

EQUALITY IMPACT ASSESSMENT - RESULTS

Title of Policy	Scottish Elections (Franchise and Representation) Bill
Summary of aims and desired outcomes of Policy	<p>The Scottish Elections (Franchise and Representation) Bill sets out a number of changes to the electoral franchise in respect of Scottish Parliament and local government elections in Scotland. It includes provisions extending the franchise for these elections to include all those with a legal right to live in Scotland and extending the right to vote to prisoners sentenced to 12 months or less. This extension will apply in respect of other devolved elections (such as elections for membership of a National Park authority) that rely on the local government franchise. It also extends candidacy rights for Scottish Parliament and local government elections for foreign nationals, so that these broadly mirror the extension to voting rights (with some exceptions).</p>
Directorate: Division: team	Directorate for Constitution and Cabinet: Elections and FOI Division: Elections Team

Executive summary

The Scottish Government is committed to increasing participation in elections both in terms of voter turnout and encouraging citizens to stand for election. Democratic participation challenges the inequalities of power and influence that exist in society. The Bill seeks to ensure an electoral system that supports and empowers the engagement in elections of all those who have chosen to make Scotland their home.

The Bill proposes to extend the franchise to allow anyone legally resident in Scotland to vote in Scottish Parliament and local government elections. It will also permit those with an indefinite right to live in Scotland to stand as candidates in devolved elections and hold office. This is in line with the Scottish Government's position in relation to immigration, its desire to demonstrate that Scotland is a welcoming place for all, and the New Scots refugee integration strategy¹. The Bill will also enfranchise those prisoners sentenced to terms of 12 months or less.

The policy will affect everyone in Scotland who will become entitled to vote as a result of its provisions. This EQIA has considered the potential effects of the Bill and how it will impact on people with one or more protected characteristics. Our findings are based on desk based research; analysis of consultation responses; stakeholder engagement and feedback.

The Bill has the potential to impact positively on those who share the following protected characteristics:

Age - young people aged 16 or 17 are already able to vote in devolved elections if they are EU or Commonwealth nationals. Extending the franchise to all those legally resident in Scotland will enfranchise young people aged 16 or 17 from countries other than the EU and the Commonwealth. This is likely to

¹ <https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-2022/>

positively impact upon young people in Scotland as empowered and valued members of the community.

Race – the protected characteristic of race includes nationality². Extending the franchise in Scotland will enfranchise foreign nationals from countries other than the EU and the Commonwealth who are legally resident in Scotland. This is likely to positively impact upon all those resident in Scotland as empowered and valued members of the community.

Sex – some of those responding to the consultation on prisoner voting highlighted that female prisoners typically serve shorter sentences, and that many will therefore be enfranchised by removal of the prohibition of voting for those prisoners serving 12 months or less. This is likely to positively impact upon those prisoners as a part of rehabilitation.

By expanding democratic engagement and accountability in extending the franchise, the Bill will contribute to the achievement of the Scottish Government's National Performance Framework Outcomes of inclusive, empowered, resilient and safe communities and support respect, protection and fulfilment of human rights and lives free from discrimination.

The policy is not considered to have a negative impact on any of the protected equality groups. It promotes equality through provisions to ensure that any eligible person who wishes to vote is able to do so.

Background

The Scotland Act 2016³ amended the Scotland Act 1998⁴ to devolve further powers to the Scottish Parliament. These additional powers gave the Scottish Parliament and the Scottish

² Section 9 of the [Equality Act 2010](#)

³ <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>

⁴ <http://www.legislation.gov.uk/ukpga/1998/46/contents>

Ministers increased autonomy in relation to the operation of Scottish Parliament and local government elections in Scotland.

The Scottish Government has held two separate public consultation exercises on electoral reform and prisoner voting in relation to Scottish Parliament and local government elections. The consultation on Electoral Reform⁵ was undertaken between December 2017 and March 2018 and a further consultation exercise, on Prisoner Voting⁶, took place from 14 December 2018 to 8 March 2019.

