



Canolfan
Llywodraethiant Cymru

Wales Governance
Centre

**WRITTEN EVIDENCE TO THE NATIONAL ASSEMBLY FOR
WALES EQUALITY, LOCAL GOVERNMENT AND COMMUNITIES
COMMITTEE'S INQUIRY INTO VOTING RIGHTS FOR
PRISONERS**

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ABOUT US

The Wales Governance Centre is a research centre that forms part of Cardiff University's School of Law and Politics undertaking innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance. A key objective of the Centre is to facilitate and encourage informed public debate of key developments in Welsh governance not only through its research, but also through events and postgraduate teaching.

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NOTES ON TEXT

This evidence is based largely on a previous submission to the Welsh Government's consultation on Electoral Reform in Local Government in Wales in October 2017. Changes

have been made to reflect new case law and the latest available data on imprisonment in Wales.

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EXECUTIVE SUMMARY

The Case for Extending the Franchise to Prisoners

- It is our shared view that the Welsh Government should extend the franchise for Welsh elections to *all prisoners*. We support this view with legal, reintegrative and political arguments.
- **The legal arguments.** The Welsh Government should go beyond the minimal efforts made by the UK Government to comply with the judgments of the European Court of Human Rights on this issue. It is questionable whether the kind of administrative measures adopted by the UK Government in 2017 will be sufficient in the long term to satisfy the courts that the current legislative ban on prisoner voting no longer violates the right to participate in elections under Article 3 of the First Protocol ('A3P1') of the European Convention on Human Rights ('ECHR').
- International law clearly supports prisoners' rights of democratic participation, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
- **The reintegrative arguments.** We believe that the current law fails in its stated aims to reduce crime and to act as a means of positive retributive punishment. The ban on prisoner voting is also counter-productive to the aims of prisoner reintegration.
- We believe that the decision to extend the franchise to prisoners would further facilitate the reintegration of Welsh prisoners. This decision would offer direct support to the Welsh Government's existing responsibilities for prisoner rehabilitation and resettlement.
- **The political arguments.** We believe that the extension of the franchise to prisoners would be a powerful demonstration of the Welsh Government's commitment to the promotion of human rights and democratic engagement. It would enhance the international reputation of Wales and, by extension, the UK. Incidentally, it would also undo much of the damage caused by the UK's refusal to meet its obligation in international law to comply with the adverse rulings of the ECtHR on this issue.
- We also believe that extending the vote to prisoners would be consistent with the Welsh Government's approach to international human rights law, as reflected in the

Rights of Children and Young Persons (Wales) Measure, the Welsh Language (Wales) Measure and the Well-being of Future Generations (Wales) Act.

Operationalising the Franchise

- We believe that the custody threshold and sentence length are arbitrary measures for the loss of the vote. Under such a system, the actual loss of voting rights is, in most cases, determined by the date of sentencing, early release, the timing of elections and the location of sentencing. The latter is subject to the well-known problem of a 'sentencing lottery' whereby the commission of the same offence can result in a custodial sentence and loss of voting rights in one area but a non-custodial sentence and retention of voting rights in another.
- This position is supported by data from the Wales Governance Centre's *Sentencing and Immediate Custody in Wales* report which show that the average custody rate is higher at courts in Wales than in England. These data also reveal that Wales has the highest rate of imprisonment in Western Europe.
- In terms of implementing the extended franchise, we believe that the model based on a declaration of local interest offers a viable way forward. It will allow prisoners held in England to participate in Welsh elections and will enable the Welsh Government to draw on its experience of providing support services to Welsh prisoners held across England and Wales. It will also prevent the risk of a sudden and drastic increase in the electorates for constituencies in which Welsh prisons are located.

I. INTRODUCTION

Our evidence will discuss two separate themes. *Firstly*, we provide a case to support the extension of the voting franchise to prisoners from Wales. This will be guided by a legal, reintegrative and political set of arguments. *Secondly*, we will discuss the ways in which Welsh prisoner voting can be operationalised within the current institutional and organisational frameworks of the England and Wales system.

