

158 Written evidence from Daniel Viehoff and Christopher Bennett

159 Q 130

160 Written evidence from Dr Susan Easton

161 Q 13

162 Q 13

163 Q 2

143. The other principle purposes of punishment are still harder to relate to prisoner disenfranchisement. No argument was advanced to us that disenfranchisement acts either as a deterrent, that it protects the public, or that it contributes to the rehabilitation of prisoners. The Caritas Social Action Network, in a joint submission with the Catholic Bishops' Conference, went even further:

“Three separate Freedom of Information requests were made to the Ministry of Justice, the Cabinet Office, and the Department of Communities and Local Government, after which it transpired that no assessment had been made, and no evidence base had been developed, for the current policy that deprives all prisoners of the vote. None of these bodies were able to produce evidence to prove that the current disenfranchisement of prisoners furthers any aim of punishment whatsoever.”¹⁶⁴

Prisoner voting and rehabilitation

144. While no witnesses suggested that depriving prisoners of the vote contributes to rehabilitation, several argued that reinstating prisoners' right to vote could be a powerful tool for rehabilitation. Mark Johnson, of User Voice, a charity which works with prisoners in establishing prison councils, described time in prison as “a tremendous opportunity to teach the benefits of entering a democratic process”. He also noted that where prisoners had been engaged in democratic systems, such as prison council elections, research had shown an increased interest on the part of prisoners in exercising their right to vote on release.¹⁶⁵ Prisoners at HMP High Down and HMP Downview were also overwhelmingly of the view that the exercise of voting rights could play a useful part in rehabilitation. They noted that while many prisoners were alienated from society before their conviction, prison gave them time to sort out their lives, and that in the process they became politically engaged for the first time.¹⁶⁶ Caritas Social Action Network argued that “we must not turn our backs on prisoners and forget about them; instead we should put them on the path to reform by showing them that they have a continuing stake in, and duty towards, the community into which they will return.”¹⁶⁷ Such arguments would apply equally were prisoners to retain the right to vote, or were they to lose that right upon sentencing while being given the chance to apply for its reinstatement at some point during their sentence.

145. Mr Nick Hardwick, the Chief Inspector of Prisons, confirmed that giving prisoners the vote could help promote rehabilitation, but told us that its importance should not be overstated: “In terms of the things that might cause a prisoner not to offend, being able to vote would be pretty low down the list ... I do not think you would give the right to vote because it encouraged rehabilitation but, if you were going to extend the right to vote, I would use it as an opportunity to work on citizenship-type issues.”¹⁶⁸

164 Written evidence from Caritas Social Action Network

165 Q 5

166 See Appendix 5

167 Written evidence from the Caritas Social Action Network; see also written evidence from Howard League Scotland and HM Inspectorate of Prisons

168 QQ 120–1 21

146. The Government, while acknowledging that there might be a rationale for allowing prisoners to “earn back” the right to vote, drew attention to various practical issues, including cost and the administrative burden upon the National Offender Management Service, the accessibility of any courses offered to prisoners, establishing criteria for re-enfranchisement, and “the implications of providing citizenship education or training for detained prisoners that was not also available to the wider public.”¹⁶⁹

Prisoner voting: symbolism

147. The Government, in its submissions to the ECtHR, supplemented arguments based on punishment with the wider proposition that disenfranchisement “enhances civic responsibility and respect for the rule of law”. The ECtHR, in assessing this argument, drew on the minority judgment in the Canadian case of *Sauvé v the Attorney General of Canada* (no. 2):

“The social rejection of serious crime reflected a moral line which safeguarded the social contract and the rule of law and bolstered the importance of the nexus between individuals and the community. The ‘promotion of civic responsibility’ might be abstract or symbolic, but symbolic or abstract purposes could be valid of their own accord and should not be downplayed simply for being symbolic.”¹⁷⁰

The Court accordingly accepted that the “symbolic” objective of safeguarding the “social contract” might in principle constitute a “legitimate aim.”¹⁷¹

148. The “social contract”, as we have already noted, is widely regarded as a convenient fiction. But the cultural and constitutional history of the United Kingdom is very different from that of most other European states. The UK constitution remains uncodified, and thus mutual trust between government and the governed, between Parliament and the people, though subject to many challenges, continues to be a key component in political life, and is arguably the moral foundation for the constitutional doctrine of parliamentary sovereignty.

149. Another possible explanation for the particular symbolic power of the ban on prisoner voting was advanced by Professor Jeremy Waldron, who noted that the vote was not just a right or liberty, but a power which every voter enjoys, over his or her fellow citizens: “If you thought of the vote as a power ... you might want to give some thought to whether people who have shown disregard for the rights and interests of others should, for the time being, be entrusted by their fellow citizens with that minuscule power over them ... It seems to me that that might ... hook up with the idea that serious offending should be what you are looking at.”¹⁷²

150. Admittedly the power that each individual voter exercises is, in Professor Waldron’s words, “minuscule”. But there remains an intuitive connection between exercising the vote and having power over how society is governed. In private discussion with Professor

169 Written evidence from Her Majesty’s Government

170 *Hirst*, paragraph 37

171 *Hirst*, paragraph 75

172 Q 119

Nicola Lacey we explored the analogy of a self-governing association, in which, if a member had grossly violated the basic rules, it would seem self-evidently appropriate to take away that member’s partial control of the affairs of the association.

151. The individual voter is just one among an electorate which in 2011 amounted to more than 46 million; but experience demonstrates that there will always be particular constituencies, and occasionally even whole elections, where a handful of votes tip the balance one way or another. We cannot conceive of the UK people or Parliament accepting that such power should be vested in the most serious offenders, whose crimes fundamentally damage the fabric of society. As Baroness Hale of Richmond commented, in respect of the two convicted murderers whose case was recently considered by the Supreme Court: “I cannot envisage any law which the United Kingdom Parliament might eventually pass on this subject which would grant either of them the right to vote.”¹⁷³

152. So the symbolic and emotive force for the UK electorate of the current ban on prisoner voting is clear. While there is little detailed evidence on public opinion on the issue of prisoner voting, such polling data as exist confirm that, as David Davis MP told us, around two thirds of the British public oppose any change to the existing ban on prisoner voting.¹⁷⁴ But the weight of public opinion is not of itself sufficient to justify a complete ban; indeed, the EctHR specifically addressed this point: “Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.”¹⁷⁵

153. At the same time, democratically elected representatives cannot ignore the views of the electorate, and the vote in the House of Commons in February 2011 demonstrated that a large majority of MPs are sensitive to these strong views. The Attorney General accepted this, while suggesting that MPs could do more to explain the issues around prisoner voting:

“I have had quite a few letters from constituents who are concerned about this issue, a few one way and probably many more the other. It is also right to say that, when I have had discussions with constituents about the options and explained some of the background, you can often get a different response. It all depends on how you frame the question.”¹⁷⁶

Views of the Committee

154. We do not believe the distinction between fundamental and civic rights to be helpful in considering the issue of prisoner voting. In a democracy all citizens possess a presumptive right to vote, thereby having a say in the making of the laws that govern them. The existence of such a right is the necessary corollary of universal suffrage. This conclusion holds good regardless of the decision of the European Court of Human Rights in *Hirst v the United Kingdom (No. 2)*.

173 *Chester and McGeogh*, paragraph 99

174 Q 99; relevant polling data were summarised by Lady Hale in her judgment on *Chester and McGeogh*, paragraph 86.

175 *Hirst*, paragraph 70, quoted in written evidence from the Equality and Human Rights Commission.

176 Q 201

155. It follows that the vote is a right, not a privilege: it does not have to be earned, and its removal without good reason undermines democratic legitimacy. The right to vote is a presumptive right, not an absolute right: democratic states may restrict the right to vote in order to achieve clearly defined, legitimate objectives.

156. We consider that the case for depriving prisoners of the vote as a part of their punishment is weak. It is possible that disenfranchisement could fulfil a retributive function, but no assessment of the effectiveness of disenfranchisement in this regard appears to have been undertaken.

157. A case has been made that reinstating prisoner voting rights, in whole or in part, could contribute to rehabilitation, though this is not in itself a strong enough argument to justify a change in the law.

158. The justification of the disenfranchisement of convicted prisoners as a symbolic act, which enhances civic responsibility and reflects the consequences of failure to respect the laws made by the community as a whole, is, in our view, the strongest that has been advanced in the course of our inquiry. We consider in Chapter 7 whether the current prohibition is a proportionate means to achieve this legitimate aim.

6 Practicalities of disenfranchisement and re-enfranchisement

Who is denied the right to vote in the UK?

159. To vote in a UK general election a person must be registered to vote and must not belong to any of the following groups:

- young persons under 18 years old;
- foreign nationals (apart from citizens of the Irish Republic and Commonwealth countries resident in Britain);
- peers sitting in the House of Lords;
- sentenced prisoners; or
- persons convicted within the previous five years of illegal election practices.

160. The qualifications for voting in local elections, elections to the devolved bodies, or in European Parliamentary elections, may vary. For instance, the disqualification attaching to peers who sit in the House of Lords, which derives ultimately from Resolutions of the House of Commons rather than statute law, extends only to elections to the House of Commons, and peers may accordingly register to vote in local and European Parliamentary elections.

161. The prohibition on sentenced prisoners voting extends to all elections for which the UK Parliament is responsible for the franchise, whether local or European. As the entitlement to vote in general elections in other countries is set out in the relevant national law, some overseas nationals serving prison sentences in the UK can and do vote in parliamentary elections in their country of origin. When members of the Committee visited HMP Downview prisoners told us that a Dutch inmate had voted in a recent election in the Netherlands, and that the prison authorities had facilitated her voting.

162. Unconvicted prisoners, convicted prisoners awaiting sentence, and people imprisoned either for contempt of court or due to a default of payment of a sum of money, all remain eligible to vote.¹⁷⁷ Such prisoners may or may not already be registered to vote. If they are not registered they can apply to register at their previous place of residence, or, in certain circumstances, at the prison where they are held.

The prison population

163. The Ministry of Justice estimate that on 30 June 2013 some 65,963 prisoners, who were otherwise qualified to vote according to the criteria described above, were serving immediate custodial sentences.¹⁷⁸ Although the prison population fluctuates, it follows that

¹⁷⁷ See Prison Service Order 4650, Prisoner Voting Rights, for full details on current circumstances.

