

STATES OF JERSEY



DRAFT PUBLIC ELECTIONS (AMENDMENT No. 7) (JERSEY) LAW 201-

Lodged au Greffe on 23rd November 2016
by the Privileges and Procedures Committee

STATES GREFFE



Jersey

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European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chairman of the Privileges and Procedures Committee has made the following statement –

In the view of the Chairman of the Privileges and Procedures Committee, the provisions of the Draft Public Elections (Amendment No. 7) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Connétable L. Norman of St. Clement**

Chairman, Privileges and Procedures Committee

Dated: 21st November 2016

REPORT

Most European countries have no form of electoral ban for imprisoned offenders, or electoral disqualification depends on the crime committed or the length of the sentence. In Jersey, as in the United Kingdom, all imprisoned offenders are disqualified from voting (although arrangements may be made for prisoners held on remand to cast pre-poll votes, by arrangement with the Judicial Greffe). In 2004, the European Court of Human Rights, in the case of *Hirst v the UK*, found that the UK's blanket ban on convicted prisoners' voting breached Article 3 of Protocol 1 of the European Convention on Human Rights, which guarantees "free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Jersey is subject to the jurisdiction of the European Court of Human Rights, by virtue of the UK's membership of the European Convention on Human Rights. As such, Jersey currently stands in breach of Article 3 of Protocol 1 of the Convention.

The Privileges and Procedures Committee ("PPC") considered this matter in 2012 and decided to take no action until the matter was addressed in the UK. No action has since been taken by the UK government, and there would appear to be no prospect of the UK changing its legislation on prisoner voting before the election due in 2020.

The Legislation Advisory Panel again raised the matter with PPC in May 2016, which decided, on a majority vote, to bring forward a draft Law to enfranchise some convicted prisoners in order to bring Jersey into compliance with the European Convention. The Draft Public Elections (Amendment No. 7) (Jersey) Law 201- has been drawn up in consultation with the Law Officers' Department, the Judicial Greffier and the Governor of H.M.P. La Moye.

If adopted, the draft Law would enfranchise convicted prisoners who are registered to vote if they are serving sentences of 4 years or less. Prisoners sentenced for more than 4 years would remain disenfranchised, as would prisoners on the run.

Prisoners will be permitted to vote by post or, on the day of the poll, by special arrangement with the *Autorisé*. As a backstop, provision is included to permit the Judicial Greffier to accept postal vote applications after the advertised deadline in exceptional circumstances. Pre-poll voting will not be available to prisoners.

Time spent in prison serving a sentence will not count towards the periods of ordinary residence on the Island which entitle someone to register to vote.

Financial and manpower implications

The number of people likely to be enfranchised by this provision is small, and any extra work in relation to canvassing the prison and arranging for prisoners to vote will be modest and require no additional resourcing by the States.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Notes on the Draft Public Elections (Amendment No. 7) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Public Elections (Amendment No. 7) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The ECHR right that is engaged by the draft Law is Article 3 of the First Protocol of the ECHR (“**A3P1**”).

A3P1 provides that –

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Limitations on A3P1 rights are permitted provided that they do not impair the very essence of the rights or deprive them of their effectiveness, provided they are imposed in pursuit of, and proportionate to, some legitimate aim. A state is afforded a considerable margin of appreciation by the European Court of Human Rights (“**ECtHR**”) in determining what is proportionate.

The courts have interpreted A3P1 as providing citizens with a right to vote in the elections which decide the persons elected to form the legislature. This is a qualified right which can be interfered with to the extent that any interference pursues a legitimate aim and is proportionate.

At present, Article 4 of the Public Elections (Jersey) Law 2002 (“**the Public Elections Law**”) provides that –

“A convicted person during the time that he or she is detained in a prison or other penal institution in pursuance of his or her sentence or unlawfully at large when he or she would otherwise be detained is legally incapable of voting at a public election.”

A “convicted person” is defined to mean a person found guilty in Jersey or elsewhere of an offence, but does not extend to persons imprisoned for contempt of court or for default in complying with his or her sentence. Prisoners on remand are also entitled to vote in public elections and Article 42(11) of the Public Elections Law provides that the Judicial Greffier may take such measures as are appropriate for taking the pre-poll vote of remand prisoners.

Section 3 of the Representation of the People Act 1983 (the “**UK Act**”) is almost identical to Article 4 of the Public Elections Law. In *Hirst v UK*¹ the ECtHR held that the “blanket ban” imposed by section 3 of the UK Act was incompatible with A3P1.

¹ *Hirst v UK* (2004) 38 E.H.R.R. 40 and *Hirst v UK* (No. 2) (2006) 42 E.H.R.R. 41

The legitimate aims of punishing offenders, preventing crime and promoting civic duty were accepted, but the court ruled that the blanket ban was disproportionate.

