

Voting Rights of Convicted Prisoners Detained within the United Kingdom

- The UK Government's response to the Grand Chamber of the European Court of Human Rights judgment in the case of Hirst v. The United Kingdom

Consultation Paper

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of the European Court of Human Rights judgment in the
case of Hirst v. The United Kingdom**

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Foreword by Lord Falconer of Thoroton

The right to vote in the UK is considered by many to be a privilege as well as an entitlement, and that persons who are convicted of an offence serious enough to warrant a term in prison have cast aside that privilege and entitlement for the duration of their sentence. Successive UK Governments have held to the view that the right to vote forms part of the social contract between individuals and the State, and that loss of the right to vote, reflected in the current law, is a proper and proportionate punishment for breaches of the social contract that resulted in imprisonment. That remains this Government's position, and that of a number of other Council of Europe states.

However, on October 6 2005, the Grand Chamber of the European Court of Human Rights delivered a judgment on the UK's current policy of withdrawing the voting rights of convicted, detained prisoners. That judgment concluded that the UK was in breach of Article 3 of Protocol 1 of the European Convention on Human Rights, and that as a consequence, the UK needs to give proper consideration to possible changes to the law, that would bring it into line with Convention rights.

I am aware that this is a contentious issue. The Government is firm in its 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. Nonetheless we recognise that we must take steps to respond to the Grand Chamber's judgment.

That judgment did not conclude that the UK must enfranchise all prisoners. As we would be opposed to such a level of enfranchisement, we are therefore not offering it as a possible option for change. However, the Grand Chamber did find that the current total ban was beyond the margin of appreciation given under the Convention. However between these two extremes there are a number of different systems already in place within other European states, offering various forms of partial enfranchisement, based on criteria such as sentence length and type of offence.

This document will be followed by a second consultation, to consider how any change might work in practice. Once the consultation process has concluded, and views considered, we will put proposals to Parliament, who must, ultimately, debate and decide upon an issue as significant as this.

Executive summary

This consultation document contains the following:

- A brief introduction and background to the consultation.
- A History of UK's policy towards the enfranchisement of prisoners, and the current statutory position under Section 3 of the Representation of the People Act 1983, together with a brief summary of previous challenges to UK law on prisoner enfranchisement.
- Background to the case of *Hirst v. The United Kingdom*, including a brief description of its route to the Grand Chamber of the European Court of Human Rights (the Grand Chamber), and a summary of the judgment itself. This section highlights that although the Court found the UK's blanket ban on prisoners voting to be in contravention of the European Convention on Human Rights (the Convention), there were minority dissenting judgments, and the judgment did not say that all convicted prisoners detained within the UK should be given the right to vote.
- A brief consideration of the policies of other countries on the enfranchisement of prisoners in other States within the Council of Europe. This section will provide some examples demonstrating that there is a wide range of voting arrangements for convicted prisoners detained within different states.
- The potential options for the enfranchisement of convicted prisoners, short of full enfranchisement. This section will set out a brief analysis of the potential benefits and drawbacks, and asks respondents for their views on each. Briefly, the following are considered:
 - Retaining the ban on voting for all convicted, detained prisoners. The judgment of the ECtHR Grand Chamber was clear that a blanket ban on voting is outside the margin of appreciation given by the European Convention of Human Rights. However, the UK Government believes that it is important to include views in favour of total disenfranchisement in deciding the extent of any reform to the UK's current position. We are, therefore, inviting respondents to comment on total disenfranchisement, while considering the other available options.

- Relating disenfranchisement to the length of sentence. This could be an effective method of distinguishing the prisoners who should or shouldn't retain the right to vote, based on setting a threshold sentence length. Prisoners given sentences below this threshold would retain their voting rights, while sentences of greater length would result in the loss of those rights. However, the timing of sentences and any perceived inconsistency of sentencing could create problems of unfairness.
- Allowing UK judicial sentencers to determine whether the right to vote should be withdrawn. This could mean that either a convicted prisoner retains their right to vote, unless specifically taken away by a judge at the time of sentencing, or that they automatically lose their voting rights, unless the sentencer states that they should retain them. Placing the decision in the hands of UK judges would address the problems that could be caused by an automatic equivalence between sentence length and period of electoral disenfranchisement, and trying to account for every statutory criminal offence. However, this option would lead to an increased burden being placed on sentencers at the time of sentencing. It may also be argued that judges are not best placed to exercise control over an individual's right to vote.
- There are also two further sections that set out proposals on specific circumstances which deal with two discrete issues. Namely, the franchise of prisoners convicted of an offence relating to an election, and the enfranchisement of different categories of offenders detained in mental hospitals. The following are considered:
 - Electoral offences serious enough to warrant a term in prison, could specifically be judged to entail an automatic penalty of disenfranchisement, irrespective of which of the two options above were to apply, since such offences strike at the very integrity of democracy, and the punishment should reflect this.
 - UK electoral law makes specific provisions for certain categories of persons detained in mental hospitals, who are either awaiting trial for an offence, or have been convicted. Consideration needs to be given to whether there needs to be a change in the law for these categories of detained persons in mental hospitals. However, the Government is not consulting on the status of restricted patients.

Introduction

1. This paper is the first stage of the UK Government's consultation on the voting rights of prisoners. The Government recognises that the potential enfranchisement of UK prisoners is a complex and value laden issue, and therefore intends to approach this subject openly and transparently, taking on board the views from as wide a range of respondents as possible, on a number of potential approaches.

2. On October 6 2005, the Grand Chamber of the European Court of Human Rights (the Grand Chamber) found that in the case of **Hirst v. The United Kingdom (NO. 2)** (*Application no. 74025/01*), the UK's current policy of a blanket ban on all serving prisoners from voting is in contravention of Article 3 of Protocol No 1 of the European Convention on Human Rights (the right to free and fair elections).