¹⁷⁸ See Table 1. For the purposes of this calculation it is assumed that all Irish and Commonwealth citizens are resident in the UK and would be able to register to vote.

60-70,000 convicted prisoners would gain the right to vote were the current prohibition to be entirely lifted.¹⁷⁹

164. Option 1, as set out in the draft Bill would permit prisoners sentenced to a custodial sentence of less than 4 years to vote. Analysis of the 2013 prison population shows that enacting Option 1 would grant the right to vote to approximately 24,000 prisoners.

165. Option 2, as set out in the draft Bill, would allow those prisoners sentenced to a custodial; sentence of six months or less the right to vote. On 30 June 2013, just over 4,000 prisoners sentenced to six months or less would have been eligible to vote in a Parliamentary election under Option 2.¹⁸⁰

166. If the vote were to be restored to prisoners serving sentences of one year or less (which would bring the threshold for loss of voting rights into line with the existing statutory disqualification for sitting in or standing for election to the House of Commons), approximately 7,000 prisoners would be enfranchised.

167. Table 1 provides a summary of the prison population in June 2013 by reference not only to sentence length but to types of offences. It should be noted that some offence types encompass a very wide spectrum of individual offences, from the relatively minor to the very serious. It should also be noted that if a person is prosecuted for more than one crime or offence in a single case, only the “principal offence” (the one for which the heaviest penalty is imposed) is counted.¹⁸¹

Table 1 The prison population¹⁸²

Prison population under immediate custodial sentence (aged 18+ UK, Irish or Commonwealth nationalities), England and Wales, 30 September 2013				
	Sentence length			
	6 months or less: total	12 months or less: total	Less than 4 years: total	Total prison population: all sentence lengths
Violence against the person	863	1,521	4,432	18,176
Sexual offence	89	295	1,601	10,169
Robbery	9	91	1,866	8,114
Burglary	150	505	4,163	6,846
Theft and handling	1,349	1,974	3,277	3,981
Fraud and forgery	77	208	664	1,139

179 This number represents those prisoners in the current prison population who are aged 18 or over and of UK, Irish and Commonwealth nationalities. For the purposes of this calculation it is assumed that all Irish and Commonwealth citizens are resident in the UK and would be able to register to vote.

180 Supplementary written evidence from Her Majesty’s Government, Table 1

181 Supplementary written evidence from Her Majesty’s Government, paragraphs 33–35

182 Source: Ministry of Justice

Drug offences	109	397	3,717	9,402
Motoring offences	237	394	602	694
Other offences	1,071	1,637	3,354	7,153
Offence not recorded	67	80	175	289
Total	4,021	7,102	23,851	65,963

Sentencing

168. Most of the evidence submitted to this inquiry as to the impact of the prohibition relied upon snapshots of that population—in other words, the number of prisoners being detained on a given day. But a snapshot tells only part of the story, since it overlooks the much larger number of offenders each year (including repeat offenders) who receive short sentences, most of whom fail to show up in the figures for any given day.

169. The snapshot contained in Table 1 shows that on any given day when an election is held, only some 6 percent of otherwise eligible sentenced prisoners will be serving sentences of 6 months or less; around 9 percent will be serving sentences of 12 months or less; and around 40 percent are likely to be serving sentences of less than 4 years.

170. The figures for sentencing over the whole of 2012 are given in Table 2.

Table 2 Number and length of custodial sentences given in England and Wales in 2012¹⁸³

6 months or less	12 months or less	Less than 4 years	All custodial sentences
55,777	67,352	89,289	98,047

171. These figures include some double-counting, in that a number of individuals may have been sentenced to more than one short term of imprisonment in the course of the year. With this proviso they show that in the course of 2012 some 57 percent of those sentenced to terms of imprisonment were given sentences of 6 months or less; 69 percent were given sentences of 12 months or less; than 91 percent were given sentences of less than 4 years.

172. Combining the data on sentencing and on the prison population suggests that of all those sentenced to terms of imprisonment of 6 months or less in the course of a year, fewer than 8 percent are in prison (and therefore actually deprived of the vote) on any given day within that year. Whether or not the prohibition actually affects a particular prisoner serving a short-term sentence is in large part a matter of chance.

173. Moreover, those prisoners who are given immediate custodial sentences in themselves represent only a small proportion of those passing through the criminal justice system each year. The overall sentencing figures for 2012 are given in Table 3.

¹⁸³ Source: Ministry of Justice, Criminal Justice Statistics Quarterly, December 2012, Table 5.6

Table 3 Sentencing data for 2012¹⁸⁴

Immediate custody	Suspended sentence	Community sentence	Fines	Other disposals	Total offenders sentenced
98,047	44,644	149,328	823,298	114,510	1,229,827

174. Most of the offences listed here were summary offences, including non-indictable motoring offences; of those sentenced for this category of offence, fewer than 2 percent were given custodial sentences. The largest single category of indictable offences was theft and handling stolen goods: a total of 111,025 people were sentenced for this category of offence. Of these, just over a fifth, 22,862 people, received an immediate custodial sentence, of an average length of 4.1 months. The next largest category was drug offences: a total of 57,601 people were sentenced, of whom 9,011 (just over 15 percent) received an immediate custodial sentence, with an average length of 28.7 months.

175. The numbers involved, and the relatively low percentage of custodial sentences handed out in these two large categories of offender, illustrate the many factors that judges have to take into account in sentencing. Lord Faulks QC, who has sat as a Recorder, underlined the seriousness of any decision to send an offender to prison: “You did so very reluctantly, and you were encouraged to be reluctant. There are all sorts of reasons for avoiding sending people to prison, such as expense and the fact that it does not provide much rehabilitation. As a result, you send people to prison only when you have exhausted other options, either because of repeat offending or because of the seriousness of the offence.”¹⁸⁵

176. One further factor that may determine the likelihood and length of a custodial sentence is the readiness of defendants to enter a guilty plea, thereby earning a “discount” on their ultimate sentence. Readiness to enter a guilty plea appears to vary between ethnic groups, and Professor Mike Hough therefore suggested that “If minority ethnic groups are ... a bit less likely to enter a guilty plea, they will get a heavier sentence—other things being equal—so a disproportionate number would be over the custody threshold.”¹⁸⁶ Published Government statistics appear to give some support to this suggestion.¹⁸⁷ Such considerations led Baroness Hale of Richmond, in her judgment on *Chester and McGeogh*, to suggest that the vagaries of sentencing mean that there is “an element of arbitrariness in selecting the custody threshold as a unique indicator of offending so serious as to justify exclusion from the democratic process.”¹⁸⁸

Types of offences leading to imprisonment

177. We found it very difficult to acquire good quality data on the types of offenders serving sentences of particular lengths. While there is comprehensive sentencing data, broken down by offence, the prison service do not hold such data in respect of prisoners in

¹⁸⁴ Source: Ministry of Justice, Criminal Justice Statistics Quarterly, December 2012

¹⁸⁵ Q 33

¹⁸⁶ Q 87

¹⁸⁷ See Ministry of Justice, Statistics on Race and the Criminal Justice System 2012

¹⁸⁸ *Chester and McGeogh*, paragraph 96

detention. Nevertheless, the Government’s supplementary written evidence provides an overview, by reference to the Government’s options of 6 months or 4 years and to broad categories of offence type.¹⁸⁹

178. The figures show, for example, that on 30 June 2012 some 19,373 prisoners guilty of offences under the heading “violence against the person” were in detention in England and Wales. Of these, 995 were serving sentences of 6 months or less, and 5,122 sentences of under 4 years.

179. The difficulty arises in interpreting these offence types. At one extreme, 4,949 of those serving sentences for violence against the person were serving life sentences for murder. But at the lower end of the spectrum, the bulk of the prisoners are grouped together under what the Government called “other offences against the person”, including “a range of offences under Offences Against the Person Act 1861 e.g. assault; assault occasioning Actual Bodily Harm; wounding with intent to do Grievous Bodily Harm.”¹⁹⁰ This makes it difficult to assess the seriousness of the individual offences committed by those serving shorter sentences for this type of offence—and, at the same time, lends some support to the Government’s approach of using sentence length as a general proxy for the seriousness of offences, regardless of sentence type.

Registration practicalities

180. The Committee has also considered the practical implications of allowing prisoners to register to vote. The introduction to the draft Bill states that the Government envisages that any prisoners granted the right to vote would vote by post or proxy, and would “be entitled to register to vote not at the prison, but at their former address or, if they did not have a former address, the area where they had a local connection.”¹⁹¹ The Ministry of Justice’s second stage consultation paper, issued in 2009, supported this method of registration, noting that there were significant disadvantages to prisoners being registered in the local authority area in which the prison was located—the obvious risk being that the outcome of elections in areas where large prisons are located (such as the Isle of Wight) would be distorted. The former Chief Inspector of Prisons, Lord Ramsbotham, welcomed the Government’s approach, telling us that it was right that such prisoners voted “where they come from, not where the prison is.”¹⁹²

181. While prisoners would be able to register in a particular area by making a ‘declaration of local connection’, the consultation paper made clear that they would be barred from making such a declaration to register in the constituency in which the prison was situated unless they could demonstrate a genuine connection with this locality.¹⁹³ This marks a change of approach when compared with the provisions in the Representation of the People Act 2000, which, in certain circumstances, enable prisoners to register their place of detention as their place of residence.

189 Supplementary written evidence from Her Majesty’s Government, Table 3

190 Supplementary written evidence from Her Majesty’s Government

191 Draft Bill, paras 33 and 37

192 Q 23

193 Voting rights of convicted prisoners detained within the United Kingdom: second stage consultation. Consultation Paper CP6/09, Ministry of Justice, 8 April 2009, p 15.

