



The Odyssey Trust

RESPONSE TO THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS CONSULTATION

‘Voting Rights of Convicted Prisoners Detained within the United Kingdom’

1. The Odyssey Trust¹ is a not-for-profit company limited by guarantee which seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC, together with two Parliamentary Legal Officers, Kate Beattie and Bonita Meyersfeld. This paper responds to the Department for Constitutional Affairs’ consultation on “Voting Rights of Convicted Prisoners Detained within the United Kingdom”.
2. We welcome publication of the consultation paper and the opportunity to comment on the implementation of the judgment of the Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom*,² which found that the blanket ban on prisoners’ voting rights violated Article 3 of Protocol 1 to the European Convention on Human Rights.
3. We agree with the Joint Committee on Human Rights that it is regrettable that delay in publishing the consultation paper will mean that several upcoming elections in the UK will be conducted in a manner incompatible with the Convention.³ The Grand Chamber delivered judgment in the *Hirst* case on 6 October 2005. On 2 February 2006 the Lord Chancellor made a written Ministerial statement indicating that a consultation document would be available for discussion “within a few weeks”.⁴ However, the consultation paper was not published until 14 December 2006.

¹ For more information about the work of the Trust, please visit our website, www.odysseustrust.org.

² *Hirst v United Kingdom* (2006) 42 EHRR 41.

³ Letter from the Joint Committee on Human Rights to the Lord Chancellor, “Implementation of Judgments of the European Court of Human Rights”, 23 January 2007 (see Press Notice No.15, 23 February 2007). See also *Smith v Scott* [2007] CSIH 9, in which the Registration Appeal Court of Scotland made a declaration of incompatibility in relation to section 3(1) of the Representation of the People Act 1983.

⁴ Written Statement “Prisoners: Voting Rights”, HL Official Report, Column WS26 (2 February 2006).

4. The consultation paper shows some misgivings about the Grand Chamber decision in *Hirst*. For example, it states that it remains the Government's view that prisoners should lose the right to vote. The paper states that the Government would be "wholly opposed" to full enfranchisement and therefore it does not set out this possibility as it is not considered "a realistic option for change". This view was also expressed in the written Ministerial statement by the Lord Chancellor, which said that "the Government are firm in their belief that individuals who have committed an offence serious enough to warrant a term of imprisonment, should not be able to vote while in prison. None the less, we recognise that we must decide how to respond to the Grand Chamber's judgment."⁵
5. The Grand Chamber held that while Article 3 of Protocol 1 to the European Convention on Human Rights did not give an absolute right to vote, any measures of disenfranchisement were not to be taken lightly, and the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned. In light of the Grand Chamber decision, we regret that the consultation paper does not offer total enfranchisement of prisoners as an option for reform, but does offer as an option total *disenfranchisement* of prisoners (in other words, the *status quo* which the Grand Chamber found to violate the Convention). We share the concerns of the Joint Committee on Human Rights about this omission.⁶

The right to vote

6. As the Supreme Court of Canada has stated, the right to vote is fundamental to democracy and the rule of law and cannot be lightly set aside.⁷ Universal suffrage is a basic principle of modern democracy and the right to vote is no longer a "privilege" accorded only to certain classes or groups of persons. The right to vote is also not based on any notion of "moral authority" separate from or additional to threshold requirements such as citizenship, residence and age. In our view prisoner enfranchisement would respect the principle of equality and non-discrimination, which is fundamental to the rule of law.
7. Imprisonment as a form of punishment is marked by loss of liberty but not by the loss of other civil rights. This was clearly stated by the House of Lords in *Raymond v Honey*, where Lord Wilberforce said that "under English

⁵ *Id.*

⁶ Letter from Joint Committee on Human Rights to the Lord Chancellor, "Implementation of Judgments of the European Court of Human Rights", 23 January 2007 (see Press Notice No.15, 23 February 2007).

⁷ *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, 2002 SCC 68.

law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".⁸ We endorse the comments of Justice Sachs of the Constitutional Court of South Africa that:⁹

"The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."

8. The right to free and fair elections is recognized in the major international and regional human rights treaties and instruments.¹⁰ It is clear that, despite being phrased as an obligation on states, Article 3 of Protocol 1 to the European Convention guarantees to individuals the right to vote and to stand for election.¹¹ We acknowledge that there is varied practice among democratic countries in Europe and the rest of the world, as recognized by the Grand Chamber in *Hirst*. We recommend that the United Kingdom follow the lead of those countries which have abolished restrictions on the right to vote for prisoners.

Consultation questions

1. Do you support the proposal that enfranchisement of detained prisoners should be determined by reference to the length of sentence they receive?

9. No. We consider that all prisoners should be entitled to vote, irrespective of the length of sentence. We do not recommend the creation of different entitlements based on length of sentence, which would lead to disproportionate and inconsistent consequences.
10. Length of sentence is variable on many factors and is not a rational basis for determining enfranchisement. We are concerned that a move to determine voting rights by reference to length of sentence would simply replace an indiscriminate ban with an automatic cut-off which would operate in an arbitrary way. The reasons for handing down a custodial sentence, and the length of that sentence, may vary depending on the defendant's age, health or family situation. A sentence may be custodial or non-custodial. This means that the same criminal offence can lead to different sentencing

⁸ *Raymond v. Honey* [1983] 1 AC 1 at 9. See further *R v. Home Secretary, ex parte Simms* [2000] 2 AC 115; *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532.