Extending the franchise to foreign nationals – consultation

The Scottish Government's consultation on Electoral Reform revealed that there was general support amongst organisations and individuals to extending the electoral franchise for devolved elections to everyone who is legally resident in Scotland, with 78% of those who responded agreeing to this proposition. Currently, only British, qualifying Commonwealth⁷, Irish and EU citizens are able to vote in devolved elections. The Bill makes no change to the currently unrestricted rights of EU citizens to vote and stand in devolved elections as provided in statute. No legislative change is necessary to secure these voting rights for EU citizens as a result of the UK's departure from the European Union, but the Scottish Government intends to take this opportunity to restate the whole franchise in primary legislation, while extending it to include all foreign nationals with a legal right to live here. The Scottish Government has previously made a public commitment to ensuring that the rights of EU citizens to vote are protected after Brexit.

⁵ <https://www.gov.scot/publications/consultation-electoral-reform/>

⁶ <https://consult.gov.scot/elections/prisoner-voting/>

⁷ Under section 4(6) of the Representation of the People Act 1983 a person is a 'qualifying' Commonwealth citizen for registration purposes if they do not require leave to enter or remain in the UK or they do require leave to enter or remain in the UK but have been granted such leave or are treated as having been granted such leave. Any type of leave to enter or remain is acceptable, whether indefinite, time limited or conditional.

The Equality and Human Rights Commission, in its response to the consultation on Electoral Reform, welcomed the Scottish Government's proposal to extend the franchise to include everyone legally resident in Scotland to ensure equality of treatment⁸.

The Scottish Parliament's Equalities and Human Rights Committee 2018 report on prisoner voting (discussed further below) also referenced voting by foreign nationals, noting representations from Patrick Harvie MSP in relation to the voting rights of EU citizens and citizens of non-EU countries. He argued there was "*an argument for taking national identity out of the equation altogether and making residence the only requirement to vote*". Mr Harvie also highlighted communities that faced barriers to participation in voting, such as disabled people and Gypsy Traveller communities. The Committee requested (at para. 120) that the Scottish Government fully consider these issues in its response to the consultation.

An independent analysis of responses to the electoral reform consultation has been published here:

<https://www.gov.scot/publications/electoral-reform-consultation-analysis/pages/2/>

Extending the franchise to certain prisoners - consultation

There has been a longstanding⁹ prohibition on convicted prisoners voting in all elections in the UK while they are detained in a penal institution. The Representation of the People Act 1983¹⁰ ("the 1983 Act") established the current legal basis for the ban and section 3 of that Act sets out that any convicted

⁸https://consult.gov.scot/elections/electoral-reform/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=equality&uuld=508390916

⁹ Historical background on prisoner voting is summarised in this House of Commons Standard Note:
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport> A further paper sets out developments since 2015:
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7461>

¹⁰ <http://www.legislation.gov.uk/ukpga/1983/2>

person is “legally incapable” of voting at any election while detained in pursuance of their sentence or while unlawfully at large when required to be so detained. This ban applies irrespective of the length of the sentence and applies to all UK elections, including Scottish Parliament and local government elections.

In 2005 the European Court of Human Rights (ECtHR) found in *Hirst v UK (No 2)*¹¹ that the UK blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR). This Article provides that member states (of the Council of Europe): “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 has been interpreted by the courts to give individuals the right to vote and to stand for election. The ECtHR allows member states a wide “margin of appreciation” in relation to the exercise of the franchise by convicted prisoners. This reflects the wide variety of approaches on prisoner voting across the member states of the Council of Europe. In *Hirst*, the UK’s blanket prohibition on prisoner voting was deemed to be outwith this margin, as it applied to all convicted prisoners, regardless of the nature of their offence or length of their sentence.

The role of the Scottish Parliament’s Equalities and Human Rights Committee includes considering and reporting on human rights issues. In June 2017 the Committee decided to take evidence on the current UK legal position on prisoner voting, the practical issues around voting in prisons and the arguments for and against allowing prisoners to vote. Having taken evidence from a wide range of stakeholders and interested parties, the Committee published a report on Prisoner Voting in Scotland¹² on 14 May 2018. The Committee recommended that the Scottish

¹¹ <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

¹² <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/5/14/Prisoner-Voting-in-Scotland#Introduction>

Government should “legislate to remove the ban on prisoner voting in its entirety”.