182. We asked our witnesses if they had encountered any problems administering voting by prisoners, or whether they would envisage any difficulties were Options 1 or 2 in the draft Bill to be adopted. Lord Ramsbotham told us that “prisons that I have experienced have never had a problem in administering it. It is a straightforward provision”¹⁹⁴. The Prison Governors’ Association told us that they “did not believe that there would be any significant administrative impact on the prison system if prisoners were given the right to vote, it has not been an issue with remand prisoners in the past, and since most prisoners approaching their release date have an address to go to it would be possible to know which constituency they would vote in.”¹⁹⁵ Dr Cormac Behan confirmed that most jurisdictions that allow prisoners to vote do so by way of postal ballot from their home, rather than the prison, constituency.¹⁹⁶

183. Dr Behan did, though, indicate that in the Republic of Ireland studies had found that the bulk of prisoners came from disadvantaged urban areas, with a number of electoral districts and constituencies containing a higher proportion of those incarcerated in comparison to other districts. It therefore remains possible that, even if convicted prisoners were to be registered to vote in the constituency in which they were registered prior to conviction, there could be significant effects upon particular constituencies—though in the absence of detailed research it is impossible to state this with confidence.

How many prisoners would vote?

184. During our inquiry we were able to take evidence from serving prisoners; charities working with prisoners; and lawyers representing approximately 1,000 prisoners who have brought cases before the ECtHR. Tony Kelly, a lawyer acting for between 400-500 prisoners, suggested that there were many different motivations for prisoners coming to seek legal advice upon this issue. A number of prisoners were keen to vote, while some prisoners were inevitably motivated “purely by the prospect of damages.”¹⁹⁷ The number of prisoners lodging claims for compensation may not therefore be a reliable indicator of the level of interest in voting among the prison population as a whole.

185. When we visited two prisons in the South Central region, HMP High Down and HMP Downview,¹⁹⁸ there was no mention by the prisoners of compensation. Prisoners at both prisons expressed the overriding view that all prisoners should be allowed to vote. The reasons for stating this varied, but the point made most strongly was that prisoners were still part of society, had links to the wider community, and were affected by Government policies, and that they should therefore have a say in how the country is governed. Some of the female prisoners pointed out that they had children, cared for either by family members or the state, and that they should have the right to vote on their behalf. There was also a general view that prisoners should be given an opportunity to have a say in how the society into which they would ultimately be released was run.

194 Q 25

195 Written evidence from the Prison Governors’ Association

196 Written evidence from Dr Cormac Behan

197 Q 158

198 See Appendix 5. HMP High Down is a category B, male, local prison primarily holding remand prisoners but with a significant number of sentenced prisoners who remain in High Down on a more long-term basis. HMP Downview is a female, closed training prison with a small YOI unit that is due to be closed.

186. In contrast, the Prison Governors Association (PGA) was not convinced that the majority of prisoners were actively seeking the right to vote. The PGA suggested that issue had been “needlessly escalated by political rhetoric,” as “in reality, the vast majority of prisoners would not even bother voting.”¹⁹⁹ Dr Behan, in a study of the proportion of Irish prisoners who voted in the 2007 Irish election, found that only 10.1% of eligible prisoners actually voted, though this figure may have been depressed by the tight registration period. His study suggested that in Ireland, there were greater levels of registration in those institutions that housed long term or mature prisoners.²⁰⁰

187. Mark Johnson, Director of User Voice, an ex-offender led charity that runs democratically elected prisoner councils in a number of prisons, confirmed that “when you are in prison, when you come from a chaotic background with drug addiction, mental health and kind of allergic reaction to society or society’s allergic reaction to you—the political right to vote every term is not at the top of that scale.”²⁰¹ Mr Nick Hardwick, of HM Inspectorate of Prisons, told us that prisoners very rarely raised the right to vote with him or his inspectors. He regarded this as “of some concern in itself”, and said that “there is something to be said for the argument that an acceptance of civic obligations which include the responsibility to vote is something that should be encouraged as part of a prison’s work to try and ensure prisoners leave custody less likely to offend than when they entered.”²⁰²

188. The Government has not sought to defend the current ban on prisoner voting by reference to the impact of prisoners’ votes upon the outcome of elections. In purely practical terms the number of convicted prisoners serving custodial sentences at any one time, relative to the size of the electorate as a whole, is tiny,²⁰³ and, as the preceding paragraphs show, turnout among prisoners would in all probability be low. Any impact upon constituencies where prisons are located could also be mitigated by ensuring that prisoners were to register to vote in those constituencies in which they were resident prior to their imprisonment. In such circumstances, it is difficult to imagine that the votes of prisoners, even were all prisoners to be enfranchised, could have a significant impact upon the outcome of an election.

Conclusions of the Committee

189. For those prisoners sentenced to short terms of imprisonment, who make up a large majority of those sentenced each year, the chance that their period of detention will coincide with an election is small: whether or not the current ban on prisoner voting results in any particular individual losing the ability to vote is substantially a matter of chance.

199 Written evidence from the Prison Governors Association

200 Q 79; see also Behan, C and O’Donnell, I. ‘Prisoners, Politics and the Polls’, *British Journal of Criminology*, (2008) 48, pp 319–336.

201 Q 5

202 Written evidence from HM Inspectorate of Prisons

203 The Government’s evidence states that the total prison population in England and Wales on 30 June 2012 was 68,709 (including all British, Commonwealth and EU citizens aged 18 or over); the prison population in Scotland on the same date was 6,504, and in Northern Ireland 1,225. The total number of parliamentary electors in December 2012 was 46,353,900.

190. In the absence of good quality data on the offences committed by the prison population, it is difficult to assess the types of prisoners who would be affected by Options 1 and 2 in the draft Bill.

191. We have heard no evidence that suggests the implementation of a process to allow a number of prisoners to vote would be difficult for the Prison Service to administer.

192. In the event that some prisoners are enfranchised, we would support the Government's preferred approach of enabling prisoners to vote either in the place of previous residence, or by means of a declaration of local connection, rather than in the constituency in which they are detained.

193. There is little evidence regarding the number of enfranchised prisoners who would actually vote. Experience in Ireland suggests that the numbers will be small, possibly no more than 1 in 10.

194. We therefore conclude, on the basis of the small numbers likely to vote, and the Government's approach to prisoner registration, that neither Option 1 nor Option 2 would have a significant bearing on the outcome of future elections.

7 Proportionality

Introduction

195. In Chapter 3 we noted that the Court, in assessing the extent of the “margin of appreciation” enjoyed by member states in interpreting Convention rights, inevitably goes on to consider what it describes as the “proportionality” of the measure in question. This assessment of proportionality was at the heart of the Court’s finding in *Hirst*, in which the Court accepted the Government’s argument that section 3 of the Representation of the People Act 1983 pursued the “legitimate aim” of “sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law”, but held that it was “arbitrary in its effects”. In reaching this conclusion the Court also held that there was “no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.”²⁰⁴

196. It follows therefore that if Parliament were to decide to change the law with a view to complying with the *Hirst* judgment, and in the very likely event that further litigation were to follow, the ECtHR would not only assess whether the new law was, in its view, “proportionate”, but as part of that assessment would consider the extent to which Parliament, and this Committee, had conducted a similar assessment.

197. In this chapter we accordingly consider which of the options for compliance proposed in the course of this inquiry, either by the Government or by witnesses, would be regarded as “proportionate”. In so doing, we do not pre-judge Parliament’s decision on whether or not to comply with the judgment, which is a matter for Parliament. Instead we seek to identify a single compliant option, which we believe to be proportionate, for Parliament to consider alongside the option of non-compliance.

The meaning of “proportionality”

198. The term “proportionality”, like so many we have encountered in this inquiry, has a specific meaning in the context of ECtHR case law. As Lord Faulks QC observed, “rationality and proportionality are rather in the eye of the beholder ... We are speaking a great deal with the language of the European court, which is very evolved—it has terms of art and nuances—but not all constituencies are familiar with the nuances of the European court.”²⁰⁵

199. What does proportionality mean? In the context of ECtHR jurisprudence, that Court has regard to a series of factors when considering whether an interference can be justified. These will usually include whether the interference with the right is in accordance with law and is necessary in a democratic society to pursue a legitimate aim. In such cases, the Court will consider whether the extent of the encroachment is in reasonable proportion both to the seriousness of the interest being protected and the importance of the legitimate aim pursued.

²⁰⁴ *Hirst*, paragraph 79

²⁰⁵ Q 41

200. Another way to describe the test of proportionality, in the context of sanctions imposed on offenders, is to ask whether the punishment (in this case, disenfranchisement) fits the crime. Such a test has ancient origins, as the Archbishops' Council of the Church of England reminded us: "The Bible contains insistence on proportionality in punishment—the limits of the *lex talionis* are set at 'an eye for an eye'".²⁰⁶ We have adopted this simpler test, whether the punishment fits the crime, in considering the issue of proportionality in the remainder of this chapter.

Does proportionality require individual consideration?

201. The difficulty is to apply even a basic conception of proportionality to the multitude of unique individual cases that come before the courts. As we have noted, the ECtHR held in *Hirst* that "the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned". Such individual assessments are of course already made in the context of the primary sanction imposed by the sentencing judge, whether custodial or non-custodial. In the words of Professor Julian Roberts:

"A sentencing court in this or any common-law jurisdiction will consider all the factors relevant to the case in terms of culpability and harm, decisions from the Court of Appeal, the sentencing guidelines and so on. Those factors will be taken into account. They will be explicitly identified in the guidelines and in appellate judgments and they are part of the case law of common law. To assist judges in this task detailed sentencing guidelines are published by the Sentencing Council for England and Wales and analogous bodies in Scotland and Northern Ireland."²⁰⁷

202. Thus every sentencing judge is required to link the harm done by a convicted criminal to a particular point on a complex scale of punishment, including fines, community orders, suspended sentences and custodial sentences ranging from five days to life. Martin Howe QC argued that "prisoners are sent to prison for offences which vary greatly in nature and seriousness, [and] these factors are reflected in the sentence imposed. The voting disqualification lasts for the length of the sentence, and so in that respect the period of voting disqualification is proportionate to the offence."²⁰⁸

203. The difficulty in this argument lies not in the proportionality of the judge's decision to impose a custodial sentence per se, but in the proportionality (which has been rejected by the ECtHR) of adding loss of voting rights as an automatic consequence. Not only is there no reference within the sentencing guidelines to loss of voting rights as a relevant factor in deciding between a custodial and non-custodial sentence, but, as Aidan O'Neill QC noted, "it is not the length of the sentence that determines the right to vote, it is the length of detention. That means that somebody sentenced to life will regain their right to vote once they are out of prison on licence."²⁰⁹ Since sentencing judges cannot anticipate the facts that will ultimately determine an individual's release date (good or bad behaviour,

²⁰⁶ Written evidence from the Archbishops' Council, Church of England

²⁰⁷ Q 86

²⁰⁸ Written evidence from Martin Howe QC

²⁰⁹ Q 34

psychological assessment, expressions of remorse, and so on), nor can they, at the time of sentencing, predict the effect of that sentence in respect of the franchise.

