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BARRED FROM VOTING:

THE RIGHT TO VOTE FOR SENTENCED PRISONERS

The UK's ban on sentenced prisoners voting undermines the principle that in a democracy everybody counts. It is an unjustified relic from the past which neither protects public safety nor acts as an effective deterrent.

The blanket ban remains in place despite the European Court of Human Rights ruling it unlawful in March 2004. In April 2009 the government acknowledged for the first time that some sentenced prisoners will eventually be allowed to vote but, without urgent action, the general election in 2010 will not be compliant with the European Convention on Human Rights.

The government must now put aside delaying tactics, respect and obey the judgment of the court and overturn the outdated ban on prisoners voting. People in custody should be able to exercise their democratic rights and responsibilities in the forthcoming election.

Key facts and figures

- ▷ On 18 December 2009, the prison population in England & Wales stood at 84,231. The vast majority, 70,344, are sentenced prisoners who are denied the right to vote.
- ▷ The electoral ban on sentenced prisoners is contained in Section 3 of the Representation of the People Act 1983, as amended by the Representation of the People Acts 1985 and 2000. The ban dates back to the Forfeiture Act of 1870.
- ▷ Protocol 1, Article 3 of the European Convention on Human Rights guarantees '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'. This guarantee is now contained in the Human Rights Act, which became part of the law throughout the UK on 2 October 2000.
- ▷ In April 2001 the High Court rejected a case demanding enfranchisement of prisoners. In March 2004 the European Court of Human Rights (*Hirst vs the United Kingdom (No 2)*) ruled unanimously against the UK government's blanket ban on sentenced prisoners voting; the government's subsequent appeal to the Grand Chamber of the European Court was dismissed in October 2005.
- ▷ The UK is out of step with most other European countries. Around 40% of the countries in the Council of Europe have no restrictions on prisoners voting. Many others only ban some sentenced prisoners from voting. In France and Germany, courts have the power to impose loss of voting rights as an additional punishment. The UK is only one of a handful of European countries that automatically disenfranchise all sentenced prisoners, the others including Armenia, Bulgaria, Estonia, Hungary and Romania.
- ▷ The only other adult nationals who cannot vote in general elections are hereditary peers who are members of the House of Lords, life peers, patients detained in psychiatric hospitals as a result of their crimes and those convicted in the previous five years of corrupt or illegal election practices. Remand prisoners, people imprisoned for contempt of court and fine defaulters held in prison are eligible to vote.

Blanket ban unlawful

High Court

In April 2001, three sentenced prisoners took a case to the High Court stating that the ban on their right to vote was incompatible with the Human Rights Act. The High Court found the government was acting lawfully. John Hirst, one of the three applicants, subsequently decided to appeal to the European Court of Human Rights (ECtHR).

Basic principles for electoral democracy are set out in international law. These include the right of citizens to vote. The European Convention on Human Rights, Protocol 1, Article 3 states:

The 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.

This guarantee is now contained within the Human Rights Act (2000). It does not make exclusions for sentenced prisoners.

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides every citizen with the right to take part in the conduct of public affairs, to vote in elections which have universal suffrage and to have equal access to public service. On a number of occasions, the United Nations Human Rights Committee, which monitors adherence to the ICCPR, has expressed concern about countries that do not allow prisoners to vote.

On 6 Dec 2001, the United Nations in the Concluding Observations of its International Covenant on Civil and Political Rights, Human Rights Committee, made it clear that the maintenance of the ban on voting is a “principal subject of concern”. In Part 10 of the Observations, the Committee “fails to discern the justification for such practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoners’ reformation and social rehabilitation, contrary to Article 10,

Paragraph 3, in conjunction with Article 25 of the Covenant”.

The Committee concluded, “The State party should now reconsider its law in depriving convicted prisoners of the right to vote”.

The UK government’s position was set out by Baroness Scotland of Asthal, then Minister of State at the Home Office:¹

Prisoners convicted of a crime serious enough to warrant imprisonment have lost the moral authority to vote. The working party on electoral procedures ... could find no reason to change the existing system in which convicted prisoners found guilty of a crime serious enough to warrant imprisonment are denied the right to vote for the duration of their imprisonment.

The European Court of Human Rights

Hirst v UK: In March 2004 the ECtHR considered the case of John Hirst. It found unanimously that the UK government was in violation of Article 3 Protocol 1 of the European Convention on Human Rights (ECHR), which guarantees the right to vote. The panel of judges that considered the case included Sir Nicolas Bratza, a British judge.