3. As a result of the Grand Chamber's judgment, the UK Government was required to let the Council of Ministers know what it intended to do to implement the judgment within 6 months (that is, by 6 April 2006).

4. To that end, the Lord Chancellor, Lord Falconer of Thoroton, issued a written statement on Thursday 2 February 2006, announcing that the UK Government would be consulting on the difficult and complex issues that the Grand Chamber's judgment had raised. He explained that the ECtHR had indicated that there should be proper debate about those issues. He had therefore concluded that the best way forward would be to embark on a full public consultation in which the options can be examined and which will give everyone the opportunity to have their say in order to inform the development of future policy. This consultation is the result of that commitment.

5. The Government proposes a two stage consultation process before putting proposals to the Parliament:

- Stage 1 - Sets out the principles behind the arguments for and against convicted prisoners retaining the right to vote whilst they are detained in prison, and aims to ascertain whether any form of enfranchisement should be taken forward.

- Stage 2 - Will look exclusively at the possible impact of implementing any change needed to UK law on the conduct of local and national elections, on officials with the responsibility for maintaining the electoral register and running elections, and on Her Majesty's Prison Service.

6. As this consultation is taking place at an early exploratory stage in the policy-making process, this paper does not contain a Partial Regulatory Impact Assessment. However, as Stage 2 of the consultation process will examine the possible impact of implementing any change to UK law a Partial RIA will be included then. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

7. Following the consultation process, steps will be taken, if Parliament decides, to amend the UK's electoral law appropriately. The Government will work closely with stakeholders to ensure that any changes to electoral law are fully understood, and implemented effectively and expediently.

8. Copies of the consultation paper are being sent to:

- Members of Parliament
- The Electoral Commission
- The Association of Electoral Administrators
- Victim Support Unit
- Support After Murder & Manslaughter
- Prison Reform Trust
- Unlock
- Liberty and Justice
- National Association for the Care and Resettlement of offenders
- Home Office
- HM Prison Service
- Local Government Association

9. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Background

History of the UK's policy, the current law; and previous legal challenges

10. The disenfranchisement of convicted prisoners in the UK is currently set out in section 3 of the Representation of the People Act 1983. However, the policy behind this provision goes back much further and details of this policy and the current statutory provisions are set out in Annex A.

11. There have been other challenges to the disenfranchisement of prisoners, and details of some of these are also set out in Annex A.

The Hirst case: the UK judgments

12. In 1980 John Hirst pleaded guilty to manslaughter on the ground of diminished responsibility. He was sentenced to a term of discretionary life imprisonment. He remained detained after the expiry of his tariff (that part of the sentence relating to retribution and deterrence) in June 1994 because the Parole Board's view was that he continued to present a risk of serious harm to the public. In 2001 he challenged the ban on voting in the UK courts by way of judicial review. He issued proceedings in the High Court under the Human Rights Act 1998, seeking a declaration that the provision in the Representation of the People Act 1983 ('RPA') barring prisoners from voting was incompatible with the European Convention on Human Rights ('the Convention').

13. His case was originally heard in March 2001 along with two other prisoners' applications of a similar nature. The Court dismissed these applications, noting in its judgment that there is a broad spectrum of approaches among democratic countries on disenfranchisement of prisoners, and that the UK falls into the middle of the spectrum. This decision was subsequently upheld by the Court of Appeal and the House of Lords.

14. Having exhausted his domestic remedies, Mr Hirst subsequently sought redress at the European Court of Human Rights ('ECtHR') claiming that his rights under the Convention, in particular in respect of articles 3, 10 and 14 (ensuring the right to freedom of expression, without discrimination, and the free expression of the opinion of the people in the choice of the legislature) had been denied.

ECtHR judgment

15. In July 2003, the ECtHR declared that the application by Mr Hirst was partly admissible. His case was heard by the ECtHR in December 2003.

16. The UK Government's submission to the Court, which was delivered at the hearing in December 2003, made the following points:

- a) When enacting the Representation of the People Act in 2000 ('the 2000 Act'), Parliament had impliedly endorsed the policy that prisoners who have been convicted should not be able to vote while serving their sentences. In so deciding, Parliament had regard to the Convention. The 2000 Act was accompanied by a statement of compatibility under section 19 of the Human Rights Act 1998, that is, a statement that, in introducing the measure in Parliament, the Secretary of State considered its provisions to be compatible with the Convention.
- b) The bar on voting by sentenced prisoners is properly to be regarded as a restriction on the right to vote that does not impair the essence of the right in Article 3 of the First Protocol to the Convention. The Court's case law recognises that there may be such restrictions provided they pursue a legitimate aim and satisfy the test of proportionality.
- c) The restriction on voting by prisoners in the United Kingdom has two aims, both of which are legitimate. The first is to prevent crime and punish offenders. The second is to enhance civic responsibility and respect for the rule of law, by depriving those who have seriously breached the basic rules of society of the right to have a say in the way in which such rules are made, for the duration of their sentence.
- d) The law in the United Kingdom is proportionate to its aims. In answer to one of the ECtHR's specific questions to the parties, the law does distinguish between different reasons for a person's detention in prison and as between varying types of crimes, for the following reasons:
 - i) The restriction only affects those who have been convicted of crimes which are sufficiently serious, in the individual circumstances, as to warrant a custodial sentence. Many offences will be punished by a fine only; or a sentence requiring work in the community; or a

sentence of imprisonment which is suspended and does not lead to an actual period in prison.