2. THE CASE FOR EXTENDING THE FRANCHISE

The Committee's terms of reference are to consider the arguments for and against giving some or all prisoners the right to vote in Welsh elections. Our response to this question will be guided by legal, reintegrative and political arguments. These will be used to support our shared view that *all* Welsh prisoners should be given the right to register and participate in Welsh elections.

2.1 The legal case for the right of prisoners to vote in Welsh elections

2.1.1 Article 3 of Protocol 1 ('A3PI') to the European Convention on Human Rights

A3PI of the ECHR states: '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'.¹ This encompasses a right to vote in elections and applies equally to elections for both central and sub-state legislatures.² A3PI therefore undoubtedly applies to elections for the National Assembly for Wales.

The European Court of Human Rights ('ECtHR') has held repeatedly that the systematic exclusion of prisoners from participating in elections in the UK under the Representation of the People Act 1983³ contravenes A3PI.⁴ This position has been unanimously accepted by the UK Supreme Court.⁵

2.1.2 The UK Government's response to the violations of A3PI ECHR

In November 2017, the UK Government unveiled plans to remedy the violation of A3PI ECHR with a package of administrative measures.⁶ These consisted of:

¹ Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (emphasis added)

² The ECtHR has held the term to apply to the Flemish Council, the Walloon Regional Council and the French Community Council in Belgium and regional councils in Italy.² *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR; *Vito Sante Santoro v Italy* App no 36681/97 (1 July 2004)

³ Representation of the People Act 1983 s.3(1)

⁴ *Greens and MT v United Kingdom* [2010] ECHR 1826; *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41

⁵ *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271

⁶ <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>

- allowing prisoners released on temporary licence to vote
- amending the warrant of committal to prison in order that those receiving a custodial sentence are informed of their disenfranchisement at the point of sentencing
- issuing guidance to clarify that prisoners released on home detention curfew are entitled to vote

In September 2018, the Committee of Ministers of the Council of Europe accepted that these measures were sufficient to remedy the original violation of A3PI.⁷

2.1.3 Potential problems with the minimalist approach

In our view, the Welsh Government should go beyond the UK Government's approach in relation to Welsh elections. It represents what has been termed 'minimalist compliance' with the requirements of the ECHR and in any event may not reflect a legally durable solution, for a number of reasons.

As a preliminary point, the UK Government's measures have been accepted by the Committee of Ministers – the political arm of the Council of Europe which is responsible for supervising the implementation of the Court's judgments – not by the Court itself. While this acceptance technically draws the matter to a close at the international level, the current ban on prisoner voting under the 1983 Act remains susceptible to legal challenge. It remains to be seen whether the very modest, administrative reforms introduced by the UK Government will withstand judicial scrutiny, either in the UK or in Strasbourg.

The domestic and European case law on the UK regime specifically identifies the 1983 Act as the source of the violation of the ECHR. The prohibition on prisoner voting under that legislation has been repeatedly declared 'general, automatic and indiscriminate', and therefore not a proportionate restriction on the right to vote. By its own admission, the UK Government expected the changes announced in 2017 to result in around 100 additional prisoners across the whole of the UK being able to vote at any given point in time.⁸ By that

⁷ [https://hudoc.exec.coe.int/eng#%7B%22EXECLidentifier%22:%5B%22DH-DD\(2018\)843E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECLidentifier%22:%5B%22DH-DD(2018)843E%22%5D%7D)

⁸ <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>

estimate, these reforms would mean that only 5 additional prisoners in Wales are able to vote.⁹ It is difficult to see how such a minor change would convince the courts that the offending legislation – which remains unchanged – no longer amounts to a general, automatic and indiscriminate restriction on the right to vote. To introduce no further changes in relation to Welsh elections would therefore carry the distinct possibility of successful legal challenges to the Welsh Government. Legislating to enfranchise some, if not all, prisoners would avoid this risk. *2.1.4 International law on prisoner voting*