The ECtHR concluded that:

The fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention.

and argued that the right to vote must be acknowledged as:

...the indispensable foundation of a democratic system.²

The UK government claimed that the ban is justified to prevent crime and punish offenders and to enhance civic responsibility and respect for the law. However, the ECtHR:

found no evidence to support the claim that disenfranchisement deterred crime and

considered that the imposition of a blanket punishment on all prisoners regardless of their crime or individual circumstances indicated no rational link between the punishment and the offender.

The ECtHR also maintained that:

Removal of the vote in fact runs counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power.

The ECtHR was particularly concerned by the indiscriminate way in which a large category of people are disenfranchised in the UK. It noted that the ban on voting applies to all sentenced prisoners irrespective of the length of their sentence or the nature or gravity of their offence, and observed that its actual effect depends arbitrarily on the period during which the prisoner happens to serve their sentence. It observed that:

There is no evidence that the legislature in the United Kingdom has ever sought to... assess the proportionality of the ban as it affects convicted prisoners.

It criticised countries where restrictions on the right to vote derive essentially from unquestioning and passive adherence to a historical tradition, which can be seen to be the case in the UK.

Appeal to the Grand Chamber

In 2005, the UK government appealed to the Grand Chamber of the ECtHR, arguing that people in prison have forfeited their right to have a say in how the country is governed.

In October 2005, the Grand Chamber rejected the UK government's appeal by a majority of 12 to five, emphasising once again, the clear incompatibility with the ECHR of a blanket ban on prisoners' voting. The judgment stated emphatically that:

There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.³

Government response to date

Following the Grand Chamber's decision, the government took over a year until December 2006 to initiate a consultation process to determine how best to implement the judgment. The government stated that it would complete the consultation process and propose a legislative solution by early 2008. It later announced that, in fact, the consultation process would be a two-stage process but did not indicate when the next stage would start.

In April 2009, the government finally published the findings of the first stage of the consultation.⁴ The Prison Reform Trust, UNLOCK, Liberty, the Aire Centre and allied organisations have criticised this exercise as having been seriously flawed because the consultation document expressed disapproval about any prisoners voting and did not include in its list of possible options, on which views were being sought, all prisoners being allowed to vote. It included instead the option, declared unlawful by ECtHR, of maintaining the blanket ban. However, the consultation findings revealed that, despite the flawed process, all prisoners being allowed to vote was favoured by nearly half (47%) the respondents. Only a quarter of respondents backed the government's position of a total ban.⁵

At the same time, the government published its second stage consultation paper.⁵ This for the first time reluctantly accepted the need to end the UK's blanket ban and sought views on how this should be done. Introducing the consultation's four options for enfranchising prisoners, Justice Minister Michael Wills, said:

The government has made it clear that it disagreed with the European Court of Human Rights ruling. However the result of the ruling is that some degree of voting being extended to some serving prisoners is unavoidable.

The four options the consultation sets out are:

1. Prisoners sentenced to less than one year's imprisonment.
2. Prisoners sentenced to less than two years' imprisonment.
3. Prisoners sentenced to less than four years' imprisonment.
4. Prisoners sentenced to less than two years' imprisonment plus prisoners imprisoned between two and four years who have successfully applied to a judge for permission to vote.

The option of all sentenced prisoners being enfranchised was again not included. This protracted consultation ran from 8 April until 29 September 2009.

Since then the government has maintained, in response to letters and parliamentary questions, that it is busy analysing the 100 consultation responses.

Delaying tactics and risk of non-compliance

The UK government's foot-dragging means there is an increasing risk the next general election will unlawfully deny people in prison the right to vote.

On 30 March 2009, the Prison Reform Trust lodged an official complaint with the Council of Europe, of which the ECtHR is a part, on the UK's non-compliance with the *Hirst vs the United Kingdom (No 2)* judgment. The Prison Reform Trust and UNLOCK expressed concern that the government has seemed preoccupied with the political considerations of this case rather than fairness or the rule of law.