- ii) The restriction does not apply to persons imprisoned for contempt of court.
- iii) The restriction also does not apply to those who are physically in prison but have not been convicted (i.e. those on remand).
- iv) Parliament also ensured that it does not apply to those who are imprisoned only for default in, for example, paying a fine.
- v) As soon as prisoners cease to be detained the legal incapacity to vote is removed.

17. The Government also considered that it was important to allow to the United Kingdom a wide margin of appreciation in determining restrictions upon the right to vote, for three reasons:

- a) The decision to impose limits is that of the legislature, and so deserved to be given particular weight by the ECtHR: the wording of Article 3 of the First Protocol implies that the legislature is competent to determine the conditions under which the right to vote shall be exercised.
- b) The wide margin reflects the extensive variation permissible under the Convention that exists between Contracting States in relation to votes for convicted prisoners: the law in 18 states of the Council of Europe permits a prisoner to vote without any restriction; the law in 13 states, including the United Kingdom, Ireland and Russia, prohibits all prisoners from voting; whilst in other states the right to vote is or may be restricted in some other way.
- c) This was a case that had been considered fully by the national courts, applying the principles of the Convention under the Human Rights Act. It is one of the first such cases to come before the ECtHR. The views of the Divisional Court and the Court of Appeal, courts that have closer contact with national conditions than an international court can do, should be respected unless they are manifestly wrong.

18. The Government considered that Parliament had, therefore, drawn a line in a measured way, having struck a fair balance between the rights of the individual and the general interests of the community

19. The ECtHR gave its judgment on 30 March 2004. It held unanimously that Mr Hirst's Convention rights under article 3 of Protocol 1 had been breached. It reasoned as follows:

- a) There are a variety of approaches within Member States of the Council of Europe on the issue of voting rights of prisoners, which is why a wide margin of appreciation is given to Member States on this issue.
- b) Though the UK argued that the aims of the legislation were to prevent crime and punish offenders, and to enhance civic responsibility, the ECtHR was of the view that the mere fact of imprisonment is not sufficient to justify the imposition of other blanket restrictions.
- c) The ECtHR was critical that there had not been a considered debate on the disenfranchisement of prisoners in the UK national parliament, and that the policy derives essentially from 'unquestioning and passive adherence to a historic tradition'.
- d) UK legislation operates so as to deprive prisoners (some 70,000 in the UK) of the right to vote in an indiscriminate manner - it applies to all convicted prisoners, irrespective of the length of their sentence or the gravity of their offence.
- e) The ECtHR considered Mr Hirst's case to be particularly anomalous in that he had served that part of the sentence relating to punishment, and was only detained on the grounds of his continuing danger to society. Disqualification from voting could therefore not be seen in this case as being justified any longer as part of his punishment.
- f) An absolute bar on voting by any convicted prisoner did not fall within an acceptable margin of appreciation. Accordingly, there had been a breach of Article 3 of Protocol No. 1 of the Convention (which provides for States to undertake to hold elections under conditions that will ensure the free expression of the opinion of the people).

20. Having reached its conclusions in respect of the relevance of Article 3 of Protocol No. 1 of the Convention to this case, the ECtHR considered that no separate issue arose either under Article 10 or Article 14 and so made no separate finding.

21. The Government reflected upon the first judgment and the ECtHR's reasoning. It decided to seek a hearing at the Grand Chamber of the ECtHR ('the Grand Chamber') to address concerns with the reasoning and ruling of the ECtHR.

22. Following representations to the ECtHR, the application for referral to the Grand Chamber was successful. Permission was also granted by the ECtHR to Latvia, the Prison Reform Trust, and the AIRE Trust to intervene in writing. Latvia made representations in support of the UK Government's position; the Prison Reform Trust and the AIRE Trust intervened in support of the applicant's position.

The Grand Chamber Judgment

23. The Grand Chamber heard the Hirst case afresh on 27 April 2005, delivering its judgment on 6 October 2005. By a majority of 12 to 5 it found in favour of the applicant that there had been a breach of Article 3 of Protocol No 1 of the Convention (right to free elections) to the European Convention on Human Rights.

24. The Government has considered the reasoning of the Grand Chamber and the issues of how and what is required to comply with the UK's obligation to conform with the Court's ruling. Several paragraphs in the reasoned decision of the Grand Chamber provide elucidation.

25. The Grand Chamber's comment (paragraph 61) - that "the Court would re-affirm that the margin of appreciation in this area is wide" is relevant in confirming that the Court accepts that there may be differing ways to remedy the breach.

26. The Grand Chamber commented (paragraph 62) that departures from the principle of universal suffrage undermine the democratic validity of the legislature and that exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol 1. This flags up, essentially, the Court's concern about blanket exclusions.

27. The Grand Chamber recognised (at paragraph 71) some explicit situations that might justify electoral disenfranchisement (abuse of a public position or undermining the rule of law or democratic foundations).

28. The Grand Chamber (also at paragraph 71) emphasised that the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. It favoured the

Venice Commission recommendations requiring judicial decision applying a cumulative list of guidelines and an adversarial procedure as the strongest safeguard against arbitrariness.

29. The concurring judgment of Judge Caflesh (at paragraph 8) adds to the Grand Chamber's apparent view that imprisonment is not of itself a definition of seriousness of offence. Disenfranchisement had, in his view, to be restricted to major crimes, and must remain confined to the punitive part of the sentence.

The rationale for the majority decision

30. In essence, the rationale of the majority of the Grand Chamber is that it was convinced of an absence of proportionality in that the disenfranchisement was the same whether a convicted prisoner served one day or life. The automatic nature of the ban was also central to the Grand Chamber's view.