In addition to avoiding the risks of minimalist compliance, legislating to extend the franchise to prisoners in Wales would be consistent with the spirit of international human rights law. The foundational document of modern human rights, the UN's Universal Declaration of Human Rights (UDHR), states: 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.¹⁰ Article 25 of the UN's International Covenant on Civil and Political Rights (ICCPR), another cornerstone of international human rights law, also lays down a broad right to 'take part in the conduct of public affairs, directly or through freely chosen representatives'.¹¹ The Prison Reform Trust¹² has pointed out how the UN Human Rights Committee, charged with interpreting the ICCPR, has found the disenfranchisement of prisoners in the UK to contravene the right of participation because it amounts to an 'additional punishment'¹³ which 'does not contribute towards the prisoner's reformation and social rehabilitation'.¹⁴ Finally, the Basic Principles for the Treatment of Prisoners set out by the UN Office of the High Commissioner on Human Rights states that '[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms'¹⁵

⁹ This figure is calculated using prison population data from each jurisdiction at the end of September 2018: England and Wales: 82,788; Northern Ireland: 1,423; Scotland: 7,771
Total: 91,982

There were 4,771 Welsh prisoners at the end of September 2018.

¹⁰ United Nations Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) UNDHR art 21

¹¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25

¹² See Prisoner Reform Trust's evidence to Scottish Parliament's Equalities and Human Rights Committee: www.parliament.scot/S5_Equal_Opps/.../EHRiC_public_papers_20170907.pdf

¹³ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (2001) UN doc CCPR/CO/73/UK, para 10

¹⁴ Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland (2001) UN doc CCPR/CO/73/UK, para 10

¹⁵ UNCHR, Basic Principles for the Treatment of Prisoners (Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990)

set out in the UN human rights treaties. On this basis, the fact of imprisonment alone should not deprive individuals of their right to vote in elections.

2.2 The reintegrative case for extending the Welsh election franchise to prisoners

2.2.1 Deconstructing the policy of disenfranchisement: Deterrence and Retribution

Successive UK governments have sought to legitimate the ban on prisoner voting on the grounds that it helps to incentivise civic responsibility and adds to the punishment already faced by those sentenced to custodial imprisonment.¹⁶ Attempts have also been made to forge a link between prisoner disenfranchisement and the other widely stated aims of imprisonment.¹⁷

Firstly, there is the contention that a ban on voting is likely to deter people from committing crime. The deterrence argument, however, is widely disputed. In support of existing work in this area,¹⁸ we contend that it is highly unlikely that any decision made by the Welsh Government to uphold the voting ban will have any ‘strong deterrent effect’ on would be offenders.¹⁹ For example, we have found no evidence to support the claim that the loss of voting rights plays any decisive role in the decision-making processes of individuals who choose to desist from crime. The deterrence argument is further undermined by the fact that the removal of voting rights is a far less probable deterrent than the loss of other social benefits that accompany periods of custodial imprisonment (e.g. loss of liberty, denial of privacy, removal from outside relations).

Secondly, the removal of prisoner voting rights is often justified as a form of positive retributive punishment. This view contends that offenders who have broken the law have forfeited their rights to partake in the voting franchise. While we fully accept that the removal of voting rights certainly represents a punishment for prisoners, we contend that the retributive justification is highly problematic and indeed is flawed in accordance with its own stated aims.

¹⁶ See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41

¹⁷ This includes incapacitation.

¹⁸ C. Bennett, ‘Penal Disenfranchisement’ (2016) 10(3) *Criminal Law and Philosophy* 411

¹⁹ C. Bennett, ‘Penal Disenfranchisement’ (2016) 10(3) *Criminal Law and Philosophy* 411, 416

The concept of retribution²⁰ (cf. ‘just deserts’) is an approach rooted in belief that there should be a ‘fit’²¹ – or a strong element of proportionality – between the crime and the punishment. That is to say that the punishment should, in accordance with the principle of proportionality, be related to the crime that has been committed. This point raises the suggestion that only a crime of a political nature merits the removal of voting rights *alongside* a period of custodial imprisonment. This argument was put before the Scottish Parliament’s Equalities and Human Rights Committee by Professor Fergus McNeil as part of their own inquiry into extending the voting franchise to prisoners:

