

**Letter to the Chair from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice,
dated 8 October 2009**

Hirst (No 2) v United Kingdom

Thank you for your letter dated 21 July, in which you asked a number of questions about the Government's implementation of the *Hirst (No 2)* judgment.

You will be aware from the Government's second consultation paper, *Voting rights of convicted prisoners detained within the United Kingdom*, published on 8 April 2009, and from the Annotated Agenda notes published following the 1059th meeting of the Council of Europe's Committee of Ministers' Deputies (CoM) on 3 June, that the position of the UK Government remains that there are legitimate reasons for removing a prisoner's right to vote. The Government believes that the right to vote forms part of the social contract between the individual and the State, and that it is a proper and proportionate response to breaches of that contract that result in imprisonment. However we take our responsibilities under the European Convention on Human Rights in respect of ECtHR decisions seriously.

You ask a number of specific questions in your letter. For ease of reference, I have repeated these in this reply.

1. We would be grateful if you could agree to publish the responses to the first stage consultation – if necessary, redacted to protect anonymity, if requested – to allow for more effective parliamentary and public scrutiny of the Government's next steps.

My officials have prepared a copy of the full individual responses (with some personal data redacted in accordance with data protection legislation) which will be published and sent to you under separate cover. It is worth adding that the total number of responses received was 90, as opposed to the published figure of 88. The difference is a result of an administrative oversight within the Department. The responses not included in the published consultation response were from JUSTICE and from Steve Foster, an academic at Coventry University. Both supported the full enfranchisement of prisoners, and had their responses been included in the document would have increased the number of those in favour of enfranchisement from 41, to 43.

2. How does the Government respond to the significant number of responses to the first consultation which argued in favour of full enfranchisement? In particular, please outline the consultation respondents' arguments in favour of full enfranchisement and the Government's responses to them.

3. Given the low numbers of respondents to the first stage consultation who favoured this approach, we would be grateful if you could explain why the Government has adopted this approach.

4. We would be grateful if you could explain the Government's view that maintaining a blanket ban for all prisoners serving a custodial sentence over a set duration is justified, proportionate and compatible with Article 3 of Protocol 1 ECHR. Please specify any other similar arrangements which operate in other Council of Europe States which have influenced the Government's thinking on this issue.

5. In particular, we would be grateful if you could explain how an absolute ban based on length of sentence (a) allows for a sufficient link between the sanction, the offence and the rule of law or its democratic foundations and (b) allows for the consideration of the conduct and circumstances of each individual offender.

The Government has made clear its opposition to full enfranchisement for all convicted prisoners and conducted the first stage consultation on that basis. Although we have taken account of the number of respondents to the first consultation paper who urged full enfranchisement, as the second consultation paper notes, the responses to the first consultation paper were heavily polarised. On the question of how far the franchise should be extended to convicted prisoners in custody, the second stage consultation paper notes that the majority of respondents made strong representations for the introduction of either full enfranchisement (41 responses, or approximately 47 per cent), or continuing with the UK's current policy of total disenfranchisement (22 responses, or 25 per cent),¹ and many respondents made no comment or gave a 'not applicable' answer to many of the questions.

The reasons for the Government's proposals for limited, rather than full, prisoner enfranchisement are set out in the second stage consultation paper. On page 21 of that paper, the Government states that it accepts that "it must act in a way that is compatible with its obligations under the ECHR [and] so any approach will need to be within the margin of appreciation afforded to signatory states in applying Convention rights." Therefore:

"The Government has reached the preliminary conclusion that to meet the terms of the judgment a limited enfranchisement of convicted prisoners in custody must take place, with eligibility determined on the basis of sentence length."

Regarding the decision not to enfranchise prisoners sentenced to four years and over, the consultation paper states (pages 25-26):

"In line with its view that the more serious the offence that has been committed, the less right an individual should have to retain the right to vote when sentenced to a period of imprisonment, the Government does not intend to permit the enfranchisement of prisoners who are sentenced to 4 years' imprisonment or more in any circumstances. The Government believes that this is compatible with the ECtHR ruling in *Hirst (No 2)*."

Additionally, as the second stage consultation document makes clear at page 24:

"Although few respondents to the first stage consultation document actively agreed with a system of enfranchisement based on sentence length, many respondents did not engage with the question given their support for either full enfranchisement or retaining a total ban; and nor was there a clear expression of support for the alternative approach of the decision being handed to sentencers.