31. In summary the Grand Chamber affirmed that:

- a) Prisoners generally continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, except for the right to liberty. There was, therefore, no question that prisoners forfeit their general Convention rights merely because of their status as detainees following conviction; automatic disenfranchisement based purely on what might offend public opinion is unacceptable under the Convention system.
- b) A democratic society is not prevented from taking steps to protect itself against activities intended to destroy the rights or freedoms set out in the Convention, which therefore did not exclude the imposition of restrictions on the electoral rights of an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic institutions. However, the severe measure of disenfranchisement should not 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; an independent court provided a strong safeguard against arbitrariness.
- c) Even if the impact of the current UK law was to restrict the voting rights of only 48,000 prisoners this was a significant figure that could not be

claimed to be negligible in its effects, especially since it included a wide range of offenders with very short sentences or who had been convicted of relatively minor offences. Also, in sentencing, the criminal courts in England and Wales made no reference to disenfranchisement and it was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote.

- d) 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 members of the legislature on the continued justification, in the 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.
- e) Even though the Representation of the People Act 2000 had granted the vote to remand prisoners, section 3 of the Representation of the People Act 1983 stripped of their Convention right to vote a significant category of people. It did so in a way which was indiscriminate, applying automatically to convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction (effectively a “blanket ban”) on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.
- f) Considering that the Contracting States had adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court left the United Kingdom legislature to decide on the particular choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1.

Summary and the way forward

32. The judgment concludes that the Court now regards a blanket ban on the right of all convicted and detained prisoners to vote as being outside the margin of

appreciation available to member States and incompatible with the European Convention on Human Rights. Paragraph 82 of the judgment is explicit in holding that an indiscriminate blanket ban is outside the margin of appreciation of contracting States.

“While the Court reiterates that the margin of appreciation is wide, it is not all embracing. Further although the situation was somewhat improved by the Act of 2000 which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol 1.”

33. In the light of this paragraph no change would be contrary to the terms of the judgment. However, the Grand Chamber did *not* say that *all* convicted prisoners must necessarily be given the right to vote in order to achieve that compatibility. As the Government would be wholly opposed to any such full enfranchisement, such a position is therefore not set out in this paper as a realistic option for change.

34. In considering what restrictions on prisoners' voting rights might be compatible with the Convention, the Grand Chamber judgment identifies some restrictions that, in principle, might be justified. In particular, it is clear from the judgment as a whole that any legislation that replaces the current prohibition will have to be carefully targeted.

35. In the light of the comments made by the ECtHR and subsequently the Grand Chamber, the UK Government considers that the process of considering the principles and options should be open and targeted at eliciting relevant information from those consulted, the independent Electoral Commission and parliamentarians. The process of deliberate consideration would be particularly relevant to any further consideration by the ECtHR of the legitimacy of the aim and the proportionality of any future measure of continuing prisoner disenfranchisement.

International dimensions and comparisons

International law and obligations

37. In the light of the case of *Hirst v the UK*, the following requirements of International law or obligations were held by the European Court of Human Rights (ECtHR) to be relevant or admissible:

European Convention on Human Rights

38. Article 3 of Protocol No. 1 of the European Convention on Human Rights provides that "...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....".

39. Article 10 of the Convention provides as relevant that "...Everyone has the right to freedom of expression...".

40. Article 14 provides that "...The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

International Covenant on Civil and Political Rights ("ICCPR")

41. Article 25 of the ICCPR provides that "...Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote..."

42. In respect of the right guaranteed under Article 25 the United Nations Human Rights Committee requires States to indicate and explain the legislative provisions that would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be

proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

43. Article 10 provides that, "...all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.." and that "...the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation..".

European Prison Rules (1987),

44. Recommendation R(87)3 of the Council of Europe states that "imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this."

Code of Good Practice in Electoral Matters

45. This document adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002 includes the Commission's guidelines on the circumstances in which there may be deprivation of the right to vote or to be elected:

"d) ...

- i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions;
- ii. it must be provided for by law;
- iii. the proportionality principle must be observed; conditions for disenfranchising individuals of the right to stand for election may be less strict than for disenfranchising them;
- iv. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law."

Sauvé v. the Attorney General of Canada (No. 2)

46. The Supreme Court of Canada on 31 October 2002 held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional, i.e., infringing Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, because “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out ... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society..” and that “... every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein....”

Comparisons with other states within the Council of Europe

47. We have outlined above, in detail, the judgments of the ECtHR and Grand Chamber in the case of Hirst v. the United Kingdom, which have led to this consultation. The practices of the 41 countries within the Council of Europe are not insignificant in the reasoning behind the judgments. The following therefore provides a brief outline on the voting provisions for detained prisoners in some of those Council of Europe countries.

48. As the Grand Chamber noted, there is a wide range of practices between states. Any action taken by the UK could, therefore, have implications for the law within other countries, in particular those countries that also currently have a blanket ban on the enfranchisement of prisoners.

Countries that enfranchise all prisoners

49. Of the 41 Council of Europe countries, the law in 18 States permits a prisoner to vote without any restriction. These states are: Albania, Azerbaijan, Croatia, Czech Republic, Denmark, Finland, Germany, Iceland, Lithuania, Macedonia, Moldova, the Netherlands, Portugal, Spain, Slovenia, Sweden, Switzerland, and the Ukraine. The Republic of Ireland is exceptional, in that while there is no legal ban on a prisoner voting, there are no arrangements in place to allow persons in custody who are on the electoral register to exercise their

franchise. The UK Government is aware, however, that a Bill is currently being debated in the Irish Parliament that would allow a prisoner to apply for a postal vote. Under the Bill, prisoners would continue to be registered at their home address and, for voting purposes, would be deemed to be ordinarily resident at the address where they would have been residing, but for their detention (i.e. in their home constituency).