... the question is not the severity of the crime but the nature of the crime. Disenfranchisement is a political punishment, so the crime to which it should be applied should be a political crime, such as misconduct in a public or political office or offences against acts that seek to govern the proper conduct of elections. Those would be the sorts of things that might feasibly and logically lead to disenfranchisement as a punishment. The mere fact that the crime is serious enough to warrant a long prison sentence does not create a logic for disenfranchisement...²²

It is our view that this argument strongly undermines the retributive case for maintaining the blanket ban for Welsh prisoners. Unless the Welsh Government decides to consider applying the ban to those convicted of political offences,²³ there is little evidence to support disenfranchisement in accordance with the retributive principles that have upheld the ban previously. As argued by Bennett:

If a retributivist defence of disenfranchisement is to be plausible, it would have to be shown, either that more crimes than previously thought have a “political” element; or that there is a respectable notion of proportionality that shows why disenfranchisement is fitting and proportional to crimes other than political

²⁰ This is underpinned by deontological perspectives on punishment.

²¹ C. Bennett, ‘Penal Disenfranchisement’ (2016) 10(3) *Criminal Law and Philosophy* 411, 415

²² See Professor Fergus McNeil’s evidence to the Scottish Parliament’s Equalities and Human Rights Committee: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11067&mode=pdf>

²³ A Freedom of Information request was submitted to the Ministry of Justice in September 2017 to determine the exact number of Welsh prisoners sentenced for electoral offences. The Ministry of Justice’s response revealed that there were no prisoners from Wales serving sentences for electoral offences at the end of June 2017.

ones.²⁴

2.2.2 *Disenfranchisement as inimical to reintegration*

The blanket ban on prisoner voting sustains the view that custodial imprisonment marks the ‘civic death’ of an individual. Prisoners without the vote are subsequently without citizenship status – effectively rendered ‘non-persons’. This process, therefore, results in prisoners being ‘forgotten’ and marginalised by policy makers, politicians and the public at large.²⁵

We contend, as have others, that the ban on prisoner voting is inimical to the supposed ‘rehabilitative’ aims of custodial imprisonment. This argument is strongly supported by the view that inclusion and democratic engagement can offer offenders an important, and indeed unique, opportunity to reinvent themselves as part of the rehabilitative process. This includes helping offenders to ‘take on’ a new image of themselves ‘as responsible players in a cooperative self-governing society’.²⁶ As the new President of the UK Supreme Court, Lady Hale, has put it, if the aim of the current ban is to ‘encourage a sense of civic responsibility and respect for democratic institutions ... it could well be argued that this is more likely to be achieved by retaining the vote, as a badge of continuing citizenship, to encourage civic responsibility and reintegration in civil society in due course’.²⁷ The Welsh Government’s decision to extend such rehabilitative opportunities to Welsh prisoners through the franchise would play a central role in the reintegration and desistance process.

2.2.3 *Welsh Government and reintegration*

The opportunity to further facilitate the reintegration process through the extension of the franchise is particularly significant when we take into account that ‘much of the work’²⁸ already being done to help resettle and support Welsh offenders is being carried out by the Welsh

²⁴ C. Bennett, ‘Penal Disenfranchisement’ (2016) 10(3) *Criminal Law and Philosophy* 411, 417

²⁵ S. Easton ‘The prisoner’s right to vote and civic responsibility: Reaffirming the social contract?’ (2009) 56(3) *The Journal of Community and Criminal Justice* 230

²⁶ C. Bennett, ‘Penal Disenfranchisement’ (2016) 10(3) *Criminal Law and Philosophy* 411, 416. See also S. Easton ‘The prisoner’s right to vote and civic responsibility: Reaffirming the social contract?’ (2009) 56(3) *The Journal of Community and Criminal Justice* 224

²⁷ *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271 [93]

²⁸ See the written evidence of the Ministry of Justice submitted to the House of Commons Welsh Affairs Committee’s Inquiry on Prisons in Wales and the Treatment of Welsh Offenders (2014) 8

Government. Indeed, despite the fact that powers over criminal justice in Wales are reserved to the UK Government, ‘many of the mechanisms’²⁹ for supporting prisoners’ resettlement and reintegration, such as health, housing and education, are already devolved.³⁰ We argue that the end to disenfranchisement therefore represents an important, necessary, and worthwhile step in light of the Welsh Government’s existing responsibilities for the reintegration of offenders in Wales.