On 5 June 2009 the Committee of Ministers at the Council of Europe expressed its "concern about the significant delay."⁶ On 3 December 2009 the Committee of Ministers expressed serious concern that:

...the substantial delay in implementing the judgment has given rise to a significant risk that the next UK general election, which must take place by June 2010, will be performed in a way that fails to comply with the Convention.⁷

Earlier the UK parliament's Joint Committee on Human Rights has also made clear its dissatisfaction with the government's delaying tactics:

We call on the government to publish the responses to its earlier consultation and to publish proposals for reform, including a clear timetable, without further delay. A legislative solution can and should be introduced during the next parliamentary session. If the government fails to meet this timetable, there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised.⁸

Further condemnation of the UK government's inaction came from the UN Human Rights Committee, which has called for the UK to:

Review its legislation denying all convicted prisoners the right to vote in light of the [UN] Covenant.⁹

Serious questions have been raised about the government's failure to comply with the Convention in a number of parliamentary debates. On 20 April 2009 in the House of Lords, Lord Ramsbotham, former HM Chief Inspector of Prisons, said:

I have two questions: first, why is there this continued prevarication in defiance of the rule of law, of human rights and the

rehabilitation of offenders—all causes that the Government claim to champion? Secondly, what message does the Minister think that that continued defiance of the rule of law sends to prisoners?

The Liberal Democrat peer, Lord Lester of Herne Hill, asked:

Have the Government taken into account that their timid prevarication will lead to costs to the taxpayer if prisoners take cases to Strasbourg for this gross violation of a binding judgment and then we have to pay the costs of all these legal proceedings? Was that taken into account when the Government decided to kick this into the long grass?

In this debate, of those speaking only Lord Tebbit congratulated ministers on what he described as their resistance to “judicial imperialism”.

In a recent debate in the Lords on 15 December 2009, again initiated by Lord Ramsbotham, Lord Corbett of Castle Vale, chair of the Labour Parliamentary Peers, criticised “this pick and mix approach to decisions of the court”. Lord Lester stated:

...that for there to be an interim resolution by the Committee of Ministers of the Council of Europe of this character is a very serious matter, which affects the reputation of this country to abide by the rule of law.

Crossbencher Lord Pannick sought, and received from Lord Bach, an “unequivocal assurance” that the government was not, as it appeared “deliberately delaying this matter until after the next election”.

The case for reform

The case for reform is unequivocal. It rests on the view that voting should not be a privilege; it is a basic human right. This entitlement is not a selective reward for those who have been judged morally decent by a government.

The ban perpetuates social exclusion and the notion of “civic death”

Social exclusion is a major cause of crime and re-offending. Removing the right to vote increases social exclusion by signalling to serving prisoners that, at least for the duration of their sentence, they are dead to society.

The disenfranchisement of sentenced prisoners dates back to the Forfeiture Act of 1870. The origins of the ban are rooted in a notion of civic death, a punishment entailing the withdrawal of citizenship rights.

Dr Peter Selby, former Bishop to HM Prisons and now President of the National Council for Independent Monitoring Boards for Prisons has stated that:

Denying convicted prisoners the right to vote serves no purpose of deterrence or reform. What it does is to state in the clearest terms society’s belief that once convicted you are a non-person, one who should have no say in how our society is to develop, whose opinion is to count for nothing. It is making someone an ‘outlaw’, and as such has no place in expressing a civilised attitude towards those in prison.¹⁰

The notion of civic death is applied selectively. People serving a sentence of any length continue to contribute financially to society from within prison. They pay tax on their savings, capital gains and any earnings that they receive during their sentence. If they are civically alive when it comes to financial contributions, they should be treated in the same way when it comes to basic human rights.

Minority ethnic groups are disproportionately affected

Whilst approximately 2% of the UK population is black, an estimated 11% of the British national prison population is black.¹¹ As such, black men are significantly more likely to be barred from voting than their white counterparts due to their over-representation in the prison population. A US federal appeals

court has recently ruled (*Farrakan vs Gregoire*) that imprisoned felons should be allowed to vote in Washington State to ensure that racial minorities are protected under the Voting Rights Act.¹² This ruling is subject to an appeal in the US Supreme Court.

Voting would promote prisoners' rehabilitation, resettlement and sense of civic responsibility

The UK government is pursuing an ambitious programme of civic renewal aimed to improve community cohesion. The notion of civic death works against this policy by excluding those who are already on the margins of society and further isolating them from the communities to which they will return on release.

The Prison Governors' Association and many senior managers in the Prison Service believe that voting rights and representation form part of the process of preparing prisoners for resettlement in their communities.