The Government considers that, in general, the more serious the offence that has been committed, the less right an individual should have to retain the right to vote when sentenced to imprisonment. Tying entitlement to vote to sentence length would have the benefit of establishing a clear relationship

¹ As stated in answer to the first question, two further responses were received in favour of full enfranchisement, bringing the total to 43, or 48%.

between the seriousness of the offence, or offences, and suspension of the right to vote. The Government believes it would also be more administratively straightforward to achieve than leaving discretion to the sentencer. In addition, the Government is obliged to take account of the degree to which any sentence length chosen as the “cut off” point is compatible with the ECHR. In determining the length of a custodial sentence, sentencers take into account the nature and gravity of the offence and, in most cases, the individual circumstances of the offender. Under these proposals, the suspension of the right to vote will only occur where those factors are such as to have led a sentencer to conclude not only that the offence is such as to warrant a custodial sentence rather than some other form of punishment, but also that a term of a some length is appropriate.”

You ask whether the Government’s proposed approach to enfranchisement arrangements for convicted prisoners has been informed by practice in other Council of Europe Member States. In fact, this was discussed in the first stage consultation paper. This noted (pages 20- 21) that policies within the (then) 41 Council of Europe countries ranged from 18 that practised full or virtually full enfranchisement to 13 (including the UK) who maintained a blanket ban. Regarding those states that impose a partial ban on prisoners’ voting rights, it was noted that:

“For example, in Belgium, prisoners who receive a sentence length of longer than 4 months are disqualified [and] the period of disenfranchisement may actually exceed the period of the sentence. Austria disenfranchises prisoners serving more than 1 year, while in Italy, those serving a sentence of 5 years or more are disqualified.”

There is, therefore, no uniformity on this issue, and a number of Contracting States do place restrictions on the right to vote based on sentence length. As the Grand Chamber noted (at paragraph 84):

“In a case such as the present, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Art. 3 of Protocol No.1”.

6. **Please list the additional burdens on the courts and on institutions where individuals are currently held in custody which affected the Government’s view on whether or not sentencing courts should be responsible for decisions in respect of the right of an individual prisoner to vote.**
7. **Why does the Government consider that it would be inappropriate for Parliament to delegate the decision on the extent of an individual’s right to participate in elections to the sentencing court?**
8. **Please explain why the Government’s view that removal of the franchise should not be treated like any other criminal sanction is compatible with the decision of the Grand Chamber in *Hirst* and Article 6 ECHR.**

The Government has consistently been clear that it considers that for an issue as important as prisoner voting rights, upon which strong and often contrary views are held, Parliament should have the opportunity to debate the principles behind prisoner enfranchisement and the competing interests at stake and to assess the proportionality of any measures taken to restrict the right to vote. Further, it is right that

in general Parliament should set the legislative threshold or thresholds at which convicted prisoners ought to retain the right to vote or have that vote restricted.

The Government accepts, of course, that any restriction upon the right to vote must be proportionate, but for the reasons set out above, namely that the sentencing decision itself takes into account the nature and circumstances of the offence and the individual circumstances of the offender, it considers that legislative thresholds for disenfranchisement based on sentence length may in principle be a proportionate means of implementing the judgment. The Grand Chamber in *Hirst (No.2)* did not state that the only permissible means of restricting the rights afforded by Article 3, Protocol 1 was by express judicial decision in every case, but stated that it was “primarily for the state concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention.” (para. 83 of the judgment). As already noted, many states operate a system of partial disenfranchisement which does not depend upon the decision of sentencers in each individual case.

That said, as you rightly state, Lord Bach indicated in the debate on Lord Ramsbotham’s amendment to the Coroners and Justice Bill on 15 July 2009 that the Government is not entirely opposed to giving sentencers some role in the decision; indeed this is expressly provided for in one of the four options which is currently out to consultation. However, as Lord Bach also said, “this approach needs to be considered very carefully”.

In relation to the additional burdens posed by any options which require the judicial sentencer to take decisions to restore or withdraw voting rights from offenders at the point of handing down a sentence, the Government does consider that such an option would impose additional burdens both on the Court and the UK penal institutions in which offenders are detained.

In the case of the courts, it is clear that a requirement to make a judgment on enfranchisement at the point of sentence which takes account of the individual circumstances of the offender will impose an additional burden on the sentencing court. The Government is mindful of the need not to underestimate the impact on the courts of any new requirements.