While the ECtHR acknowledged that a ban on some prisoners voting may be proportionate, it did not give any specific guidance as to what the extent of ban that is compatible with A3P1 would be. However, Hirst and subsequent jurisprudence involving other Council of Europe states² has established the following principles that are relevant to determining whether the draft Law is compatible with A3P1. These are –

- a. contracting states of the ECHR have a margin of appreciation to interfere with prisoners' A3P1 rights;
- b. a so called "blanket ban" on all prisoners (save for limited exceptions for those imprisoned for contempt of court or in default of sentence) is not compatible with A3P1);
- c. extending the franchise to a limited number of convicted prisoners serving a sentence of one year or less is not compatible with A3P1; and
- d. disenfranchising only those who have been sentenced to a more serious crime may be compatible. For example, in Italy persons sentenced to 5 or more years in prison are disenfranchised for life, and those sentenced to between 3 and 5 years lose the right for 5 years. Those sentenced for a term under 3 years continue to enjoy the right to vote unless convicted of a specific public office crime.

The ECtHR endorsed the Italian approach to disenfranchising prisoners because this linked disenfranchisement with offences of such gravity that the courts considered them to warrant a particularly harsh sentence.

The draft Law is likely to be compatible with A3P1 because it reflects the ECtHR case law. Specifically, Article 2 would substitute Article 4 of the Public Elections Law, so that it only disqualifies from voting persons who are convicted of an offence and who are detained pursuant to a sentence of imprisonment for a term exceeding 4 years, or who are unlawfully at large following a sentence of imprisonment for any term.

In Jersey, for a person to be sentenced to a term of imprisonment in excess of 4 years, the Superior Number of the Royal Court (i.e. a Judge and no less than 5 Jurats) must be convened. Therefore, it can clearly be said that any person sentenced to more than 4 years in prison has been convicted of a serious crime that warrants losing his or her right to vote in public elections whilst incarcerated in prison. Further, it is proportionate to disenfranchise a prisoner who, having been sentenced to imprisonment, is unlawfully at large.

Further, provision is made in the draft Law to ensure that those prisoners who are enfranchised are able to vote. Article 2 of the draft Law inserts a new Article 4A into the Public Elections Law to provide that persons who are not disqualified under Article 4, but are nevertheless detained in prison on the day of the poll, may vote only if they are registered on an electoral register in force for that election, and may do so only by postal vote or by special arrangements under Article 35 of the Public Elections Law.

² *Frodl v Austria* (2011) 52 E.H.R.R. 5 and *Scoppola v Italy* (No. 3) (2013) 56 E.H.R.R. 19

Article 35 of the Public Elections Law is amended by Article 4 of the draft Law to permit such arrangements to be made in relation to persons in custody as well as those who are prevented from voting by reason of illness, disability or illiteracy. Postal voting by prisoners who are entitled to vote is enabled by the amendment by Article 6 of the draft Law to Article 39 of the Law.

Article 3 of the draft Law would amend Article 5 of the Public Elections Law to make it clear that where a person becomes ordinarily resident in Jersey only in pursuance of a sentence of imprisonment then they are not ordinarily resident in Jersey for the purposes of Article 5(1)(c) of the 2002 Law. Article 3 also provides that, in respect of a person who before being imprisoned was not entitled to have his or her name included in an electoral register, any period of imprisonment does not count towards the fulfilment of the period of ordinary residence required to become eligible to vote. Article 3 will prevent some prisoners who were, prior to their incarceration, resident outside of Jersey from becoming eligible to vote while they are in prison. Further, it will prevent those prisoners from becoming eligible to vote until have been ordinarily resident for either of the periods mentioned in Article 5(1)(c) outside of the prison. Requiring a person to be ordinarily resident for a period that demonstrates a sufficient connection with Jersey to warrant conferring the right to participate in elections does not impair the essence of the rights conferred by A3P1 and is proportionate.

The draft Law is, therefore, compatible with A3P1.

Explanatory Note

This draft Law would amend the Public Elections (Jersey) Law 2002 (the “Law”) to permit voting by certain categories of persons who are in prison on the day of a poll for a public election.

Article 1 is an interpretation provision.

Article 2 would substitute Article 4 of the Law, to disqualify from voting persons who are convicted of an offence and are in legal custody pursuant to a sentence of imprisonment for a term exceeding 4 years, or who are unlawfully at large following a sentence of imprisonment for any term. Article 2 also inserts a new Article 4A to provide that persons who are not disqualified under Article 4 but are nevertheless detained in prison may vote only by postal vote or by special arrangements (which might be made, for example, in the case of a person who is otherwise entitled to vote but who has been remanded into custody after the closing time for application for a postal vote has passed) under Article 35 of the Law. Article 35 is itself amended, by *Article 4*, to permit such arrangements to be made in relation to persons in custody (as well as those who are prevented from voting by reason of illness, disability or illiteracy). Postal voting by prisoners who are entitled to vote is enabled by the amendment by *Article 6* to Article 39 of the Law.