2.3 The political case for extending the Welsh election franchise to prisoners

2.3.1 The international reputation of Wales

There are strong, political reasons for the Welsh Government to extend the franchise to prisoners. First, we believe that the change would enhance the international standing of Wales and, by extension, the UK. It is widely recognised that the UK Government’s continued refusal to implement the rulings of the ECtHR on prisoner voting has undermined respect for human rights and the international rule of law, and has lent legitimacy to the systematic non-compliance with the ECHR system by Russia on this issue. As the Council of Europe’s Commissioner for Human Rights, Nils Muižnieks, has remarked, ‘the Convention system crumbles when one member state, and then the next, and then the next, cherry pick which judgments to implement’.³¹ The Westminster Parliament’s Joint Committee on Human Rights has been forthright in its view of the damage which the UK’s non-compliance was causing:

In short, we find it unfortunate that the UK’s generally good record on implementation is undermined to a considerable extent by the very lengthy delays in implementation in those cases where the political will to make the necessary changes is lacking. ... [!]nexcusable delay in some cases undermines the claim that the Government respects the Court’s authority and takes seriously its obligation to respond fully and in good time to its judgments. It is also damaging to the UK’s

²⁹ National Offender Management Service Cymru, Welsh Government and Youth Justice Board, *Joining Together in Wales: An Adult and Young People’s Strategy to Reduce Reoffending* (2006) 7

³⁰ See R Jones, ‘The Hybrid System: Imprisonment and Devolution in Wales’ (PhD Thesis, Cardiff University 2017)

³¹ Nils Muižnieks, ‘Non-implementation of the Court’s judgments: our shared responsibility’ (2016). See: <http://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility>

ability to take a lead in ... encouraging other States with far worse records to take their obligations under the Convention more seriously. The UK, with its strong institutional arrangements for supervising the implementation of judgments, is in a good position to lead the way out of the current crisis facing the Court, but leaders must lead by example.³²

With the power to extend the franchise to prisoners in the context of Assembly and local elections, the Welsh Government has its own opportunity to lead by example. Extending the vote to prisoners would be a powerful demonstration of its commitment to the promotion of human rights and democratic engagement. It is our view that this would enhance the international reputation of Wales and, at the same time, help to mitigate the damage caused by the UK Government's refusal to comply with its legal obligation to implement adverse judgments of the ECtHR.³³

2.3.2 The Welsh Government's approach to international human rights law

We also believe that the extension of the Welsh election franchise to prisoners in Wales would be consistent with the Welsh Government's approach to the promotion of rights recognised in international law. The Rights of Children and Young Persons (Wales) Measure created domestic legal obligations on ministers in accordance with the rights and obligations set out in the United Nations Convention on the Rights of the Child. The Welsh Language (Wales) Measure 2011 demonstrated the Welsh Government's commitment to the international obligations set out in the European Charter for Regional or Minority Languages to promote and sustain linguistic rights. The Well-being of Future Generations (Wales) Act 2015 is a further example, reflecting a commitment to the progressive realisation of rights under the United Nations rights treaties. As the UN itself remarked of that legislation, '[w]hat Wales is doing today, the world will do tomorrow'.³⁴

To accord prisoners the right to vote in Welsh elections would indicate a continuation of this welcome approach to the promotion of human rights in Wales. In the UK context, it would

³² Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (2009-10, HL 85, HC 455) 14-15

³³ Article 46 of the European Convention on Human Rights and Fundamental Freedoms

³⁴ See: <http://gov.wales/newsroom/environmentandcountryside/2015/150429-future-generations-act/?lang=en>

be a radical step. However, the Welsh Government has taken such a step before, with the Rights of Children and Young Persons Measure being the first instrument of its kind in the UK. We accept that prisoners' rights are more politically uncomfortable than children's rights. However, the Welsh Government should be emboldened by wider European trends. Various countries across Europe place either few or no restrictions at all on the voting rights of any category of prisoner. The UK, on the other hand, is one of a small handful of countries out of the forty-seven in the Council of Europe which imposes a general ban on prisoner voting, along with Armenia, Bulgaria, Estonia and Russia.³⁵ Wales is now in a position to challenge that.