⁹ *August v. Electoral Commission* (1999) (3) SA 1 (CC) at [17].

¹⁰ See, among others, Article 25, International Covenant on Civil and Political Rights; Article 21, Universal Declaration of Human Rights; Article 3 of Protocol 1, European Convention on Human Rights; Article 23, American Convention on Human Rights; Article 13, African Charter on Human and Peoples' Rights.

¹¹ *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1; *Hirst v UK* (2006) 42 EHRR 41 at [57].

outcomes which have no rational connection to the right to vote. If the rationale for prisoner disenfranchisement is moral unfitness or forfeiture of the privilege of voting, it is also not clear why those who breach civil law obligations are not similarly disenfranchised.

11. We reiterate the concerns expressed by the United Nations Human Rights Committee that a voting ban amounts to an additional punishment and does not contribute towards prisoners' reformation and social rehabilitation.¹² In our view it makes sense to extend the franchise to all prisoners following its extension to prisoners on remand by the Representation of the People Act 2000.
12. We note that prisoners on remand are already entitled to vote, so there are not insuperable administrative barriers to facilitating voting by other prisoners. We also point out that community sentences are increasingly used, which further makes incarceration an irrational basis for depriving people of their civil rights.

2. What length of sentence do you consider appropriate as the threshold above which prisoners will be disenfranchised? Please give reasons for the threshold you suggest.

13. We do not consider that length of sentence is an appropriate basis for determining enfranchisement.

3. Should the decision to either grant or withdraw voting rights from convicted prisoners be made by UK sentencers on a case by case basis, at the time of sentencing? Please give reasons to support your view, e.g. if you do not believe sentencers should be given a power to determine voting rights, is this because you believe it would place an unjustifiable burden on sentencers?

14. We do not think that voting rights should be granted or withdrawn by sentencers at the time of sentencing, as the franchise should be extended to all prisoners. Such a system would involve additional costs and would be subject to legal challenge and appeal. Where the offence has no connection with the electoral system, it is difficult to envisage a rational and proportionate basis on which sentencers would determine whether to withdraw voting rights, where the offence has no connection with the electoral system.

¹² UN Human Rights Committee Concluding Observations on the UK's Fifth Periodic Report: CCPR/CO/73/UK;CCPR/CO/73/UKOT, 6 December 2001.

15. If sentencers were given the right to disenfranchise prisoners, we emphasise that the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. We refer to the Code of Good Practice in Electoral Matters, adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session, submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002. The Code provides that any deprivation of the right to vote must be: (1) provided by law; (2) observe the principle of proportionality; (3) be based on mental incapacity or a criminal conviction for a serious offence; and (4) only be imposed by express decision of a court of law.

4. If the Government were to follow this approach, which variant do you favour?

(i) that statute should provide that convicted and sentenced prisoners should automatically lose their right to vote, but subject to the sentencing judge's right to specify that they shall be entitled to retain that right.

or

(ii) that statute should remove the general rule of disenfranchisement of sentenced prisoners, but should confer on sentencing judges the right to disqualify sentenced offenders.

16. We do not consider that length of sentence is an appropriate basis for determining enfranchisement. However, in response to the question we would favour the second option so that the presumption is in favour of enfranchisement.

5. Should offences specifically related to the electoral process automatically attract a withdrawal of the franchise? Please provide reasons to support your answer.

17. No. We do not think that any offences should attract an automatic withdrawal of the franchise. However, we recognize that in the case of electoral offences the offending behaviour has some relevance to the right to vote. Electoral offences threaten the integrity of the electoral process. For this reason disenfranchisement may be justified, but only if the withdrawal meets the principle of proportionality and is justified in an individual case. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

6. Should any voting rights given to prisoners detained in mental hospitals be determined on the same basis as ordinary prisoners, or are there any categories (See Annex B), that should be treated exceptionally? Please list those categories and give reasons.

18. Yes. All persons detained in mental hospitals should have the right to vote, unless it is established that they lack capacity to exercise the right to vote within the meaning of the Mental Capacity Act 2005. There is no justification for distinguishing between prisoners detained in mental hospitals and other prisoners for the purpose of the franchise.

7. If your answer to question 6 was no, do you consider that any categories of detained offenders in mental hospitals should be enfranchised?

19. As above, we consider that all categories of detained offenders in mental hospitals should be enfranchised, unless it is established that they lack capacity to exercise the right to vote within the meaning of the Mental Capacity Act 2005.

8. Should any of the circumstances covered by the statutory provisions referred to in Annex B more properly be aligned with the position of pre-conviction remand prisoners?

20. Yes. See our answers to questions 6 and 7 above.

The Odysseus Trust
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