Countries that ban all prisoners from voting

50. The law in 13 states, including the United Kingdom, the Republic of Ireland (see above) and Russia, prohibits all convicted prisoners from voting. Others include Armenia, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Latvia, Slovakia, and Turkey.

Countries that have a partial ban on some prisoners

51. Several states base the enfranchisement of prisoners on the length of sentence. For example, we understand that in Belgium prisoners who receive a sentence of longer than 4 months are disqualified. Belgium is also notable in that the period of disqualification may actually exceed the period of the sentence. Austria disenfranchises prisoners serving a sentence of more than 1 year, while in Italy, those serving a sentence of 5 years or more are disqualified. In Greece, those prisoners given a life sentence face permanent disenfranchisement.

52. In other states the right to vote is or may be restricted based on the offence committed. For example, In Romania, persons convicted of 'petty' crimes retain their voting rights, but those convicted of more serious offences do not.

Further examples

53. Several Council of Europe countries allow their judicial sentencers either to allow or withdraw a prisoner's right to vote, under certain circumstances. France is probably the most well-known example of this, in that it has given its sentencers the power to direct at the time of sentencing in every case whether the prisoner retains the right to vote. Under these arrangements, convicted prisoners are able to vote by proxy. Italy's judges also have this discretionary power, but only up to

sentences of 5 years, at which point a convicted prisoner is automatically disenfranchised. Norway is another example, but this power is rarely used by judges in practice.

54. The Government believes that the clear differences between other Council of Europe states demonstrates that a range of options need to be considered. This consultation paper, therefore, includes the basic elements from a number of the above examples, on which the Government is seeking the views of respondents to this paper

The Proposals

55. The following section sets out the basic proposals, and the range of potential views on this subject, that the Government believes merit careful consideration, and upon which the Government welcomes the views of respondents. Other issues may, of course, arise from the responses received. These will be taken on board, and may be included in the second stage of the consultation process.

56. Overall, we anticipate that the main objection to some or all of the enfranchisement options discussed below will be a value-based one. Whenever the question is raised, there is a strong reaction to the suggestion that convicted prisoners should be allowed to vote. Such reactions invariably take as examples some of those imprisoned for the most notorious crimes, to convey at its starkest the message “How can it be morally right to allow this person to vote?”. There is understandably a strong emotive element to the idea that convicted prisoners should be allowed to vote, in particular from those who are the innocent victims of crime.

Retain the current ban on voting rights for convicted prisoners

57. The Government appreciates that many people will continue to hold to the view that it is right in principle that prisoners should remain disenfranchised. Indeed, that remains the Government’s view. In coming to a decision as to where the correct balance is to be found, the Government wishes to hear the full range of opinions.

58. The judgment of the ECtHR Grand Chamber was clear that a blanket ban on voting is outside the margin of appreciation given by the European Convention of Human Rights. However, the UK Government believes that it is important to include views in favour of total disenfranchisement in deciding the extent of any reform to the UK’s current position. We are, therefore, inviting respondents to comment on total disenfranchisement, while considering the other available options.

Enfranchise prisoners sentenced to less than a specified term

59. This option would provide, in legislation, that the disenfranchisement only applies to persons serving a sentence of more than a stated duration. As discussed above, the policy of a number of member states within the Council of Europe towards prisoner enfranchisement, is to allow prisoners sentenced for less than a specified term to retain the right to vote, while disenfranchising those prisoners with longer sentences.

60. Setting the threshold at which point prisoners become disenfranchised may lead to perceived inconsistencies. It may also provoke new arguments as to arbitrariness of impact on Convention rights. Setting the threshold for disenfranchisement low (e.g. a sentence of 3 months or less), is likely to disenfranchise all but those convicted of the most minor offences or 'petty' crimes. The Government is not inclined to consider extending the eligible length of sentence beyond low sentence lengths, such as one year in prison.

Allow sentencers to decide on withdrawal of franchise

61. There are two alternatives to linking disenfranchisement with the sentencing process in individual cases. One approach might be for legislation to empower judicial sentencers to determine whether, despite a general statutory disenfranchisement, the sentenced offender should retain the legal capacity to vote. Alternatively, legislation might empower a judicial sentencer to direct that a sentenced offender should be disqualified even if there were no general statutory disqualification of prisoners.

62. These approaches would give the sentencing judge the right to determine whether to restrict a prisoner's right to vote. The advantages of judicial participation include the sentencer's independence and close knowledge of the crime, the criminal and the victims.

63. This, it could be argued, would demonstrate a reasonable restriction for a legitimate aim proportionate to the individual's offence consistent with the requirements of the Convention. In particular, individual consideration would clearly demonstrate a move away from a "blanket ban" on prisoners' voting rights.

64. A disadvantage could be that the burden placed on UK judges when determining sentences would certainly be increased by such a power, and it may

not, therefore, be appropriate to add this additional element to their role as sentencers.

65. It is also hard to see what the legal reasoning would be to justify a judicial sentencer making extensive use of the discretion conferred upon him, to restore or withdraw voting rights from offenders who are being sentenced to similar terms of imprisonment for crimes of similar degrees of seriousness.

Enfranchise all tariff-expired life sentence prisoners

66. Part of the argument against the UK's blanket ban on prisoners voting, was that this included post-tariff prisoners (i.e. prisoners kept beyond the original length of their sentence, for whatever reason). Mr Hirst was, when he first brought his case forward, a tariff-expired prisoner himself. It was argued that since the punishment element of his sentence had expired, meaning he was effectively detained on grounds of risk, there could no longer be any punishment-based justification for continuing to ban him from voting.