³⁵ See Howard League Scotland's evidence to the Scottish Parliament's Equalities and Human Rights Committee on prisoner voting rights: <http://howardleague.scot/news/2017/september/evidence-prisoner-voting-rights-equalities-and-human-rights-committee>

3. TO WHOM AND HOW? OPERATIONALISING THE EXTENDED FRANCHISE

The Committee's terms of reference also consider whether distinctions can be drawn between prisoners based on sentence length and offence type. Using information obtained from the Ministry of Justice, we will reflect upon the issues of sentence length and offence type. We will also offer support to the method of 'designated local connection' as a way to extend the franchise to *all* Welsh prisoners regardless of the length of their sentence, the crime they have committed, or where they are being held across the prison estate.

3.1 The custody threshold and the problem of arbitrariness

It is our view that the Welsh Government should extend the right to vote to all prisoners. This section sets out our reasons for this position.

The disenfranchisement of individuals based on particular sentence lengths can be justified in law. In the case of *Scoppola v Italy*,³⁶ the Grand Chamber of the ECtHR held that 'Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied'.³⁷ However, it reasoned that legislatures must 'avoid any general, automatic and indiscriminate restriction'.³⁸ The Italian restrictions on prisoner voting were held in that case to be compliant with A3PI ECHR because they were connected to specific categories of offence, irrespective of sentence length, and also to individuals sentenced to more than three years' imprisonment.³⁹

However, it is clear that the imposition of a custodial sentence alone is an arbitrary measure for whether someone should lose the right to vote. As Howard League Scotland has pointed out, it is particularly arbitrary in relation to shorter prison sentences.⁴⁰ Whether the vote is

³⁶ *Scoppola v Italy (No 3)* (2013) 56 EHRR 19

³⁷ *Scoppola v Italy (No 3)* (2013) 56 EHRR 19 para 102

³⁸ *Scoppola v Italy (No 3)* (2013) 56 EHRR 19 para 102

³⁹ *Scoppola v Italy (No 3)* (2013) 56 EHRR 19 paras 105-106

⁴⁰ See Howard League Scotland's evidence to the Scottish Parliament's Equalities and Human Rights Committee on prisoner voting rights: <http://howardleague.scot/news/2017/september/evidence-prisoner-voting-rights-equalities-and-human-rights-committee>

actually lost under those circumstances will often depend on the date of sentencing, whether the individual is released early and the timing of elections, rather than the offence committed.⁴¹ The former Justice of the UK Supreme Court, Lord Clarke, has pointed out how the existing framework can therefore ‘deprive a person of a vote which is relevant to the governance of the state for a period of five years in circumstances where that person may be in prison for no more than 14 days’.⁴² The custody threshold for the loss of the right to vote is also subject to a ‘sentencing lottery’, the problems of which have been eloquently stated by Lady Hale, now President of the UK Supreme Court:

There are many people in prison who have not committed very serious crimes, but for whom community punishments are not available, or who have committed minor crimes so frequently that the courts have run out of alternatives. ... Exactly the same crime may attract an immediate custodial sentence and disenfranchisement at one time or a suspended sentence without disenfranchisement at another. Moreover, the custody threshold has traditionally varied as between different parts of the United Kingdom ... The sentencing regimes are different in England and Wales, Scotland and Northern Ireland, but the exclusion from voting is the same.