Peter Bottomley, Conservative MP and former Minister, notes that:

*Ex-offenders and ex-prisoners should be active, responsible citizens. Voting in prison can be a useful first step to engaging in society.*¹³

The Catholic Bishops of England and Wales also support the view that prisoners should have the right to vote. Their report *A Place of Redemption* states that:

*Prison regimes should treat prisoners less as objects, done to by others, and more as subjects who can become authors of their own reform and redemption. In that spirit, the right to vote should be restored to sentenced prisoners.*¹⁴

The ban contributes to the failure of imprisonment

Reconviction rates show that imprisonment fails to rehabilitate a very high proportion of offenders. Reconviction rates for those sentenced to 12 months or less can reach 70%.¹³ At the end of December 2009, of the 141 prisons in England and Wales, 83 were overcrowded, with some by up to 174%.¹⁵ Prisoner self harm and suicides continue to be a matter of great concern. Without the vote, prisoners have no formal, organised and

protected right to a voice. This removes one of the pivotal ways of being heard by a government and leaves prisoners with limited, if any, recourse to challenge their worsening conditions. Cited in the Telegraph, John Hirst explained:

*That was the reason I took the case. Until now there have been no votes in jails and so MPs did nothing about penal reform. I hope it will force politicians to talk to prisoners. They will have to go knocking on our doors like they do other people.*¹⁶

Former Conservative Home Secretary Lord Hurd has stated that:

*If prisoners had the vote then MPs would take a good deal more interest in conditions in prisons.*¹⁷

The ban is an unjust additional punishment that achieves nothing

It does not protect public safety. It is not an effective deterrent. It is not a means to correct offending behaviour or to assist in the rehabilitation of offenders. It is an unjust additional punishment imposed, but not articulated, by the court at the point of sentence and bears no relation to the causes of crime.

Prisoners' voting is the norm in most other European countries and elsewhere
Voting by sentenced prisoners works successfully elsewhere, and almost all of our European neighbours have partial or no restrictions on voting – without detrimental social effects.

Around 40% of the countries in the Council of Europe, including Ireland, the Netherlands and Spain, have no ban. Following the ECtHR judgment in *Hirst v. UK (No 2)*, Latvia has allowed all prisoners the right to vote.¹⁸ In 2006, Cyprus, which also previously had a blanket ban on prisoners voting, passed legislation enabling full enfranchisement of its prison population.

Many other European countries only ban some sentenced prisoners from voting. For example, in France and Germany, courts have the power to impose loss of voting rights as an additional punishment.

The UK is one of only one of a handful of Europe countries automatically to disenfranchise

sentenced prisoners, the others including Armenia, Bulgaria, Estonia, Hungary and Romania.

The Council of Europe is in the process of revising the European Prison Rules, which aim to establish common principles in the area of penal policy. It is anticipated that the new rules may require Member States to enable prisoners to participate in elections, in so far as their right to do so is not restricted by national legislation.

In 2002 the Canadian Supreme Court stated that:

*Denial of the right to vote...undermines the legitimacy of government, the effectiveness of government, and the rule of law...It countermands the message that everyone is equally worthy and entitled to respect under the law.*¹⁹

It ruled that to ban prisoners serving over two years from voting was too broad a measure.

In Australia and New Zealand, the length of their sentence determines whether or not convicted prisoners retain voting rights. In South Africa, all prisoners have the right to vote. Handing down a landmark ruling in April 1999, the Constitutional Court of South Africa declared that:

*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 personhood. Quite literally, it says that everybody counts.*²⁰

How would the right to vote work in practice?

In the UK, people held on custodial remand maintain their voting rights, and are able to vote by post or proxy. They cannot register at the prison address, but the Representation of the People Act was amended in 2000 to enable remand prisoners to register using a declaration of local connection (this means that they use the address where they would be living if they were not on remand or an address where they have lived in the past). A similar procedure could be used for sentenced prisoners. The Electoral Commission has identified remand prisoners as

‘hard to reach’ voters with whom it is important to engage.

In its evidence to the Ministry of Justice second consultation in 2009, the Electoral Commission confirmed that:

We are not taking a view on which prisoners should or should not be able to vote. However, we feel that prisoners who have been allowed the vote should be entitled to vote in all elections that their age, nationality and deemed place of residence would allow them to, were they not imprisoned.