67. However, this case raises for consideration the position of persons who may have committed very serious offences, and who have been detained beyond their original sentence, due to their continued threat to the public. The Government considers that enfranchising such prisoners is undesirable, and does not intend to pursue this option.

Proposals specific to convicted prisoners found guilty of election offences

68. Those convicted of certain offences relating to electoral registration, voting, candidacy or other electoral activities may under current UK electoral law be sentenced to imprisonment and thus automatically lose their right to vote during the period they are serving the custodial part of their sentence. Such offences include bribery, treating (both corrupt practices) and tampering with election documents; those found guilty of these offences could, on summary conviction, be sentenced to a maximum of 6 months imprisonment, or a fine not exceeding the statutory maximum (£5,000), or both. In the case of personation (voting whilst fraudulently pretending to be another elector) the same penalty could be imposed on summary conviction or, upon indictment, imprisonment for up to one year, or a fine, or both.

69. Other offences have come into effect through the commencement of the Electoral Administration Act 2006. Offences of making a false statement in a candidate's nomination papers or exercising undue influence upon the way a person votes will all attract upon summary conviction a fine not exceeding the statutory maximum (£5,000), or up to 6 months imprisonment, or both; on conviction on indictment, they will attract an unlimited fine or up to 1 year's imprisonment, or both. The penalties for offences related to applications for a postal or proxy vote are the same, save that on conviction on indictment the maximum term of imprisonment is 2 years. These offences are all corrupt practices; this means that a convicted offender will be barred from holding elective office for 5 years and in the case of offences relating to applications for a postal or proxy vote he or she will also be barred from voting in UK Parliamentary and GB local government elections for a period of 5 years. The Act also makes provision for summary offences regarding the provision of false registration information that will attract a fine not exceeding the statutory maximum (£5,000), or up to six months imprisonment (to be increased to 51 weeks when s.281(5) of the Criminal Justice Act 2003 comes into force), or both.

70. In the light of the judgment of the Grand Chamber of the ECtHR the question arises, irrespective of what conclusion is reached on the two main choices, as to whether these offences should attract a withdrawal of the franchise. One justification in support of this view might be that these offences by their nature strike at the heart of the democratic system and the imposition of an automatic disenfranchisement is a necessary defence of the integrity of the democratic process essential for the maintenance of public confidence. As such, it is not only

an appropriate punishment in itself but also sends a suitably severe message to others in order to deter them from doing the same.

71. Once again, the guiding principle in respect of such a ban is that it could, if challenged, be demonstrated that such a withdrawal represents a reasonable restriction for a legitimate aim proportionate to the individual's offence consistent with the requirements of the Convention. In this context it should be noted that in Germany a ban on prisoners' voting rights extends only to those whose crimes target the integrity of the state or the democratic order, such as political insurgents.

Proposals specific to unconvicted and convicted offenders detained in mental hospitals

72. The status of offenders detained in mental hospitals is currently covered by section 3A of the Representation of the People Act 1983. This section is similar in policy terms to the provisions for ordinary detained prisoners set out in section 3 of that Act. Under Section 3A, where a court finds that a person is not guilty by reason of insanity, it may direct the person to be admitted into hospital. Such persons are currently not able to register to vote.

73. However, there are separate and distinct categories of mental patients, which are dealt with differently under existing law. It is for this reason that the Government is putting this issue forward as a separate area for discussion.

74. The Mental Health Act 1983 (MHA 1983), contains several provisions that cover different circumstances where persons are detained in mental hospitals, and cannot vote. **Annex B** provides a table of the different circumstances, and respondents are advised to review this before responding to the questions below. Different legislation of similar effect to the provisions referred to in Annex B apply in different parts of the United Kingdom (as specified in section 3A of the 1983 Act), and to persons in the armed forces.

75. Patients who are subject to a hospital order made under section 37 or 51(5) of the 1983 Act, or under the 1964 Act, may, if it appears to the court that it is necessary to protect the public from serious harm, also be made subject to a restriction order under section 41 of the 1983 Act. This order restricts the patient's transfer, leave or discharge from hospital without the consent of the Home Secretary. A prisoner who has been transferred to hospital under section 47 of the 1983 Act may also be made subject to a restriction direction under section 49; this has the same effect as a restriction order. Finally, where the court makes a hospital direction under section 45A of the 1983 Act, it must also make a limitation direction under that section, which has the same effect as a restriction order or direction.

76. The Government would not consider extending the vote to restricted patients, who are some of the most dangerous people currently detained.

77. In addition, during the Electoral Administration Bill (now Act), amendments were tabled, though not pressed, concerning whether certain mental patients

covered by orders and directions referred to in section 3A should be entitled to register.

Questionnaire

We would welcome responses to the proposals and principles set out in this consultation paper and in particular to the following questions.

Question 1

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

Question 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.

Question 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?

Question 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.

Question 5

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

Question 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.

Question 7

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

Question 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?

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by [insert date] to:

Chris Phillips
Department for Constitutional Affairs
Electoral Policy Division
6.21, 6th floor
Selborne House
54-60 Victoria Street
London
SW1E 6QW

Tel: 020 7210 8227

Fax: 020 7201 2659

Email: elections@dca.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

Publication of response

A paper summarising the responses to this consultation will be published which, as far as possible, should be within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.dca.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page [insert number].

History of the UK's policy and law on voting rights of prisoners

1. The provisions governing prisoners' disfranchisement reflect, in part, the domestic residence based system of electoral registration in the United Kingdom and the purposes and consequences of legal custody. They are the combined result of the common law and statutes reflecting the franchise and criminal justice sentencing policy. We set out in this section a brief overview of the main developments.