204. These factors led some witnesses to conclude that the test of proportionality required individual case-by-case consideration, and an explicit decision by a judge distinct from that on sentencing—thereby adopting the approach of the ECtHR in the case of *Frodl v Austria*, an outcome which was significantly modified in the later case of *Scoppola v Italy (No. 3)*. The AIRE Centre cited “the crucial importance of retaining some element of judicial discretion on the decision to disenfranchise a prisoner”,²¹⁰ and Lord Ramsbotham said that “I would leave everything to do with length firmly in the hands of the judge.”²¹¹

205. The Government, on the other hand, noted the “additional burden”²¹² such a requirement would place upon sentencing judges, and invited us to consider whether decisions should be appealed. Professor Roberts opposed the introduction of a new element of judicial discretion relating to the seriousness of the offence: “the seriousness threshold ... is problematic. Presumably, the courts would devise guidance as to the nature of the crimes ... that were so egregiously wrongful as to justify this, but it would require the exercise of judicial discretion, and it would be tricky for a court to make those distinctions.”²¹³

Linking loss of voting rights to specific offences

206. There are some offences for which disenfranchisement, with or without imprisonment, could be regarded as obviously “fitting the crime”—notably those offences which might be seen as undermining the fabric of democratic social order. It is in fact already the case that individuals convicted of illegal or corrupt practices in the conduct of elections are subject to a disqualification from registering to vote of up to five years, irrespective of whether or not they have been sentenced to a term of imprisonment.²¹⁴ A similar approach, but extended to include, for instance, terrorism offences, has been adopted in Germany.²¹⁵

207. Dr Dirk van Zyl Smit urged us to adopt the same approach in the UK: “If you were to recommend, say, that someone convicted of treason or a crime against the state, or of an electoral offence were to lose the right to vote ... I would be very surprised if that did not stand up [in the ECtHR] because you could say that this is an appropriate punishment for that sort of offence.” He did not envisage such punishment extending to other serious offences such as rape: “I would say that we are talking not about the moral blameworthiness of the offender but the appropriateness of removing the right to vote for a particular offence.”²¹⁶

210 Written evidence from the AIRE Centre

211 Q 23

212 Written evidence from Her Majesty’s Government

213 Q 91

214 Sections 160 and 173 of the Representation of the People Act 1983

215 Written evidence from Her Majesty’s Government; Q 51

216 Q 48

208. The implication of Dr van Zyl Smit’s approach is, as the Government put it, that “offenders who might potentially be serving long sentences [would] retain the vote on the basis that they were not convicted of a particular offence.”²¹⁷ In other words, an offender convicted of a relatively minor offence relating to the conduct of elections would lose the right to vote, whereas someone convicted of murder would not.

209. We have noted, in chapter 5, the argument of Professor Waldron that the vote should be regarded as a “power”, and that there is a legitimate discussion as to “whether people who have shown disregard for the rights and interests of others should, for the time being, be entrusted by their fellow citizens with that minuscule power over them.”²¹⁸ This consideration is, we believe, a factor underlying the strong public opposition to giving convicted prisoners the vote, and we therefore do not consider that an outcome which would result in those convicted of the most heinous crimes being able to vote would be acceptable to either Parliament or the electorate. This in turn lends support to an approach involving an element of automaticity, whereby those convicted of crimes of a certain level of seriousness, who have shown utter disregard for the rights of others, would be temporarily disenfranchised without the need for separate judicial decision-making.

Linking disenfranchisement to sentence length

210. The Government’s proposal, as set out in the draft Bill, is to link loss of voting rights to sentence length, with the three options setting the threshold at 4 years, 6 months, or the imposition of any custodial sentence, respectively. In each case this means, as Professor Roberts noted, linking loss of voting rights to the seriousness of the crime, and using “sentence length as a proxy for crime seriousness.”²¹⁹

211. The evidence cited in Chapter 6 suggests that a cut-off which takes effect at the point an offender is given an immediate custodial sentence may be somewhat arbitrary in its effects. But the same will be true of any other cut-off set by reference to sentence length—sentence length will always be, as Dr Susan Easton put it, a “rudimentary measure with which to distinguish offenders and offending.”²²⁰ Aidan O’Neill QC noted that “there are going to be people who fall on the wrong side or the right side of that ... rule.”²²¹ The Government acknowledged accordingly that any ban based on sentence length risked being regarded by the ECtHR as “general, automatic and indiscriminate.”²²²

212. Wherever the threshold is set, there will be hard cases just above and just below. Nevertheless, we heard persuasive arguments in support of the Government’s position that sentence length was the best indicator of the seriousness of the offence. Professor Roberts acknowledged that courts “think very carefully about the length of sentence; there is a custodial threshold prior to the imposition of a term of custody. It is a good index.”²²³ Asked about the use of sentence length as a measure of crime seriousness, Paul McDowell

217 Written evidence from Her Majesty’s Government

218 Q 119

219 Q 84

220 Written evidence from Dr Susan Easton

221 Q 41

222 Written evidence from Her Majesty’s Government

223 Q 85

of NACRO said that “I do not think it is ideal, but I do not know of a better measure.”²²⁴ Lord Faulks agreed: “The particular facts of the case are much better reflected in the sentence than by the description of the offence. Although it is arbitrary ... if you are going to have a cut-off point, it is better to do it by length of sentence.”²²⁵ We agree.

Setting the threshold

213. The Draft Bill proposes two possible thresholds: 6 months and 4 years. We have received much evidence on the advantages and disadvantages of these thresholds, but no conclusive logical case been made for either of them. In the words of Professor Mike Hough and Professor Julian Roberts, “there is no significance [in either]; both are arbitrary thresholds.”²²⁶

214. A threshold of 6 months equates to the sentencing powers of magistrates’ courts in respect of a single offence, though sentences of up to 12 months may be imposed by a magistrate in respect of multiple offences—indeed, Professor Hough and Professor Roberts confirmed that 810 individuals sentenced in magistrates’ courts in 2012 were given custodial sentences of more than 6 months.²²⁷ Moreover, as the Government pointed out, “it is possible for an offender sentenced in a Crown Court to be given a shorter sentence.”²²⁸ In reality, of 90,386 people convicted in the Crown Court in 2012 only 50,683 received custodial sentences at all, of whom 41,460 (just 46 percent of those sentenced) received sentences of over 6 months.²²⁹ The link between the 6-month threshold and the sentencing powers of magistrates’ courts is thus weak.

215. The arguments in favour of a 4-year threshold are little stronger. As the option in the draft Bill which would enfranchise the largest number of prisoners, it was preferred by many witnesses. For instance, Angela Patrick, while stating her preference for a system of judicial discretion, described 4 years as the “most likely to be considered proportionate” of the options in the draft Bill.²³⁰ However, the choice of 4 years appears to be, in itself, arbitrary. The Government noted that both the Criminal Justice Act 1991 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 used 4 years as “an indicator of seriousness.”²³¹ But this is a circular argument, against which must be set the relatively large number of serious offenders who, if such a threshold were adopted, would be enfranchised. We see no likelihood that either Parliament or the wider population will accept a 4-year threshold.

216. An alternative was proposed to us by Robert Walter MP, namely that the threshold should be set at 12 months. In defence of this proposal Mr Walter noted that, as we have shown in Chapter 2 of this Report, the Forfeiture Act 1870 tied the loss of voting rights to imprisonment for a felony leading to a sentence of more than 12 months. The result of this

224 Q 129

225 Q 33

226 Written evidence from Professor Mike Hough and Professor Julian Roberts

227 *Ibid*

228 Written evidence from Her Majesty’s Government

229 Written evidence from Professor Mike Hough and Professor Julian Roberts

230 Q 43

231 Written evidence from Her Majesty’s Government

Act, and subsequent legislation, was that at the time the UK signed the ECHR prisoners sentenced to terms of imprisonment of 12 months or less were able to and did vote in elections. Mr Walter accordingly proposed that “we should go for a return to the situation that persisted at the time we signed the Convention.”²³² Mr Walter also noted that 12 months was the maximum sentence length that can be imposed by a magistrates’ court, in respect of multiple offences. This linkage would, in Mr Walter’s view, be “easily understandable, both by our colleagues and the British public.”²³³ It would mean that no prisoner would lose the right to vote unless sentenced by a judge sitting in the Crown Court.

217. Another argument may be advanced in support of a 12-month threshold: at present, under section 1 of the Representation of the People Act 1981, any person sentenced to a term of imprisonment of more than one year shall be disqualified, while detained, shall be disqualified from sitting in or being elected or nominated to the House of Commons.²³⁴ It could be argued that, if a prisoner who has been sentenced to a term of less than 1 year is entitled to sit as a Member of Parliament, or to stand for election, that prisoner should also be able to vote in a parliamentary election (including for himself, if standing as a candidate). Thus a 12-month threshold would help in bringing consistency across relevant statutory provisions.

Regaining the right to vote

218. The establishment of a threshold for disenfranchisement would not rule out the possibility that prisoners serving longer sentences could regain the vote as they approach the end of their detention. As we have noted in Chapter 5, such reinstatement of voting rights could help re-engage prisoners with their responsibilities to the wider community, thereby contributing to prisoner rehabilitation.

219. We see two possible approaches to prisoner re-enfranchisement. The first would require prisoner to “earn back” the right to vote—in other words, a mechanism could be established whereby prisoners would be able to apply for reinstatement of the franchise, for instance at any point after becoming eligible to apply for parole. As part of the application, they would be required to demonstrate their suitability, either on the basis of general good conduct, or by completing particular educational programmes, such as a citizenship course.