The Committee also highlighted that the International Covenant of Civil and Political Rights (ICCPR)¹³ gives every citizen the right to participate in the conduct of public affairs, to vote in elections which have universal suffrage and to have equal access to public service. It noted that:

“The United Nations Human Rights Committee, which monitors compliance with the ICCPR, has expressed concern on several occasions about countries which do not allow their prisoners to vote. The Committee said that it “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 prisoner’s reformation and social rehabilitation, contrary to Article 25 of the Covenant.”

The Scottish Government’s public consultation on prisoner voting sought views on the favoured proposal to link voting rights to length of sentence: specifically, to prisoners serving 6 or 12 month sentences. The consultation paper also sought views on the practicalities of prisoner voting. Responses were received from 35 organisations and 230 individuals. Respondents were split fairly evenly across three main positions. Around 3 in 10 thought that prisoners’ right to vote should be linked to the length of their sentence (Option 1). Of the remaining respondents, those who went on to comment generally preferred one of two approaches: allowing no prisoners to vote (around 1 in 3 of all respondents); or extending the franchise to all prisoners (around 3 in 10 of all respondents).

¹³ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

One consultation response¹⁴, from Engender, an organisation working on feminist agendas in Scotland and Europe, included the following observations:

“The Scottish Government must also ensure that the right to vote for prisoners is made practicable. There should be specific consideration of the high rates of homelessness among women coming into prison and the need to establish a local connection. Prison staff should be proactive in ensuring that new prisoners are entered onto the register and made aware of their voting rights.”;

and

“As women are far more likely to receive a short term sentence following a non-violent offence we argue that the current UK law acts as an unnecessary barrier to women’s participation in public life. The majority of women who receive a custodial sentence are sentenced to short term sentences, with around two-thirds of the women at Cornton Vale serving sentences of six months or less. Around 79% of offences are for low-level offences such as - shoplifting, common assault, bail offences and breach of the peace. Women’s involvement in crime often stems directly from socio-economic survival for themselves and their families. Scotland has one of the highest rates of women’s imprisonment in the world. The average daily women’s prison population is approximately 400, with 315 sentenced women and 85 women on remand. Female prisoners have higher lifetime incidences of trauma. Over 50% have been subjected to domestic violence at some point in their lives and 33% experienced sexual abuse. More than a quarter reported having been treated/ counselled for a mental health and/or emotional problem in the year before custody, compared with 16% of men. Concerns have

¹⁴https://consult.gov.scot/elections/prisoner-voting/consultation/view_respondent?_b_index=180&uuld=515500775

also been raised by the UN Special Rapporteur on violence against women over the disproportionate number of black and minority ethnic (BME) women in UK prison. As a result of these inequalities, women in prison are some of the most excluded from public life. Voting is a benefit of active citizenship, or the process of participating in community decision-making. This is particularly important where the individual has been systematically socially and economically excluded from public life prior to imprisonment. Voting and civic participation have the power to entrench the feeling of community and belonging that is central to preventing reoffending. We believe that voting sends an important message of inclusion and status within society.”

Extending the franchise to foreign nationals

This Bill proposes to extend the devolved franchise to citizens of any country who are legally resident in Scotland. It empowers those with the right to reside in Scotland and who may be paying taxes, own or rent a home and/or use public services in Scotland. Up until now, the franchise has been closely based on residence combined with the citizenship of certain countries. The Bill goes beyond the existing arrangement of providing voting rights in devolved elections to EU citizens and qualifying Commonwealth citizens resident in Scotland. The Scottish Government wants Scotland to be a country where every individual who has chosen to live here is equally valued, no matter where they were born. With this in mind, we want to allow all foreign nationals who are legally resident in Scotland to vote at Scottish Parliament and local government elections.

Allowing persons of all nationalities legally resident in Scotland to vote at Scottish Parliament and local government elections has been estimated to extend the franchise to include over

59,000¹⁵ non-EU, non-Commonwealth citizens who are currently not able to vote in any elections in Scotland.

As the policy is to enfranchise citizens of all nationalities who are legally resident in Scotland, this will include those whose claim for asylum has been allowed and have been granted refugee status and leave to remain in the UK (usually for an initial period of 5 years). It would also include those who have been granted temporary protection or humanitarian protection or other forms of leave to remain in the UK. These individuals are likely to be residing in Home Office supported accommodation and the documentation which they have from the Home Office should enable them to demonstrate residence to an Electoral Registration Officer (“ERO”) in Scotland for the purposes of electoral registration.