2. From 1870 until the Representation of the People Act (RPA) 1969, the general position was that in practice convicted prisoners could not vote whilst serving their custodial sentence (with some very limited exceptions).

19th Century law

3. The expansion of electoral suffrage has a long history. In 1832, the franchise was given to men who owned land valued at not less than ten pounds. At common law, before 1870, convicted traitors and felons forfeited their lands; the loss of property rights had a consequential effect of excluding them from the suffrage. Persons convicted of a misdemeanour only (a less serious crime) did not lose their property rights on conviction and, accordingly, any imprisonment did not legally disenfranchise them unless they were physically prevented by the fact of being in prison on the day of the poll.

4. In the 19th century entitlement to the franchise was exercised by making a claim to the overseers of the electoral roll. Once registered an elector remained on the register almost indefinitely (unless they moved to a different place), as the register was not annually revised. At that period there were no arrangements for voting by post or proxy.

5. The Forfeiture Act 1870 removed the rule by which felons forfeited their land, but section 2 of the Act provided that any person convicted of treason or felony and sentenced to a term of imprisonment exceeding 12 months lost the right to vote at parliamentary or municipal (local) elections until they had served their sentence. The Act applied to England, Wales and Ireland. This Act reflected earlier rules of law relating to the forfeiture of certain rights by a convicted "felon" (the so-called "civic death" of the times of King Edward III). In recent times the term "civic death" has been revived by those opposed to the current legal bar on voting by sentenced prisoners serving the custodial part of their sentence. The Forfeiture

Act 1870 continued to have effect until the Criminal Law Act 1967 when the distinction between felonies and misdemeanours was abolished and the 1870 Act was amended so that only persons convicted of treason were disenfranchised.

Representation of the People Acts

6. In 1918, due to the Representation of the People Act 1918, electors generally had to be able to prove six months residence at a qualifying address in the parliamentary constituency (or related area) in which they wanted to register. Persons in custody, whether in lunatic asylums or prisons were specified as not falling within the interpretation of “resident” at those places for the purposes of electoral registration. New arrangements were put in place; the register was revised twice a year following house to house and other inquiries by local authority staff. Special arrangements were made for servicemen. To overcome the difficulties of demonstrating six months residence, particularly for those still employed in the forces, the 1918 Act conferred on them a qualification based on their status as servicemen.

7. In 1968, a multi-party Speaker's Conference on Electoral Law recommended that convicted prisoners in custody should not be entitled to vote. In consequence, the Representation of the People Act 1969 introduced specific provision that convicted persons were legally incapable of voting during the time that they were detained in a penal institution. The 1969 Act applied to persons detained in penal institutions even if convicted abroad and repatriated to prisons in the UK. It also specified the types of “convictions” covered by the legal incapacity: including courts-martial, but not those whose detention related to fine defaults or contempt of court. These provisions were re-enacted again in section 3 of the Representation of the People Act 1983 (set out below). Even those who had been duly registered as electors were, by this provision, rendered legally incapable of voting. The provisions did not distinguish between remand and convicted persons detained in such penal institutions.

8. Under the Representation of the People Act 2000, unconvicted prisoners held on remand at penal institutions became entitled to refer to residence at a penal institution for the purposes of electoral registration. Similarly, patients in mental hospitals, whether or not detained, could register based upon residence at the mental hospital, as long as they were not detained offenders. In this way the 2000 Act cut down on the restrictions as to what counted as “residence” for the purposes of electoral registration.

9. The 2000 Act also introduced new provisions for expanding the use of declaration based registration for those who might not be able to satisfy the basic test of residence. Section 7B introduced a qualification for registration based on notional residence via declarations of local connection. All these new approaches to satisfying the requirement of residence related to entitlement to be registered for a period of 12 months only. Registration could not be carried forward from one year to another.

Current United Kingdom electoral law

10. Section 3 of the Representation of the People Act 1983 provides as follows:

“3 (1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election.

(2) For this purpose-

(a) “convicted person” means any person found guilty of an offence (whether under the law of the United Kingdom or not), including a person found guilty by a court-martial under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, or by a Standing Civilian Court established under the Armed Forces Act 1976, but not including a person dealt with by committal or other summary process for contempt of court; and

(b) “penal institution” means an institution to which the Prison Act 1952, the Prisons (Scotland) Act 1952 or the Prison Act (Northern Ireland) 1953 applies; and

(c) a person detained for default in complying with his sentence shall not be treated as detained in pursuance of the sentence, whether or not the sentence provided for detention in the event of default, but a person detained by virtue of a conditional pardon in respect of an offence shall be treated as detained in pursuance of his sentence for the offence.

(3) It is immaterial for the purposes of this section whether a conviction or sentence was before or after the passing of this Act.”

11. Section 3A of the 1983 Act as introduced by the 2000 Act makes provision for the disfranchisement of offenders detained in mental hospitals:

“3A(1) A person to whom this section applies is, during the time that he is-

(a) detained at any place in pursuance of the order or direction by virtue of which this section applies to him, or

(b) unlawfully at large when he would otherwise be so detained,

legally incapable of voting at any parliamentary or local government election.”

12. Other provisions within section 3A specify the particular provisions applicable in different parts of the United Kingdom to which that section applies.

13. Section 5(6) of the 1983 Act provides general interpretation of “residence”. This is the provision that now specifies that legal custody does not count as residence for electoral registration purposes:

“5.-(6) Subject to section 7 and 7A below, a person who is detained at any place in legal custody shall not, by reason of his presence there, be treated for the purposes of section 4 above as resident there.”