220. An argument in favour of this approach is that, by introducing an element of individual consideration of each prisoner’s needs (comparable in nature to the process whereby those stripped of voting rights in Italy are able to apply for their reinstatement), it would help meet the test of proportionality, as set out in ECtHR jurisprudence. It could also deliver benefits in terms of prisoner rehabilitation, by providing an incentive to prisoners to engage with their wider social responsibilities. Against this approach, on the other hand, is the cost and the drain on resources inherent in adding a new layer of judicial

232 Q 138

233 Q 138

234 *Erskine May*, 24th Edition (2011), p 35

or other individual consideration. We also heard forceful objections from some prisoners to the suggestion that they should be required to “earn back” the right to vote.²³⁵

221. An alternative would be automatic reinstatement of the franchise as each prisoner approaches release—for example, at a point six months before the scheduled release date. This approach would be simple and cost-effective: the onus would be on the prisoner, having reached the scheduled point in their sentence, and on provision of a certificate to this effect by the prison authorities, to apply to be added to the electoral roll in the constituency into which they are scheduled to be released, on the basis of a declaration of local connection. There would be opportunities to use this reinstatement of voting rights as a means of promoting rehabilitation and civic responsibility in the months leading up to release.

222. The main disadvantage of this proposal is its unpredictability—scheduled release dates are by definition prospective, and can be pushed back if a prisoner is guilty of misconduct or some further offence. It would also require the use of a prospective address as the basis for establishing a local connection. As the Electoral Management Board for Scotland noted, “allowing ‘local connection’ to a future address will ... involve a change to the legislation defining local connection.”²³⁶

Conclusions of the Committee

223. **The test of proportionality requires, in our view, that the punishment (disenfranchisement) should be a proportionate means of achieving the aim of sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law. This requires that the punishment should “fit the crime”.**

224. **We do not believe that it is feasible to require judicial consideration of the possible loss of voting rights in each individual case. Judges already take full account of the particular facts of each case in passing sentence, and we see no case for duplicating this complex and laborious task in respect of voting rights.**

225. **We do not consider that linking loss of voting rights to specific offences seen as undermining the fabric of democratic social order, while allowing those convicted of the most heinous crimes, including murder, to retain the vote, would be acceptable to public opinion or to Parliament.**

226. **Sentence length, though arguably a rudimentary measure, remains the best indicator of the seriousness of each individual offence, and thus the best means of determining the point at which the prohibition on prisoner voting should take effect.**

227. **On balance, if some convicted prisoners are to be enfranchised, we find the arguments for a 12-month threshold, reinstating the pre-1967 position and bringing prisoner voting rights into line with their existing right to sit in or stand for election to the House of Commons, more persuasive than those advanced for either a 6-month or a 4-year threshold.**

²³⁵ See Appendix 5

²³⁶ Written evidence from the Electoral Management Board for Scotland

228. We believe that allowing prisoners to regain the right to vote as they approach the end of their sentence, by showing that the loss of the right to vote is supplemented by measures promoting prisoners' reintegration into society, would assist in demonstrating the proportionality of whatever approach is adopted to prisoner disenfranchisement.

8 The way forward

The views of the Committee

229. We accept, on the basis of the evidence we have heard in the course of this inquiry, that the United Kingdom is under a binding international law obligation to comply with the *Hirst* judgment. We also understand that it would be completely unprecedented for any state that has ratified the European Convention on Human Rights to enact legislation in defiance of a binding ruling of the European Court of Human Rights. Under domestic law Parliament can of course legislate as it sees fit; but if it wishes to uphold the United Kingdom's long tradition of respect for and attachment to the rule of law, Parliament should either enact legislation complying with the *Hirst* judgment or take steps to denounce the Convention, of which the United Kingdom itself, in the years following the Second World War, was the prime mover. The latter outcome is not one that we could countenance in respect of an issue of modest practical importance.

230. We note the recent and continuing reform of the Court, and, while it falls outside the scope of our inquiry, we also recognise the need for further reform of the Court and in particular of its relationship to democratically elected national legislatures. We also note the concern of the Secretary General of the Council of Europe to help the United Kingdom find a way out of the current crisis, which threatens the entire Convention system.

231. We understand the symbolic force of the current prohibition on convicted prisoners voting, but the arguments for relaxing this prohibition are, on any rational assessment, persuasive. The Government has failed to advance a plausible case for the prohibition in terms of penal policy—disenfranchisement linked to detention is an ineffective and arbitrary punishment, particularly for the tens of thousands of prisoners serving short sentences who pass through the prison system each year. There is no evidence that disenfranchisement plays any part in deterring crime. Insofar as penal policy has a bearing on prisoner voting, the strongest argument we have heard is that there could be potentially a mild rehabilitative effect if some prisoners were to be enfranchised.

232. We acknowledge that public opinion appears at present to be against prisoners voting. However, it is difficult to judge how deep-rooted these views are, given that the debate over prisoner voting has so often been lost in the wider debate over the United Kingdom's relationships both with the European Court of Human Rights and the European Union. The public has yet to be presented either with the clear evidence that the current prohibition is both arbitrary and ineffective, or with the arguments in favour of granting some prisoners the vote. We note that of the 47 Council of Europe member states, the United Kingdom is one of only five that maintain a comprehensive prohibition on prisoner voting, the others being Armenia, Bulgaria, Estonia and Russia.

233. The Lord Chancellor invited us to recommend a Bill containing both compliant and non-compliant options. He suggested that “it [is] better—in order to promote a sensible debate in this matter—to lay the options on the table before it, rather than wait for the inevitable Back-Bench amendment that would do the same job anyway.”²³⁷

234. We agree with the Lord Chancellor that if the Government were to introduce a Bill enfranchising any or all prisoners, there would almost certainly be amendments reasserting the current complete prohibition. But we do not believe that the Government itself should be proposing to Parliament an option that it knows to be unlawful. Ministers of the Crown are under a clear duty to present a Bill to Parliament that fulfils the United Kingdom's international law obligation under Article 46 of the Convention.

235. Once such a Bill has been introduced, it is of course likely that amendments re-stating the existing prohibition on prisoner voting will be tabled and debated in both Houses. We also note that there is no procedural bar to introducing the same Bill to both Houses simultaneously. Members of the two Houses will then examine their own consciences before deciding how to vote. This Committee considers that it would be wholly disproportionate for Parliament to take the grave step of undermining the international rule of law, which the United Kingdom has worked for so many decades to defend and promote, for the sake of a small modification of domestic law.

236. The Committee therefore recommend that Parliament should comply with the Court's judgment in *Hirst* by enacting legislation that would confer voting rights on *some* convicted prisoners. Having considered the options in the draft Bill, and others that were placed before us, we have found that the most persuasive argument was that those sentenced to a term of imprisonment of 12 months or less should retain the right to vote. Twelve months is the maximum period of imprisonment that a magistrates' court can impose for multiple offences, and setting the threshold at this level would mean that only those sentenced in the Crown Court to a longer term of imprisonment would lose the right to vote. The 12-month threshold also has historical justification, corresponding broadly to the position that pertained at the time the UK ratified the Convention and the First Protocol.

237. We also support enfranchising prisoners in the period leading up to release; this should be linked to a programme of civic education, to help prisoners prepare for their return to the community. We therefore recommend that prisoners should be entitled to apply, six months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.

238. In reaching these conclusions, we have proposed a statutory framework which we believe to be proportionate, but which retains a prohibition on those convicted of particularly serious crimes voting.

Recommendations

239. We recommend that the Government bring forward a Bill, at the start of the 2014 –15 session of Parliament, to give legislative effect to the following conclusions:

- That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections;
- That such prisoners should be registered to vote in the constituency where they were registered prior to sentencing; and that, where there is no identified prior residence, they should be able to register by means of a declaration of local connection;

- **That prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.**

Conclusions and recommendations

The history of prisoner voting and the European Convention on Human Rights

1. The European Court of Human Rights has not provided the United Kingdom with specific guidance as to what is considered necessary for compliance with Article 3, Protocol 1 of the European Convention on Human Rights. Having identified that the current prohibition on convicted prisoners voting breaches the right to vote, the Court maintains that it is up to the UK to make use of its margin of appreciation to find a solution that reflects national circumstances, while complying with the fundamental principles set out in the Court’s judgments. (Paragraph 59)
2. We note that the Court’s approach has developed unpredictably in recent years. We also note the concerns expressed by some witnesses over the “living instrument” doctrine, and the uncertainty implicit in that doctrine. (Paragraph 60)
3. With these provisos, we derive the following conclusions from the Court’s recent jurisprudence:
 - A measure disenfranchising all convicted prisoners in detention is not considered to be acceptable, and any modified prohibition, if it is to satisfy the European Court of Human Rights and avoid being seen as “automatic and indiscriminate”, will have to be seen to discriminate between less serious and more serious offences and may be expected to have some regard to individual circumstances.
 - The court has partially retreated from the position that appeared to be adopted in *Frodl v Austria*, that the decision on prisoner disenfranchisement must be taken by a judge; nor does there need to be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement. (Paragraph 61)
4. The unfreezing on October 2013 of 2,354 cases on prisoner voting by the European Court of Human Rights, due to the United Kingdom’s failure to implement the decision of the Court in the case of *Hirst v United Kingdom (No. 2)*, means that finding a resolution to this issue has become particularly pressing. We are concerned that, at a time when this Joint Committee is actively considering legislative proposals responding to the ECtHR’s judgment, the Court should have seen fit to re-start judicial proceedings. (Paragraph 62)

Parliamentary sovereignty and the European Court of Human Rights

5. We agree with the evidence of Lord Mackay of Clashfern, that the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. (Paragraph 111)

6. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking. (Paragraph 112)
7. A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow. (Paragraph 113)

Is there a rational basis for disenfranchisement?