With regard to the administrative issues, we broadly support the Government’s approach as outlined in this consultation. Prisoners should be able to register to vote using a special version of the rolling registration form. Any application should be attested by an appropriate member of the prison’s staff, who should be under a duty to assist in such applications.

As far as possible, any enfranchised prisoner should be treated the same as any other elector. While it may not be desirable or indeed possible for a prisoner to attend a polling station, prisoners should be given the same rights to a postal or proxy vote as any absent voter who could show that they have a good reason for not being able to attend their polling station. Furthermore, prisoners should have the right to register anonymously on the same basis as a regular voter.

If a prisoner decides to vote by post, they should have the legal right to a secret ballot and prisons should be compelled to provide a room in which the ballot paper can be marked in secret.

*It may be preferable for a new type of elector, a prisoner voter, to be created in legislation, or for the declaration of local connection to be modified. We are happy to discuss with the MoJ how best to implement the decisions made following this consultation.*²¹

The former Chief Executive of the National Offender Management Service (NOMS), Martin Narey, confirmed some years ago that sentenced prisoners voting: “poses no problems for the Prison Service”.²²

Putting matters right

The UK government must now put aside delaying tactics and act urgently on the ECtHR judgment that the blanket ban on prisoners' voting is unlawful. It must ensure that sentenced prisoners have the right to vote by the time of the next general election.

The government's current position is morally and legally unsustainable and incompatible with its obligations as a member of the Council of Europe.

To comply with the European Convention on Human Rights, within the time remaining, the options appear to be:

- ◆ the introduction of an amendment to the constitutional reform and governance bill which is due to enter the House of Lords for debate in February 2010
- ◆ for a minister to make an urgent remedial order which would serve to amend the legislation and at the same time allow for Parliamentary debate within a proscribed period.

Under the Human Rights Act a minister has power, in specified circumstances, to make a remedial order in order to remove an incompatibility between domestic law and a Convention right. The Joint Committee on Human Rights has consistently called on the government to introduce such an order to put matters right at long last.

1. Hansard, 20 October 2003.
2. European Court of Human Rights (30 March 2008) Judgment in the case of Hirst v The United Kingdom (No. 2) (Application no. 74025/01)
3. European Court of Human Rights (6 June 2009) Grand Chamber Judgment Hirst v The United Kingdom (No. 2)
4. Ministry of Justice (2009) Voting rights of prisoners detained within the UK: second stage consultation, London: Ministry of Justice www.justice.gov.uk/consultations/docs/prisoner-voting-rights.pdf
5. Ibid.
6. Council of Europe, Committee of Ministers, 1059th meeting (DH), 2-4 and 5 (morning) June 2009, Section 4.2
7. Ibid.
8. Joint Committee Human Rights, 31st Report, 7 October 2008; para 63.
9. UN Human Rights Committee, Paper CCPR/C/GBR/CO/6, 30th July 2008.
10. Prison Reform Trust and Unlock press release (2 March 2004) Barred From Voting: Coalition calls for prisoners to be given the vote.
11. HM Prison Service and Commission for Racial Equality (2003) Implementing Race Equality in Prisons- a shared agenda for change, London: HM Prison Service.
12. United States Court of Appeals for the Ninth Circuit, Farrakan vs Gregoire, 5 Jan 2010.
13. Prison Reform Trust and Unlock press release (2 March 2004) Barred From Voting: Coalition calls for prisoners to be given the vote.
14. Catholic Bishops' Conference of England and Wales (2004) A Place of Redemption, London: Burns and Oates.
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16. Hirst, J. cited in Rozenberg, J. and Born, M. (31/03/04) Euro Court backs prisoner over voting rights in the *Telegraph*.
17. Cited in Leech & Shepherd (2003) Prisons Handbook 2003/4 Manchester: MLA press.
18. European Court of Human Rights (30 March 2008) Judgment in the case of Hirst v. The United Kingdom (No. 2) (Application no. 74025/01)
19. Supreme Court of Canada (31 Oct 2002): Richard Sauvé v Attorney General of Canada and others 2002 SCC 68.
20. Constitutional Court of South Africa (1 April 1999): August and another v Electoral Commission and Others CCT8/99.
21. Electoral Commission response to the Ministry of Justice consultation Voting Rights of Convicted Prisoners Detained within the United Kingdom (second stage) September 2009.
22. Levenson J. (2001) Barred from Voting, Prison Reform Trust.
23. www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5802.htm

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