Article 3 would amend Article 5 of the Law (which imposes certain requirements which must be fulfilled, for a person to be entitled to be registered on an electoral register) to make it clear that a period of imprisonment does not count towards fulfilment of the requirement that a person must be “ordinarily resident” in Jersey for a period specified in that Article.

Articles 5 and 7 would make consequential amendments to Articles 38 and 42(11) of the Law to exclude persons remanded in custody, who will be entitled to vote under the new provisions introduced by this Law, from the provisions relating to pre-poll voting.

Article 8 adds a new paragraph (4) to Article 43 of the Law, to confer a discretionary power on the Judicial Greffier to accept applications for postal votes received following a closing time notified to the public, where the Judicial Greffier considers there are exceptional circumstances which justify doing so.

Article 9 gives the title by which this Law may be cited and provides for it to come into force 7 days after it is registered.



Jersey

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Arrangement

Article

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Jersey

DRAFT PUBLIC ELECTIONS (AMENDMENT No. 7) (JERSEY) LAW 201-

A LAW to amend further the Public Elections (Jersey) Law 2002

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law a reference to an Article by number only is a reference to the Article of the same number in the Public Elections (Jersey) Law 2002¹.

2 Article 4 substituted and Article 4A inserted

For Article 4 there shall be substituted the following Articles –

“4 Disqualification of certain offenders

(1) A convicted person, during the time that he or she is –

- (a) detained in a prison or other penal institution in pursuance of a sentence of imprisonment for a period exceeding 4 years; or
- (b) unlawfully at large when he or she would otherwise be so detained in pursuance of a sentence of imprisonment for any period,

is legally incapable of voting at a public election.

(2) For the purposes of this Article –

- (a) ‘convicted person’ means any person found guilty in Jersey or elsewhere of an offence (whether under the law of Jersey or another place), including a person found guilty by a court-

martial or other court or tribunal applying any law applicable to armed services;

- (b) a person detained for default in complying with his or her sentence shall not be treated as detained in pursuance of the sentence, whether or not the sentence provided for detention in the event of default;
- (c) a person detained by virtue of a conditional pardon in respect of an offence shall be treated as detained in pursuance of his or her sentence for the offence; and
- (d) it does not matter whether the person has been convicted or sentenced before or after this Article comes into force.

4A Voting by prisoners not disqualified under Article 4

- (1) This Article applies to persons who –
 - (a) are detained (whether following conviction or otherwise) in a prison or other penal institution; and
 - (b) are not disqualified under Article 4.
- (2) A person to whom this Article applies may vote in a public election only –
 - (a) by postal vote, in accordance with Part 7; or
 - (b) pursuant to measures taken by an *Autorisé* or *Adjoint* under Article 35.”.

3 Article 5 amended

At the end of Article 5 there shall be added the following paragraph –

- “(3) For the purposes of paragraph (1)(c) –
 - (a) a person is not to be treated as ordinarily resident in Jersey if the person becomes resident in Jersey only in pursuance of a sentence of imprisonment; and
 - (b) in relation to any person who, before being detained in a prison or other penal institution pursuant to a sentence of imprisonment, was not entitled to have his or her name included on the electoral registers, the calculation of a period of ordinary residence shall not include any period during which the person is so detained.”.

4 Article 35 amended

- (1) For the heading to Article 35 there shall be substituted the following heading –

“Measures to assist voting by certain persons who are ill, disabled etc.”.

- (2) For Article 35(1) there shall be substituted the following paragraph –

- “(1) In the case of a person who is –
- (a) entitled to vote; but
 - (b) prevented from voting by reason that he or she is ill, disabled, illiterate or in custody,
- the *Autorisé* or an *Adjoint* may take such measures as he or she considers appropriate for taking the person’s vote on the day the poll is open, provided secrecy in voting is maintained.”.

5 Article 38 amended

In Article 38, after the words “Every voter” there shall be inserted the following words “, except a person entitled to vote only by virtue of Article 4A,”.

6 Article 39 amended

In Article 39, for paragraphs (a) and (b) there shall be substituted the following paragraphs –

- “(a) the person is likely to be out of Jersey during the hours of polling;
- (b) the person is, or will on the day of a poll for a public election be, detained in a prison or other penal institution and entitled to vote in that election only by virtue of Article 4A; or
- (c) the person’s name and address are omitted from the electoral register under Article 9.”.

7 Article 42 amended

In Article 42(11), for the words “ill, disabled, illiterate or remanded in custody” there shall be substituted the words “ill, disabled or illiterate”.

8 Article 43 amended

In Article 43, after paragraph (3) there shall be added the following paragraph –

- “(4) Where the Judicial Greffier receives an application after any closing time notified to the public under Article 40(3)(a), the Judicial Greffier may, if he or she considers there are exceptional circumstances which justify doing so, accept the application and treat it as properly made for the purposes of this Part.”.

9 Citation and commencement

This Law may be cited as the Public Elections (Amendment No. 7) (Jersey) Law 201- and shall come into force 7 days after the day on which it is registered.

¹ *chapter 16.600*