14. Section 7 (residence: patients in mental hospitals who are not detained offenders or on remand) provides:

“7.-(1) This section applies to a person who-

(a) is a patient in a mental hospital (whether or not he is liable to be detained there), but

(b) is not a person to whom section 3A above or section 7A below applies.

(2) A person to whom this section applies shall ... be regarded for the purposes of section 4 above as resident at the mental hospital in question if the length of the period which he is likely to spend at the hospital is sufficient for him to be regarded as resident there for the purposes of electoral registration.”

15. Section 7A (Residence: persons remanded in custody, etc) provides:

“7A.-(1) This section applies to a person who is detained at any place pursuant to a relevant order or direction and is so detained otherwise than after –

(a) being convicted of any offence, or

(b) a finding in criminal proceedings that he did the act or made the omission charged.

(2) A person to whom this section applies shall ... be regarded for the purposes of section 4 above as resident at the place at which he is detained if the length of the period which he is likely to spend at that place is sufficient for him to be regarded as resident there for the purposes of electoral registration.”

Legal incapacity to vote

16. The legal incapacity to which sections 3 and 3A refer means that even if the prisoner had been registered before conviction as an elector, he could not, whilst detained in a prison institution, legally vote at a parliamentary or local government election. This is so even for a prisoner who had registered and been put on the list of postal voters before his conviction. A prisoner who voted would be liable to prosecution for committing a voting offence under the 1983 Act and his vote would be struck off, in the event of a scrutiny of the election resulting from a petition.

17. In contrast, a remand prisoner, a voluntary mental patient or a compulsorily detained mental patient who is not an offender may vote by post or proxy. They may register during the period of their detention. If they are already registered under the usual canvass or provisions for declarations of local connection, their registration under those provisions would continue in effect until such time as the declaration lapsed (after 12 months), or until the electoral registration officer determined that they had ceased to be entitled to registration based upon residence at their previous address.

Resumed eligibility to register upon release

18. Upon release a prisoner, if he has been removed from the register or had never registered in the first place, can apply to be registered. The normal rules for establishing residence would apply to his application, or the normal requirements for applying via the declaration of local connection.

Other UK legal challenges: Feal-Martinez and Pearson

19. In 1996 Mr Feal-Martinez was convicted of arson with intent to endanger life, and was sentenced to serve a discretionary life sentence of imprisonment. His tariff period expired in 2000. His detention continued after his tariff expired because, in the view of the Parole Board, he continued to present a risk of serious harm to the public. Mr Pearson was convicted in 1998 of an offence relating to the importation of drugs. He was sentenced to a 10-year determinate sentence.

20. During the period of their imprisonment, being convicted prisoners, neither man was legally capable of voting in parliamentary or local government elections. The Electoral Registration Officer refused their applications to be registered as voters. They both applied for judicial review, seeking a declaration of incompatibility, pursuant to section 4 of the Human Rights Act 1998, that section 3 of the Representation of the People Act 1983 is incompatible with the European Convention on Human Rights. These cases, due to the similarities with that of Hirst, were heard together by the Divisional Court on 21 and 22 March 2001.

21. The Divisional Court dismissed all the applications. They applied for permission to appeal, but this was rejected on the grounds that the appeal had no real prospect of success. A renewed application was also refused. Subsequently Mr Feal-Martinez and Mr Pearson decided not to pursue their claims any further, but Mr Hirst decided to continue.

**STATUS OF VOTING RIGHTS OF CERTAIN CATEGORIES OF PERSONS
DETAINED IN MENTAL HOSPITALS**

The table below gives a breakdown of statutory provisions covering different circumstances where convicted and unconvicted persons are detained in mental hospitals, and the status of their voting rights.

Section 3A of RPA 1983 - references to Mental Health Act 1983 (MHA)
<p>S37 of MHA</p> <p>Power of courts to order a convicted person to be admitted and detained in a hospital or placed into guardianship, as an alternative to penal disposal. A person subject to an order under s37 cannot vote.</p>
<p>S38 of MHA</p> <p>Concerns interim hospital orders in relation to convicted persons. Where a person is convicted, the court may before making a hospital order or dealing with person in some other way, make an interim hospital order.</p> <p>Such persons cannot vote.</p>
<p>S44 of MHA</p> <p>Concerns persons convicted by magistrates' courts and sent to the Crown Court to be dealt with in respect of the offence (the expectation is that the Crown Court will make a hospital order and restriction order). Under s44 the person may be detained in hospital whilst the Crown Court deals with the matter.</p> <p>Persons detained under this section cannot vote (convicted and in custody, though will not yet sentenced or finally dealt with).</p>
Section 51(5) MHA

The court competent to try a case has the power to make a hospital order resulting in the detention of a person in hospital in his absence or whilst awaiting trial for an offence. Persons cannot vote though will not have been convicted.

Section 45A MHA

Concerns the power of the Crown Court to direct a convicted person to be detained in hospital rather than in prison.

Such persons cannot vote.

Section 47 MHA

Concerns sentenced prisoners who may be removed by a transfer direction from prison to be detained in hospital.

These persons cannot vote.

Other Relevant Provisions - referred to in section 3A of the RPA 1983

Section 3A RPA 1983 - references to other Acts of Parliament

Criminal Procedure (Insanity) Act 1964, section 5.

Where a court finds that a person is not guilty by reason of insanity, it may direct the person to be admitted into hospital. Such persons are currently not able to register to vote.

Criminal Appeal Act 1968, sections 6 and 14.

On an appeal against conviction to the Court of Appeal, the CA may decide that the proper verdict would have been one of not guilty by reason of insanity, and may order that the person be admitted into hospital for medical treatment. Such persons cannot vote.

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