All of this suggests an element of arbitrariness in selecting the custody threshold as a unique indicator of offending so serious as to justify exclusion from the democratic process. ... I have some sympathy for the view of the Strasbourg court that our present law is arbitrary and indiscriminate...⁴³

3.2 Sentence length, offence type and the continuing problem of arbitrariness

While the arbitrariness of the custody threshold is particularly acute for shorter sentences, we believe that basing the ban on the imposition of longer sentences would still retain many of the same problems, as the loss of the vote could still be dependent on the date of sentencing and the timing of the election. The Welsh Government might choose, for example, to extend the franchise to prisoners serving sentences of less than four years, viewing the four-year

⁴¹ See above

⁴² *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271 [109]

⁴³ *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271 [96]

mark as a suitable threshold of culpability for the loss of the vote. Assuming, however, that elections are held every five years, this would mean that, for two individuals sentenced to four years imprisonment, either one, both or neither could still retain the vote at the next election. This would render the threshold meaningless. Further, a threshold based on sentence length could create odd distinctions where, for example, those serving four years would lose the vote, whereas those sentenced to anything just short of that margin would maintain it.

Figure 3.1 - Welsh prisoners by sentence type, September 2018

Sentence Type	Count
Remand	526
Less than 12 months	483
12 months to less than 4 years	1,111
4 years or more	1,745
Imprisonment for Public Protection	120
Life	301
Recall	456
Non-Criminal	6
Unknown	23
Total	4,771

Source: Ministry of Justice

If the Welsh Government is determined to preserve the current disenfranchisement of certain categories of prisoner in Welsh elections, the most coherent legal approach would therefore be to tie the deprivation of the vote to particular criminal offences which the Welsh Assembly deems worthy of this additional punishment. However, it must be stressed that a decision to base prisoner disenfranchisement upon the type of offence committed would also be logically problematic for the Welsh Government. Although there may well be a temptation – based upon political expediency – for the Welsh Government to extend the ban to prisoners convicted of the most violent or serious offences, any such decision would be largely divorced from the supposed aims of custodial imprisonment as a punishment. Indeed, as explained within section 3.2.3, this includes the presumed deterrent and retributive purposes of

custodial imprisonment. The only logical exception to this, as argued by McNeil,⁴⁴ would be a ban on voting for those who have committed offences of a political nature.⁴⁵

Figure 3.2 – Welsh prisoners by offence type, September 2018

Offence Type	Count
Violence against the person	1,114
Sexual offences	901
Robbery	332
Theft offences	659
Criminal damage and arson	101
Drug offences	783
Possession of weapons	163
Public order offences	88
Miscellaneous crimes against society	232
Fraud offences	55
Summary Non-Motoring	307
Summary motoring	25
Offence not recorded	11
Total	4,771

Source: Ministry of Justice

3.3 Welsh prisoners across England and Wales: the issue of residence

Having set out our arguments for extending the franchise to all prisoners, we offer some statistics on prisoner population and our thoughts on how the franchise could be realised. At the end of December 2018, there were a total of 4,534 prisoners held in Welsh prison establishments. Of this number, a significant proportion were from outside of Wales (based on home address). In September 2018, for example, a total of 1,411 prisoners from England

⁴⁴ See Professor Fergus McNeil's evidence to the Scottish Parliament's Equalities and Human Rights Committee: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11067&mode=pdf>

⁴⁵ A Freedom of Information request was submitted to the Ministry of Justice in September 2017 to determine the exact number of Welsh prisoners sentenced for electoral offences. The Ministry of Justice's response revealed that there were no prisoners from Wales serving sentences for electoral offences at the end of June 2017.

