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The Scottish Parliament
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15 August 2019

Dear Graham

The Representation of the People Act 1983 Remedial (Scotland) Order 2019

Thank you for your letter of 7 August in relation to the above Order.

I have enclosed with this reply the attached Statement of Reasons that was laid before the Parliament at the time of the Order. That Statement sets out the necessity for legislative change in order to deal with the ECHR incompatibility in relation to the franchise at the Shetland by-election. It also explains why it was not considered sufficient to leave the law unchanged until after the passage of the Scottish Elections (Franchise and Representation) Bill.

In making these assessments, my key concern was in ensuring the compatibility of Scots law with the ECHR. Whilst the possibility of challenge was a factor to be considered, this does not change the overarching requirement to ensure that devolved elections are conducted in a manner compatible with the ECHR.

I share your regret that more time was not available for consultation prior to proceeding with the Order. The power under section 14 of the Convention Rights (Compliance) (Scotland) Act 2001 can only be employed when it appears to the Scottish Ministers that, for reasons of urgency, it is necessary to make a remedial Order without following the procedure set out in sections 13(2) to (4) of that Act. Notice for the by-election was given on 15 July and, as you will appreciate, the timing of the by-election was not set by the Scottish Government. With the deadline for registration as an elector set at midnight on Tuesday 13 August, it was imperative for the Order to be made as quickly as possible in order to allow any qualifying prisoners time to register.

You asked about the difference in approach compared with the UK Government. Scottish Ministers have been consistent – as set out in the December 2017 Consultation Paper on prisoner voting and in the accompanying documents for the Scottish Elections (Franchise and Representation) Bill - that the blanket ban on prisoner voting is not fit for purpose as it is not compatible with the ECHR as it applies to Scottish Parliament elections. It might be helpful in this context to reflect on comments (noted in the Policy Note that accompanied the Order) by the Scottish Parliament's Equalities and Human Rights Committee in its 2017 report:

“there is a strong argument that Scotland should aim for a higher standard than recently established at UK level and should therefore legislate to remove the ban on prisoner voting in its entirety.”

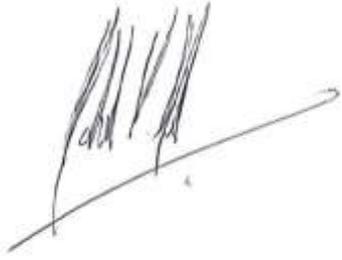
I also note that the Equality, Local Government and Communities Committee of the Welsh Assembly published a report on voting rights for prisoners on 11 June 2019, which contained the following comment (at para 120):

“A critical argument in support of extending the franchise is to ensure that legislation on Assembly and local elections in Wales is compatible with the European Convention on Human Rights as required of the Assembly. We cannot take lightly the concerns raised that the current approach by the UK Government of minimal compliance may not continue to be sufficient in the future. As legislators, we have to take very seriously the risk of failing to pass legislation that would be within competence.”

In relation to revocation, as section 14(2)(a) of the 2001 Act requires, Scottish Ministers have invited observations (to ElectionsTeam@gov.scot) within 60 days beginning with the day on which the Order was made (i.e. by 16 November 2019). Ministers are obliged to have regard to all written observations they receive, and will do so. As soon as practicable after 16 November, Ministers will lay before the Parliament a statement summarising the observations submitted and specifying what modifications they intend to make to the Order as a result of considering those observations.

That said, by November the Shetland by-election will have taken place and the purpose of the Order will have been fulfilled. As media reports have suggested, revocation of the Order can happen after the 60 day period has elapsed. It would not be appropriate to make a decision on how to proceed until that 60 day period has elapsed. An instrument making modifications would follow a form of affirmative procedure, and an instrument revoking the Order would be subject to the negative procedure. It is my view that it would be desirable for the Order to be revoked as soon as possible to ensure that Parliament, in its consideration of the Bill, can consider the Scotland-wide approach that the Scottish Government has proposed to ensure that devolved elections are compatible with the ECHR in relation to prisoner voting.

I look forward to attending at the Committee on 10 September. A copy of this letter is being sent to the Convener of the Standards, Procedures and Public Appointments Committee.

A handwritten signature in black ink, consisting of several vertical strokes followed by a long horizontal stroke that curves slightly at the end.

MICHAEL RUSSELL