8. We do not believe the distinction between fundamental and civic rights to be helpful in considering the issue of prisoner voting. In a democracy all citizens possess a presumptive right to vote, thereby having a say in the making of the laws that govern them. The existence of such a right is the necessary corollary of universal suffrage. This conclusion holds good regardless of the decision of the European Court of Human Rights in *Hirst v the United Kingdom (No. 2)*. (Paragraph 154)
9. It follows that the vote is a right, not a privilege: it does not have to be earned, and its removal without good reason undermines democratic legitimacy. The right to vote is a presumptive right, not an absolute right: democratic states may restrict the right to vote in order to achieve clearly defined, legitimate objectives. (Paragraph 155)
10. We consider that the case for depriving prisoners of the vote as a part of their punishment is weak. It is possible that disenfranchisement could fulfil a retributive function, but no assessment of the effectiveness of disenfranchisement in this regard appears to have been undertaken. (Paragraph 156)
11. A case has been made that reinstating prisoner voting rights, in whole or in part, could contribute to rehabilitation, though this is not in itself a strong enough argument to justify a change in the law. (Paragraph 157)
12. The justification of the disenfranchisement of convicted prisoners as a symbolic act, which enhances civic responsibility and reflects the consequences of failure to respect the laws made by the community as a whole, is, in our view, the strongest that has been advanced in the course of our inquiry. We consider in Chapter 7 whether the current prohibition is a proportionate means to achieve this legitimate aim. (Paragraph 158)

Practicalities of disenfranchisement and re-enfranchisement

13. For those prisoners sentenced to short terms of imprisonment, who make up a large majority of those sentenced each year, the chance that their period of detention will coincide with an election is small: whether or not the current ban on prisoner voting results in any particular individual losing the ability to vote is substantially a matter of chance. (Paragraph 189)

14. In the absence of good quality data on the offences committed by the prison population, it is difficult to assess the types of prisoners who would be affected by Options 1 and 2 in the draft Bill. (Paragraph 190)
15. We have heard no evidence that suggests the implementation of a process to allow a number of prisoners to vote would be difficult for the Prison Service to administer. (Paragraph 191)
16. In the event that some prisoners are enfranchised, we would support the Government's preferred approach of enabling prisoners to vote either in the place of previous residence, or by means of a declaration of local connection, rather than in the constituency in which they are detained. (Paragraph 192)
17. There is little evidence regarding the number of enfranchised prisoners who would actually vote. Experience in Ireland suggests that the numbers will be small, possibly no more than 1 in 10. (Paragraph 193)
18. We therefore conclude, on the basis of the small numbers likely to vote, and the Government's approach to prisoner registration, that neither Option 1 nor Option 2 would have a significant bearing on the outcome of future elections. (Paragraph 194)

Proportionality

19. The test of proportionality requires, in our view, that the punishment (disenfranchisement) should be a proportionate means of achieving the aim of sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law. This requires that the punishment should "fit the crime". (Paragraph 223)
20. We do not believe that it is feasible to require judicial consideration of the possible loss of voting rights in each individual case. Judges already take full account of the particular facts of each case in passing sentence, and we see no case for duplicating this complex and laborious task in respect of voting rights. (Paragraph 224)
21. We do not consider that linking loss of voting rights to specific offences seen as undermining the fabric of democratic social order, while allowing those convicted of the most heinous crimes, including murder, to retain the vote, would be acceptable to public opinion or to Parliament. (Paragraph 225)
22. Sentence length, though arguably a rudimentary measure, remains the best indicator of the seriousness of each individual offence, and thus the best means of determining the point at which the prohibition on prisoner voting should take effect. (Paragraph 226)
23. On balance, if some convicted prisoners are to be enfranchised, we find the arguments for a 12-month threshold, reinstating the pre-1967 position and bringing prisoner voting rights into line with their existing right to sit in or stand for election to the House of Commons, more persuasive than those advanced for either a 6-month or a 4-year threshold. (Paragraph 227)

24. We believe that allowing prisoners to regain the right to vote as they approach the end of their sentence, by showing that the loss of the right to vote is supplemented by measures promoting prisoners' reintegration into society, would assist in demonstrating the proportionality of whatever approach is adopted to prisoner disenfranchisement. (Paragraph 228)

The way forward

25. We recommend that the Government bring forward a Bill, at the start of the 2014–15 session of Parliament, to give legislative effect to the following conclusions:
- That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections;
 - That such prisoners should be registered to vote in the constituency where they were registered prior to sentencing; and that, where there is no identified prior residence, they should be able to register by means of a declaration of local connection;
 - That prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released. (Paragraph 239)

Appendix 1: Members and interests

The Members of the Joint Committee that conducted this inquiry were:

Lord Dholakia (Liberal Democrat)	Crispin Blunt (Conservative)
Baroness Gibson of Market Rasen (Labour)	Steve Brine (Conservative)
Baroness Noakes(Conservative)	Lorely Burt (Liberal Democrat)
Lord Norton of Louth (Conservative)	Nick Gibb (Chair) (Conservative)
Lord Peston (Labour)	Sir Alan Meale (Labour)
Lord Phillips of Worth Matravers (Crossbench)	Derek Twigg (Labour)

Declaration of Interests

The following interest was declared:

Lord Dholakia: President and Trustee of the National Association for the Care and Resettlement of Offenders (Nacro); Trustee of the Police Foundation; Ambassador of No Offence.

Full lists of Members' interests are recorded in the Commons Register of Members' Interests:

<http://www.publications.parliament.uk/pa/cm/cmregmem/contents.htm>

and the Lords Register of Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Appendix 2: List of oral evidence

Wednesday 19 June 2013

Sorcha Daly, Specialist Contracts Manager, Women in Prison, **Mark Johnson**, CEO, User Voice, **Juliet Lyon**, Director, Prison Reform Trust QQ 1–22

Wednesday 26 June 2013

General the Lord Ramsbotham GCB CBE, former Chief Inspector of Prisons QQ 23–30

Lord Faulks QC, **Nuala Mole**, Founder and Senior Lawyer, Aire Centre, **Aidan O’Neill QC**, **Angela Patrick**, Director of Human Rights Policy, JUSTICE QQ 31–45

Wednesday 3 July 2013

Rt Hon the Lord Goldsmith QC, **Lord Lester of Herne Hill QC** QQ 46–56

Dr Michael Pinto-Duschinsky, Senior Consultant on Constitutional Affairs, Policy Exchange, **Mr Dominic Raab MP** QQ 57–68

Wednesday 10 July 2013

Dr Cormac Behan, Lecturer in Criminology, University of Sheffield, **Rt Hon Professor Sir Francis Jacobs KCMG QC**, Professor of Law, King’s College London, **Professor Dirk Van Zyl Smit**, Professor of Comparative and International Penal Law, University of Nottingham QQ 69–83

Professor Mike Hough, Professor of Criminal Policy and Co-Director of the Institute of Criminal Policy, Birkbeck University of London, **Professor Julian Roberts**, Professor of Criminology, University of Oxford QQ 84–92

Wednesday 17 July 2013

Rt Hon David Davis MP, **Rt Hon Jack Straw MP** QQ 93–109

Wednesday 9 October 2013

Rt Hon Lord Mackay of Clashfern KT QQ 110–118

Dr Christopher Bennett, Senior Lecturer, Department of Philosophy, University of Sheffield, **Martin Kettle**, Home Affairs Policy Advisor, Mission and Public Affairs Division, Church of England, **Professor Nicola Lacey**, Q 119

Professor of Law, Gender and Social Policy, London School of Economics, **Dr Daniel Viehoff**, Lecturer, Department of Philosophy, University of Sheffield, **Professor Jeremy Waldron**, Chichele Professor of Social and Political Theory, All Souls College, Oxford University

Wednesday 16 October 2013

Nick Hardwick, Her Majesty's Chief Inspector of Prisons QQ 120–125

Digby Griffith, Director of National Operational Services, National Offender Management Service, **Paul McDowell**, Chief Executive, Nacro, **Eoin McLennan Murray**, President, Prison Governors Association QQ 126–136

Wednesday 23 October 2013

Mr Robert Walter MP QQ 137–151

Wednesday 30 October 2013

Benjamin Burrows, Solicitor, Human Rights Department, Leigh Day Solicitors, **Sean Humber**, Partner and Head of Human Rights Department, Leigh Day Solicitors, **Tony Kelly**, Partner, Taylor & Kelly Solicitors QQ 152–166

Joshua Rozenberg, legal commentator, **Adam Wagner**, founding editor, UK Human Rights Blog, and barrister QQ 167–176

Wednesday 6 November 2013

Thorbjørn Jagland, Secretary General, Council of Europe, **Christos Giakoumopoulos**, Director of Human Rights, General Directorate of Human Rights and Rule of Law, Council of Europe QQ 177–192

Rt Hon Dominic Grieve QC MP, Attorney General QQ 193–205

Wednesday 20 November 2013

Rt Hon Chris Grayling MP, Secretary of State for Justice and Lord Chancellor, **Mark Sweeney**, Director, Ministry of Justice QQ 206–240

Appendix 3: List of written evidence

- 1 Aire Centre
- 2 Archbishops' Council, Church of England
- 3 Dr Cormac Behan
- 4 Dr Christopher Bennett and Dr Daniel Viehoff
- 5 Catholic Bishops' Conference of England and Wales
- 6 Rt Hon David Blunkett MP
- 7 Peter Chester
- 8 Lord Cormack
- 9 Criminal Justice Alliance
- 10 Rt Hon David Davis MP, Dominic Raab MP, Rt Hon Jack Straw MP
- 11 Dr Susan Easton
- 12 The Electoral Commission
- 13 Electoral Management Board for Scotland
- 14 Equality and Human Rights Commission
- 15 Dr Richard Fairburn
- 16 Jonathan Fisher QC
- 17 Her Majesty's Inspectorate of Prisons
- 18 Her Majesty's Government
- 19 John Hirst
- 20 Professor Mike Hough and Professor Julian Roberts
- 21 Howard League Scotland
- 22 Martin Howe QC
- 23 Rt Hon Professor Sir Francis Jacobs KCMG QC
- 24 JUSTICE
- 25 Paul Langton
- 26 Law Society of Scotland
- 27 Leigh Day Solicitors
- 28 Sir Leigh Lewis KCB
- 29 Lord Lester of Herne Hill QC
- 30 Liberty
- 31 Dr Bharat Malkani
- 32 Nils Muižniek
- 33 Colin Murray
- 34 Nacro
- 35 Policy Exchange
- 36 Prison Governors Association
- 37 Prison Reform Trust
- 38 Quaker Crime, Community and Justice Sub-Committee
- 39 Scotland's Commissioner for Children and Young People
- 40 Anthony Speaight QC
- 41 Victim Support
- 42 Victims' Commissioner for England and Wales

43 Robert Walter MP

Written and oral evidence is published on the committee website

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/>

Appendix 4: Call for written evidence

A new Joint Committee has been appointed by both Houses of Parliament to conduct pre-legislative scrutiny of the draft Voting Eligibility (Prisoners) Bill. The Joint Committee comprises 6 MPs and 6 Peers. It will take oral and written evidence and make recommendations in a report to both Houses. The Joint Committee invites interested organisations and individuals to send written submissions by 5 pm on Thursday 13 June 2013 as part of the inquiry.