In relation to the additional burden that such an option could place on penal institutions, an approach to enfranchisement based entirely on judicial discretion would need to be carefully designed in order to minimise the administrative burden on the prison establishment. In order to facilitate registration and voting, prison officers will need to undertake some form of verification of applications to register to vote. In the event that enfranchisement is determined by the sentencing judge, there will need to be a mechanism to enable the prison authorities to check eligibility, and this would need to be designed to minimise the burden on those institutions.

Nonetheless, despite the potential for such additional burdens, the Government is not entirely opposed to the possibility of giving sentencers some role in the enfranchisement of prisoners, and, as stated above, one of the options set out in the consultation paper expressly provides for this.

9. We would be grateful if you could provide reasons why the Government considers that the consideration of both Houses of a remedial order on affirmative resolution will not provide adequate opportunity to debate the issues explored by the Grand Chamber in its decision and the Government’s proposals to remove the breach in *Hirst*.

You ask about the Government's view that a remedial Order under section 10 of the Human Rights Act would not be appropriate as the means for legislating for the implementation of the response to the *Hirst* judgment. The Grand Chamber ruling in *Hirst (No 2)* affirmed:

“As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there was no evidence that Parliament had 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 could not be said that there was any substantive debate by...the legislature on the continued justification...for maintaining such a general restriction on the right of prisoners to vote.”

The Government therefore considers it inappropriate for a remedial order – which is a summary procedure as compared to the usual process for enacting primary legislation - to be the means by which prisoner enfranchisement is enacted. The Government considers that in the special circumstances of this case, concerning an issue as fundamental as extending the franchise, Parliament should have the opportunity to debate and, if it considers necessary, amend any legislation implementing the judgment.

10. We would be grateful if you could provide us with any information which the Government has provided the Committee of Ministers since its decision in June 2009 expressing concern about the delay in this case and calling for a solution before the next general election.

11. In particular, we would be grateful if you could tell us:

- a. **Whether the Government has made any commitment to ensure that a solution will be in place before the next general election; and**
- b. **Any steps which the Government intends to attempt to meet this goal.**

12. Please explain whether the Government considers that the conduct of a general election before the blanket ban in Section 3 of the Representation of the People Act is removed will be compatible with the United Kingdom's international obligations under the Convention, including Article 13 ECHR.

The Government has previously provided the Joint Committee with its most recent update to the Committee of Ministers, which was provided to the Committee of Ministers in April 2009 for the meeting of 2-5 June 2009. This is attached (Annex A). However, a further update will be provided in advance of the Committee of Ministers' meeting in December, when the case is next due to be considered. We will, of course, provide the Joint Committee with a copy of any information submitted.

We have noted the Committee of Ministers' comments and the decision adopted in relation to this case. However, given that the consultation on this topic has only very recently concluded, we are not in a position to provide additional information at this time.

However, even if the concern of the ECtHR expressed in *Hirst (No. 2)* were not remedied by the next general election, this would not in the Government's view call into question the legality of the elections themselves.

The Government recognises that the implementation of this judgment is taking some time. However, the issues around prisoner voting are complex and require full consultation and consideration. The Government is actively working to resolve the issues, and the results of the second stage consultation will inform this work. As this second consultation has now concluded, the Government will consider the next steps towards implementing the judgment in legislation.

13. We would be grateful if you could provide us with the details of any further Convention challenges pending against the Government, either before our domestic courts or at the European Court of Human Rights, based on the failure of the United Kingdom to remove the blanket ban in section 3 of the Representation of the People Act 1983. Please include any details of the grounds of the challenge and any Government response.

The Government faces a judicial review by Peter Chester, who seeks a declaration of incompatibility in respect of section 3 of the Representation of the People Act 1983 and a declaration that he is entitled to vote in European elections. Permission has been granted and the case is listed in the Administrative Court on 22nd October 2009. There are a number of cases in Scotland which although technically pending were sisted (stayed) earlier this year.

We are aware of three further cases at the Court of Human Rights regarding prisoners' voting rights in Scotland and Northern Ireland. They are Application Numbers 8195/08, 60041/08 and 60054/08. The cases raise whether there has been a breach of Article 3, Protocol 1 in relation to various elections, whether the Northern Ireland Assembly is a "legislature" for the purposes of that Article, and whether the Applicants have had an effective domestic remedy in accordance with Article 13 of the Convention. These cases have only been notified to the Government recently, and the Government has not yet provided its observations.

I hope that you find this reply helpful.