(based on home address prior to entering custody) were being held in Welsh prisons. This is expected to increase as HMP Berwyn begins to reach its full occupational capacity.⁴⁶

The changes that have recently been made to the prison estate in Wales,⁴⁷ may serve to discourage the Welsh Government from registering all prisoners at the establishment that they are held in. Instead, the Welsh Government might decide that the most appropriate method of registering prisoners to vote is through a declaration of local interest. This system, as recently explained by the Scottish Assessors Association, allows prisoners to ‘register by a declaration to an address which they were formerly resident’.⁴⁸ There are a number of potential benefits to this approach. One is that the Welsh Government will be able to draw upon its previous use of ‘local connection’ (based on home address) to deliver ‘Welsh only’ support services to Welsh prisoners held across Wales *and* England.⁴⁹

The ‘declaration of local interest’ method will also enable Welsh prisoners held outside of Wales to take part in Welsh elections. This is significant when we consider the location of Welsh people across the prison estate in England and Wales. At the end of September 2018, 36.5% of all Welsh prisoners (based on home address prior to entering custody) were held in prisons across England. In total, Welsh prisoners were spread across 103 prisons in England in September 2018. Although this dispersal poses a number of challenges, the available data on Welsh prisoners, including detailed information broken down by local authority area (see Table 3.3) can help the Welsh Government to overcome these. This may well include allowing prisoners to vote by post once they have been identified and targeted using similar data produced here.

⁴⁶ There were 1,282 prisoners held at HMP Berwyn at the end of December 2018. The prison will eventually have an operational capacity of 2,100 places.

⁴⁷ This includes the construction of a new unit at HMP Parc – this had added more than 300 additional prisoners (voters) to the constituency of Bridgend.

⁴⁸ Written evidence of the Scottish Assessors Association submitted to the Scottish Parliament’s Equalities and Human Rights Committee’s inquiry on Prisoner Voting (2017) 2

⁴⁹ Prior to its removal in April 2015, the Homeless Persons (Priority Need) (Wales) Order 2001 provided unintentionally homeless prison leavers with an automatic priority need for accommodation in Wales. The provision was only available to those who could establish a ‘local connection’ to Wales.

Table 3.3 – The number of Welsh prisoners broken down by local authority area, September 2018

Origin Local Authority	Count
Anglesey	54
Blaenau Gwent	55
Bridgend	116
Caerphilly	142
Cardiff	1,244
Carmarthenshire	169
Ceredigion	32
Conwy	128
Denbighshire	98
Flintshire	305
Gwynedd	166
Merthyr Tydfil	267
Monmouthshire	28
Neath Port Talbot	167
Newport	378
Pembrokeshire	56
Powys	65
Rhondda	237
Swansea	709
Torfaen	74
Vale of Glamorgan	98
Wrexham	183
Total	4,771

Source: Ministry of Justice

4. SUMMARY

Throughout this document, we have attempted to make the case for extending the Welsh election franchise to all Welsh prisoners by drawing on a set of legal, reintegrative and political arguments which we believe support this change. We have also offered a practical route through which to implement this proposal.

From a legal point of view, we have shown how it would not be advisable for the Welsh Government to go no further than the minimalist approach of the UK Government to compliance with the judgments of the ECtHR on this issue. Legal risks aside, we have argued that giving prisoners the vote would conform to the spirit of international law on rights of democratic participation.

In terms of reintegration, we have argued that the current law patently fails in its stated aims of deterrence and retribution. The loss of the vote plays no role in deterring individuals from criminal activity and, in the vast majority of cases, bears no relation to the offence committed, contrary to very notion of retributive punishment. Worse, disenfranchisement actively hinders the process of reintegration by preventing prisoner engagement with political institutions via the democratic process.

From a political perspective, we contend that the Welsh Government has a valuable opportunity to demonstrate its commitment to the promotion of human rights and democratic engagement in Wales, and to undo some of the reputational damage caused by the UK Government's approach to this issue. To take this opportunity, we have argued, would be consistent with the Welsh Government's commendable approach to ensuring the realisation of internationally-recognised human rights.

In terms of the practical implementation of the extended franchise, we have argued that the model based on a declaration of local interest offers a viable route forward. It would allow Welsh prisoners held in England to participate while also avoiding the risk of a sudden and drastic growth in the electorate of the constituencies in which Welsh prisons are located. It will also allow the Welsh Government to utilise its experience in offering support services to Welsh prisoners using 'local connection'.

It is our sincere hope that the Welsh Government takes on board these arguments. To do so would demonstrate a bold commitment to the ideals of democratic participation, the reintegrative aims of incarceration and respect for the international rule of law.