CALL FOR EVIDENCE

The Joint Committee on the draft Voting Eligibility (Prisoners) Bill invites interested organisations and individuals to submit written evidence as part of its inquiry.

The draft Bill

The Joint Committee is particularly interested in receiving evidence on the three options for changes to the law set out in the draft bill. They are:

- a) Disqualifying prisoners sentenced to 4 years or more in prison from voting.
- b) Disqualifying prisoners sentenced more than 6 months in prison from voting.
- c) Disqualifying all prisoners serving custodial sentences from voting—a restatement of the existing ban.

Please state your opinion on all or any of these options giving clear reasons as to why you, or your organisation, hold that particular view.

The Joint Committee would also welcome evidence on whether approaches beyond these options should also be considered.

Additional questions

The Joint Committee would also be grateful to receive evidence on the following specific questions. It is not necessary to address every question.

1. What are the historical and philosophical justifications for denying prisoners the right to vote?
2. Why is the right to vote considered to be a human right?
3. Is disqualifying prisoners from voting a suitable part of their punishment?
4. What are the financial implications of maintaining the current ban in terms of claims by prisoners for compensation?
5. Is sentence length a legally robust basis on which to retain an entitlement to vote?
6. What would be the likely legal consequences, both domestically and internationally of:
 - i) keeping the law as it is?

- ii) passing legislation giving some prisoners the right to vote, but in a way that maintains a form of blanket restriction?
 - iii) seeking to comply by enfranchising the minimum number of prisoners possible consistent with our international legal obligations?
7. Would giving prisoners the right to vote have any significant administrative impact on either the prison system or the Electoral Commission?
8. Is there any evidence to suggest that allowing prisoners to vote would have a significant impact on particular constituencies?
9. What lessons can be drawn from the experience of other countries regarding prisoner voting?

Appendix 5: Note of visit to HMP Downview and HMP High Down

Summary Note of Visit to HMP Downview and HMP High Down 11 July 2013

Overview

Those present were:

- Ms Lorely Burt MP
- Lord Dholakia
- Mr Nick Gibb MP (Chair)
- Lord Norton of Louth
- Lord Peston
- Sian Woodward (Clerk)
- Christopher Johnson (Clerk)
- Kirstine Szifris (Committee Specialist)

Members of the Committee visited two prisons in the South Central region; HMP High Down and HMP Downview. HMP High Down is a category B, male, local prison primarily holding remand prisoners, but with a significant number of sentenced prisoners. HMP Downview is a female, closed training prison with a small YOI unit that is due to be closed.

The representatives of the Committee met two groups of prisoners, one in each prison. The first session was held at HMP Downview with 16 female prisoners. This was followed by a discussion with 9 male prisoners at HMP High Down.

HMP Downview

Members talked to a randomly selected panel of female prisoners, serving sentences of between two years three months and life; in addition two prisoners were serving Imprisonment for Public Protection (IPP) sentences. . None of the prisoners were on remand; one indicated that she had been sentenced for non-payment of a fine, but was unaware that she therefore retained the right to vote. About half the prisoners said that they had voted before their imprisonment; all indicated that they would vote in future were the opportunity to arise.

The prevailing view of the participants was that prisoners should be allowed to vote. They saw their disenfranchisement as an extra punishment that was tantamount to being judged twice. All the prisoners taking part in the meeting were clear that they remained part of society, that they should retain the right to vote, and that if they had this right they would exercise it. They confirmed that this was the view of the vast majority of prisoners, though it was suggested that there were a few inmates in HMP Downview who opposed prisoner voting.

Several female prisoners noted that they had children and families for whom they felt responsible—they wanted to stop their children making the same mistakes. It was therefore important that they retain links to the wider community, and in particular that they be able to vote so as to exercise some influence on government on behalf of their children and families, thereby giving their children a voice. Prisoners argued that one of the roles of the prison system was to build bridges with the outside world, and it was important that they had a say in how society is run.

One Scottish prisoner highlighted the forthcoming referendum on Scottish independence, which would be of permanent importance to her, and in which she should have a say. It was also noted that a Dutch prisoner in Downview had exercised her right to a postal vote in a recent Dutch general election.

Others pointed out that they continued to pay tax while imprisoned, and so were affected by governmental decisions in the same way as those at liberty. They were also affected by cuts in public spending, which had led to cuts in courses for prisoners and changes to the way prisons are managed. They were indirectly impacted by the restrictions on pay for prison staff, insofar as those restrictions affected morale and staffing in the prison service.

More generally, the prisoners pointed out that they would all, even those serving long sentences, be released one day, and they would then be expected to re-integrate with society. They should be given education to prepare them for release, and classes built around voting could be part of this. There was nothing for those serving long sentences to do, and getting them interested in politics helped them get through their sentences as well as promoting rehabilitation. One prisoner serving an IPP sentence emphasised the demoralising effect of an indeterminate sentence, and argued that being allowed to vote would give her some sense of being able to influence public affairs.

Asked whether any restrictions on prisoner voting would be appropriate, there was a general view that a ban based on sentence length was too crude and would be unfair in its effects. In particular, sentencing guidelines changed regularly, most recently in February 2012, with the result that prisoners convicted of the same crime got different sentences depending on when they were convicted.

Most of the prisoners also opposed the suggestion that judges, when sentencing, should be empowered to add loss of the right to vote to the sentence. They argued that judges could be biased, and in any case their job was to decide on an appropriate term of imprisonment, not the further punishment of loss of voting rights.

Some of the prisoners were open to the suggestion that prisoners should complete a course in citizenship to earn back the right to vote. It was pointed out that many prisoners had been alienated from society, for instance by drug addiction, before coming to prison, whilst others had been too young to be engaged in politics. It was suggested that while in prison many prisoners engage in education for the first time, and that they are far more open to learning. Providing the opportunity to engage in a citizenship course might prove to be a successful aspect of rehabilitation. Others saw the idea of courses in citizenship as patronising, and contrary to the basic principle that as British citizens they had the right to vote—prisoners argued that no other British citizen had to take a course to be able to vote. If they wanted to know what was happening they could watch the television news.

Another suggestion was that voting rights could be linked to status and privileges—for instance, being reinstated when a prisoner was moved to an open prison as part of the resettlement phase of the sentence. Prisoners under such conditions were deemed to be suitable for working in the community. Therefore it was argued that they prisoners should be allowed to have say in the community in which they worked.

However, such a system would mean re-enfranchisement was linked to administrative decisions about prisoner status. There was concern that it would also be unfair in its effects, since not all those eligible for open status were in fact given such status. It was suggested that politicians sent to prison in recent years had been given favourable treatment by being sent straight to open conditions.

HMP High Down

Members talked to a selected panel of male prisoners; most were convicted prisoners, serving sentences of between 18 months and two years; two were on remand (but were unaware that they retained the right to vote); one was serving an IPP sentence. Some indicated that they had voted in the past.

The prisoners were unanimous that prisoners should enjoy the right to vote: if the principle of universal suffrage was once accepted, why should it be limited in respect of prisoners? Voting was a fundamental right, and the rest was detail. Representation too was a fundamental right and they, as citizens, should be represented in Parliament. Some accepted that there were circumstances where the removal of the right to vote might be legitimate, for example, if they were mentally unfit to exercise it. One prisoner said that he thought serious offences such as murder should preclude people from voting although he was not backed up by his fellow prisoners.

It was argued that many prisoners had contributed to society before their imprisonment, and that the main purpose of prison itself was to rehabilitate them so as to prepare them for their return to society. It didn't make sense to deprive them of the right to vote while in prison—if it did, it would be illogical to reinstate voting rights upon release, since the original crime would still have been committed.

Asked whether there could be limits on the right to vote, some accepted that certain categories of prisoner, for instance those serving life sentences, should lose the right to vote. It was also suggested that those serving extremely long sentences were withdrawn from society for so long that it might be possible to take away the right to vote.

The prisoners criticised the attitude of MPs, particularly those who voted against prisoner voting rights in 2011—it was suggested that there was no logic in this decision, and that MPs simply voted this way because they “didn't like prisoners”.

The prisoners also opposed the approach proposed in the draft bill. It was argued that sentence length was too crude as a way of determining who should vote—prisoners convicted of drug offences or fraud could end up with the same sentence. It was also that the current disqualification was capricious and unfair: repeat offenders in particular were frequently in and out of prison, and it was pure chance whether a period of imprisonment coincided with an election.

There was opposition to linking voting rights to enhanced privileges or category status, since these were artificial and could change over time.

There was general agreement that the exercise of voting rights could play a useful part in rehabilitation, for example by means of courses in civic responsibility which could help to reintegrate prisoners in society. Many prisoners had never cared about voting before their conviction—prison gave them time to sort out their lives, and the support necessary to enable them to earn qualifications. In the process they became politically engaged for the first time.

One prisoner said that he had been a heroin addict from the age of 16. In prison he had cleaned himself up and got qualifications, and he was now due for release in 11 weeks. He saw no reason why he should not have had the right to vote while going through this process.

Another prisoner said that he now worked with other prisoners, promoting and organising educational programmes. Prisoners who contributed in this way were crucial in making prisons work, and should be treated as valued members of society. Restoring the right to vote would be seen as a gesture of good will.

Meeting with prison staff

Over lunch the Committee representatives met various staff members including uniformed officers, governors and education staff.