Extending the franchise to certain prisoners

The Bill will provide a right to vote in devolved elections for convicted persons who are sentenced to consecutive or concurrent terms of imprisonment which, in total amount to no more than 12 months. The policy will cover both Scottish local government and Scottish Parliament elections, even though there is no requirement under ECtHR caselaw to give prisoners voting rights in local government elections.

In terms of compliance with the ECHR, this policy pursues the legitimate aim of preventing crime and enhancing civic responsibility and respect for the rule of law. This approach, based on the length of sentence, strikes an appropriate balance between promotion of the rule of law and responsible citizenship, as well as the wider objectives of the rehabilitation and reintegration of prisoners in order to reduce reoffending. This approach would ensure that there is no longer a blanket

¹⁵ National Records of Scotland publish information on the breakdown of numbers of citizens of non-EU non Commonwealth countries by local authority area, available at the following link:

http://www.scotlandscensus.gov.uk/documents/cde/CT_0202_2011.xlsx

restriction on voting in devolved elections for all prisoners in Scotland, irrespective of the length of their sentence or the nature and gravity of their offence.

Prisoners will not normally be registered as residing at a prison. In most instances, they will be registered by reference to their previous home address or, failing that, a declaration of local connection which is a legal mechanism used to allow an individual with untypical residence to be allocated to an electoral community. All registration decisions will be made by the Electoral Registration Officer on the basis of information provided by the Scottish Prison Service, the prisoner and any other relevant sources. Only where the previous address cannot be used and no local connection can be established will a prisoner be registered to the ward in which the prison is situated. The Electoral Register entry will not identify any person as being resident at the prison. Prisoners will only be able to vote by proxy or by postal vote. Polling stations will not be set up in prisons.

Candidacy Rights

In general, only Commonwealth Citizens (including UK citizens), citizens of the Irish Republic and EU citizens are allowed to stand as candidates in Scottish Parliament and local government elections. The main exception to this concerns persons aged 16 or 17, who are unable to stand as candidates. Individuals are disqualified from standing in local government elections, from being elected, or from continuing to serve as a councillor if they have been sentenced to a prison term of three months or more at the time of their nomination or on polling day. They are then barred from seeking office as a councillor for 5 years. For elections to the Scottish Parliament, people are disqualified from standing or continuing to serve as an MSP if they have been convicted of an offence and have been sentenced to be imprisoned or detained for more than a year and are detained anywhere in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large.

Candidacy rights were not a feature of either Government consultation exercise, and the Bill's proposals are limited to one change to the law on candidacy: to allow all foreign nationals with an indefinite right to live in Scotland to stand as candidates in devolved elections and hold office following those elections. Although foreign nationals with a limited right of residence will be able to vote in devolved elections, a person with a limited right of residence will not be permitted to stand as a candidate.

Human Rights

The proposal within the Bill to restrict the right to vote in devolved elections to only those prisoners who have been sentenced to a term of imprisonment of more than 12 months is in line with the ECtHR's ruling that a blanket ban is unlawful. This will ensure that Scots law is not in breach of Article 3 of Protocol 1 of the ECHR.

Awareness

The Scottish Government understands the importance of ensuring that voters are aware of how to register to vote and how to cast their vote, whether in a polling station or by post. The Electoral Commission is considering how best to promote public awareness amongst those enfranchised by the Bill. This will cover how and when to register and how and when to vote.

In line with the Scottish Government's commitment in the British Sign Language (BSL) National Plan, guidance on how and when to register and how and when to vote will be available in BSL.

EROs will also have a role to play in encouraging and facilitating registration of all those who will be able to vote.

The Electoral Commission and EROs are likely to target their awareness raising activities to specific groups (e.g. prisoners) to ensure voters understand the registration and voting process.

Recommendations and Conclusion

Following the EQIA, which was largely based on the analysis of responses to the Government's two public consultation exercises and the work of the Equalities and Human Rights Committee, no significant changes to the policy were deemed necessary due to the fact that the proposed changes to the franchise are not considered to have a negative impact on any of the protected equality groups. However, the consultation process contributed to the development of the policy.

When the Bill is enacted, the policy will be implemented by the Electoral Management Board for Scotland, the Electoral Commission, the Scottish Prison Service and Scottish Government officials. The Electoral Commission oversees and monitors the conduct and administration of elections.