Formal Minutes

Wednesday 11 December 2013

Members present:

Mr Nick Gibb MP, in the Chair

Lord Dholakia	Mr Crispin Blunt MP
Baroness Gibson of Market Rasen	Steve Brine MP
Lord Norton of Louth	Lorely Burt MP
Lord Peston	Sir Alan Meale MP
	Derek Twigg MP

Draft Report (*Draft Voting Eligibility (Prisoners) Bill*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 12 read and agreed to.

Paragraph—(*Lord Peston*)—brought up, read the first and second time, and inserted (now paragraph 13).

Paragraphs 13 to 45 (now paragraphs 14 to 46) read and agreed to.

Paragraph 46 (now paragraph 47) read, amended and agreed to.

Paragraphs 47 to 53 (now paragraphs 48 to 54) read and agreed to.

Paragraph 54 (now paragraph 55) read and agreed to.

Paragraphs 55 to 71 (now paragraphs 56 to 72) read and agreed to.

Paragraph 72 (now paragraph 73) read and agreed to.

Paragraphs 73 to 109 (now paragraphs 74 to 110) read and agreed to.

Paragraphs—(*Crispin Blunt*)—brought up and read, as follows:

111. We agree with the evidence of Lord Mackay of Clashfern, that the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights.

112. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking.

113. A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow.

Question put, That the paragraphs be read a second time.

The Committee divided.

Contents, 7	Not Contents, 3
Crispin Blunt MP	Steve Brine MP
Lorely Burt MP	Nick Gibb MP
Lord Dholakia	Derek Twigg MP
Baroness Gibson of Market Rasen	
Sir Alan Meale MP	
Lord Norton of Louth	
Lord Peston	

Paragraphs (now paragraphs 111 to 113) inserted.

Amendment to the title of Chapter 5 proposed and agreed to—(*Lorely Burt*).

Paragraphs 110 to 122 (now paragraphs 114 to 126) read and agreed to.

Paragraph 123 (now paragraph 127) read and agreed to.

Paragraphs 124 to 137 (now paragraphs 128 to 141) read and agreed to.

Paragraph—(*Lorely Burt*)—brought up, read the first and second time, and inserted (now paragraph 142).

Paragraph 138 (now paragraph 143) read and agreed to.

Paragraph 139 (now paragraph 144) read, amended and agreed to.

Paragraphs 140 to 148 (now paragraphs 145 to 153) read and agreed to.

Paragraph 149 (now paragraph 154) read, amended and agreed to.

Paragraphs 150 to 152 (now paragraphs 155 to 157) read and agreed to.

Paragraph 153 (now paragraph 158) read and agreed to.

Amendment to the title of Chapter 6 proposed and agreed to—(*Lorely Burt*).

Paragraphs 154 to 184 (now paragraphs 159 to 189) read and agreed to.

Paragraph 185 (now paragraph 190) read and agreed to.

Paragraphs 186 to 221 (now paragraphs 191 to 226) read and agreed to.

Paragraph 222 (now paragraph 227) read and agreed to.

Paragraph 223 (now paragraph 228) read and agreed to.

Paragraphs 224 to 232 (Chapter 8) read as follows:

Chapter 8: The way forward

224. Parliament has a choice: to comply with the judgment of the European Court of Human Rights in *Hirst*, or to refuse to comply with that judgment. The Lord Chancellor invited us to put both compliant and non-compliant options to Parliament, alongside the political and legal consequences that flow from them. He suggested that “it [is] better—in order to promote a sensible debate in this

matter—to lay the options on the table before it, rather than wait for the inevitable Back-Bench amendment that would do the same job anyway.²³⁸

225. We agree with the Lord Chancellor that, were the Government to introduce a Bill enfranchising any or all prisoners, there would almost certainly be amendments reasserting the current complete prohibition. At the same time, we are not persuaded that Parliament should be presented with a complex menu of options for compliance: it is better for a single compliant option, which has been carefully considered and judged to be proportionate, to be put to Parliament.

Compliance or non-compliance

226. Views within the Committee on the fundamental choice—to comply or not to comply—were split.

227. A minority of members of the Committee, including the Chair, support non-compliance. They do so in full recognition of the serious consequences of non-compliance, but consider that the ECtHR has exceeded its mandate in seeking to dictate to a democratically elected legislature the detailed arrangements regarding prisoner voting. They consider that the Court’s recent jurisprudence, which suggests that automatic disenfranchisement is allowable, but not if the threshold for that disenfranchisement corresponds to the threshold for imprisonment, is internally incoherent, clearly demonstrating the dangers of judicial law-making.

228. In light of the gravity of the decision before Parliament, these members of the Committee believe that both compliant and non-compliant options should be included in any Bill introduced by the Government, so that Parliament can fully weigh up the arguments on both sides. They therefore recommend that the Government’s Bill should include a) option 3 in the draft Bill, re-stating the existing United Kingdom ban on convicted prisoners voting in elections, and b) a compliant option, which would provide as follows:

- That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections;
- That such prisoners should be registered to vote in the constituency where they were registered prior to sentencing; and that, where there is no identified prior residence, they should be able to register by means of a declaration of local connection;
- That all convicted prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.

229. The majority of members of the Committee support compliance with the judgment of the ECtHR in *Hirst*. They acknowledge the need for continuing reform of the Court and its relationship to national legislatures. But they consider that the United Kingdom is under a binding international law obligation to comply with the *Hirst* judgment, and that refusal to comply with the judgment would not only be unprecedented in itself, but would gravely undermine the principle of the rule of law and the UK’s international standing. While acknowledging the strength of public feeling on the issue of prisoner voting and the symbolic force of current ban, they believe that no case has been made for the current ban in respect of penal policy, and that the effects of the ban on individual prisoners are capricious and disproportionate.

230. These members of the Committee accordingly conclude that Parliament should comply with the Court’s judgment in *Hirst* by enacting legislation that would confer voting rights on some convicted prisoners.

Conclusions and recommendations

231. Parliament must be given the opportunity to decide, on a fully informed basis, whether to comply with the judgment of the European Court of Human Rights or not. We therefore recommend that the Government should introduce a Bill containing two options for consideration by Parliament, one representing compliance with the Court’s judgment, and the other non-compliance.

232. We recommend that the compliant option in the Government’s Bill, rather than following either option 1 or option 2 in the draft Bill, should give legislative effect to the following conclusions:

- **That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections;**
- **That such prisoners should be registered to vote in the constituency where they were registered prior to sentencing; and that, where there is no identified prior residence, they should be able to register by means of a declaration of local connection;**
- **That prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.**

Amendment proposed to leave out paragraphs 224 to 232 and insert new paragraphs 224 to 234 (now paragraphs 229 to 239)—(*Crispin Blunt*).

Question proposed, that the Amendment be made.

Amendment proposed to the proposed Amendment, to leave out “12 months or less” and insert “less than 4 years”—(*Lord Peston*).

The Committee divided.

Contents, 4	Not Contents, 6
Lord Dholakia Baroness Gibson of Market Rasen Sir Alan Meale MP Lord Peston	Crispin Blunt MP Steve Brine MP Lorely Burt MP Nick Gibb MP Lord Norton of Louth Derek Twigg MP

Question negatived.

Question put, That the proposed Amendment be made.

The Committee divided.

Contents, 7	Not Contents, 3
Crispin Blunt MP Lorely Burt MP Lord Dholakia Baroness Gibson of Market Rasen Sir Alan Meale MP Lord Norton of Louth Lord Peston	Steve Brine MP Nick Gibb MP Derek Twigg MP

Amendment agreed to.

Executive Summary read, as follows:

In November 2012 the Lord Chancellor published the Draft Voting Eligibility (Prisoners) Bill, and announced the establishment of a Joint Committee to conduct pre-legislative scrutiny.

At present the law in the United Kingdom is clear: all convicted prisoners are prohibited from voting in parliamentary, local or European parliamentary elections, for the duration of their detention. The draft Bill contains three options: options A and B would give the vote to all those serving sentences of less than 4 years or 6 months or less respectively; option C would re-state the existing complete prohibition on all convicted prisoners voting.

The Government brought forward the draft Bill as a result of the decision of the European Court of Human Rights in the 2004 case of *Hirst v United Kingdom (No. 2)*. In that case the Court found that the UK's complete prohibition on convicted prisoners voting was incompatible with the European Convention on Human Rights.

Underlying our inquiry is a far-reaching debate about the United Kingdom's future relationship with the European Court of Human Rights and the Convention system as a whole. This debate falls outside the scope of this Report, though we have, in reaching our conclusions, taken into account the implications of a refusal to comply with the Court's judgment for the UK's relationship with the Court and for the future of the entire Convention system.

In respect of prisoner voting itself, we have sought to present the arguments in a balanced and dispassionate way. In so doing we have reached the following conclusions on points of basic principle:

- In a democracy the vote is a right, not a privilege: it should not be removed without good reason.
- The vote is a presumptive, not an absolute right: all democratic states restrict the right to vote in order to achieve clearly defined, legitimate objectives.
- The vote is also a power: citizens are entrusted, in voting, with an element of power over their fellow-citizens.
- There is a legitimate expectation that those convicted of serious crimes should, as part of their punishment, be stripped of the power embodied in the right to vote.

Parliament is sovereign: it is free to legislate as it sees fit, and we expect that whatever Bill is ultimately introduced, amendments either re-stating the current prohibition on prisoner voting, or enfranchising some or all prisoners, will be debated and voted on. Our Report seeks ensure that Members of both Houses, in debating these issues, are fully informed of the historical, legal and factual background to the debate, as well as the major arguments for and against allowing some or all prisoners to vote.

Views within the Committee—as in Parliament as a whole—were divided, and in recognition of this we have recommended that any Bill introduced by the Government should include two options. One option should restate the existing prohibition; the other should include provisions enfranchising prisoners serving sentences of 12 months or less, as well as allowing all prisoners to apply, up to 1 year before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.

Amendment proposed, to leave out the Executive Summary and insert new Executive Summary—(*Crispin Blunt*).

Amendment agreed to.

Appendices to the Report agreed to.

Resolved, That the Report be the Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that Lord Peston make the Report to the House of Lords on Monday 16 December 2013.

Written evidence was ordered to be reported.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134 of the House of Commons.

The Committee adjourned.