

## **Scottish Human Rights Commission Submission to the Scottish Parliament Standards, Procedures and Public Appointments Committee Ahead of Stage 2 Consideration of the Scottish Elections (Representation and Reform) Bill**

5 November 2024

## 1. About the Commission

1.1 The Scottish Human Rights Commission (the Commission) is a public body created by the Scottish Commission for Human Rights Act 2006.

1.2 We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.

1.3 The Commission is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.

1.4 The Commission is independent of Government. We are accountable to the people of Scotland via the Scottish Parliament.

## 2. Overview

2.1 The proposed amendments under consideration in the Scottish Elections (Representation and Reform) Bill provide for the disqualification from candidacy for, or holding office as, a local authority councillor in Scotland or a Member of the Scottish Parliament on the grounds of an individual being subject to Sex Offender Notification Requirements (SONR) under Part 2 of the Sexual Offences Act 2003.

2.2 The Minister for Parliamentary Business contacted the Commission on September 24th requesting the Commission give consideration to the amendments proposed to the Bill at Stage 2. This note is a high-level input outlining the human rights considerations relevant to the amendments to support the Committee's application of the rights at stake ahead of Stage 2 of the Bill process.

2.3 The Commission offers no opinion on the merits or otherwise of the Bill and any proposed amendment and limits our comments to the human rights issues at stake in the specific proposals discussed.

### Analysis of the Human Rights at Stake

2.4 The human rights obligation most clearly engaged by the proposed amendments concern the right to stand for elections, protected by Article 3 of the First Protocol to the European Convention on Human Rights (ECHR) ('P1-3').<sup>1</sup> The legislation and its application must be compliant with P1-3 under the Human Rights Act 1998<sup>2</sup> and the Scotland Act 1998.<sup>3</sup>

P1-3 provides:

“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.”

2.4 Although framed as a state obligation, P1-3 has been the subject of cases at the European Court of Human Rights (ECtHR), which clarify the essential qualities of free and fair elections.

2.5 A 'legislature' is determined by the character of the body, namely what power it exercises within a particular constitutional structure.<sup>4</sup> The term has been found to include regional assemblies and would certainly include the Scottish Parliament. However, the term has not generally been applied to local government,<sup>5</sup> with bylaw powers explicitly distinguished from legislative power.<sup>6</sup>

2.6 The ECtHR has confirmed that P1-3 consists of both an 'active right' of individuals to vote ('active' in that the state must organise and put in place mechanisms that allow individuals to vote and have that vote be counted) and a 'passive aspect' to stand for election ('passive' in that the state should not put in place barriers that prevent candidacy.)<sup>7</sup>

2.7 This body of judicial treatments confirms that neither the active nor passive elements are absolute rights.<sup>8</sup> Both can therefore be subject to “implied limitations”, where provided for by law. There is no closed list of express limitation in P1-3, but it must be compatible with the rule of law and general objectives of the Convention.<sup>9</sup> This concept means that the proportionality test used in other convention rights is not used.

2.8 Across the case law, the following core components of the approach of the ECtHR can be identified:

1. Is the restriction on voting or candidacy arbitrary or lacking in proportionality?
2. Does the restriction interfere with the essence P1-3, namely the free expression of the opinion of the people?

2.9 The ECtHR has shown greater willingness to scrutinise restrictions on voting rights than on candidacy rights, with a strong emphasis on the arbitrariness of a particular restriction in these cases.<sup>10</sup> The ECtHR has demonstrated that it is sensitive to the political nature of scrutinising democratic institutions. Under the doctrine of 'margin of appreciation' national authorities are given a degree of latitude to organise their political systems, and all restrictions are examined in the context of a particular country (states are said to have a 'wide margin of appreciation' in their political systems).<sup>11</sup>

2.10 In addition to P1-3, other ECHR rights could be engaged by particular cases, including:

- The prohibition of discrimination (Article 14, in conjunction with P1-3),
- The right to privacy (Article 8)
- Prohibition on punishment without law (Article 7)

2.11 The Human Rights Act s.6 requires public authorities to act compatibly with the Convention, which should act as an avenue of last resort for individuals to challenge application of any disqualification.

2.12 The substantive rights above are protected to varying degrees by the International Covenant on Civil and Political Rights (ICCPR), a United Nations treaty the UK is bound by under international law. Of particular note is Article 25, which protects the right to participate in public affairs either directly or through an elected representative. Article 25 is framed differently to P1-3 and could be considered broader, with no restriction to the legislature. However, ICCPR is not directly incorporated into domestic law, and, like P1-3, the Human Rights Committee which supervises the implementation of the treaty tends to allow a significant degree of latitude to the state to design and run their governments.

### 3. Application of the Legal Framework to Proposals

3.1 On the 24th of October 2024, the Minister for Parliamentary Business shared a copy of correspondence issued to Standards, Procedures and Public Appointments.<sup>12</sup> This sets out a scheme of disqualification for those subject to sex offender notification requirements (SONR) from elected office, regardless of the length of any sentence imposed. The proposal considers previously articulated 'guiding principles,'<sup>13</sup> which include:

- "Restrictions on qualification for elected office are founded on protecting the public in personal encounters with elected representatives, upholding the rule of law and the democratic nature of the state and on maintaining the trust and confidence of the public in our system of democracy."

3.2 The ECtHR does not appear to have considered provisions of laws that prevent candidates with a sexual offence history from standing for election. However, the Court's approach to candidacy restrictions can be illustrative. A number of member states have introduced their own restrictions on the holding of office as a result of criminal offending, including other parts of the UK.<sup>14</sup>

3.3 Restrictions which amount to a retrospective disqualification are more likely to amount to a violation of P1-3.<sup>15</sup> It is therefore appropriate that the Minister suggests that a disqualification measure will be "future facing", taken by the Commission to mean that the disqualification will only apply to candidates standing for election or elected post enactment of the Bill. The proposals would provide a statutory basis for the disqualification, fulfilling the requirements that interference with rights is provided for by law.<sup>16</sup> However, beyond simply being created by legal instrument it is important that the associated amendments and policies should also meet the general principles of legality, which includes non-retroactivity.<sup>17</sup>

3.4 While P1-3 concerns only legislative bodies, the Committee may wish to apply the same approach to considering the compliance of amendments affecting local government and the Scottish Parliament, as the Government proposes to treat them the same. This would avoid any confusion whereby more stringent restrictions are applied for local government than for the Scottish Parliament.

3.5 The Minister has already highlighted that a number of considerations in favour of a ban have been explored.<sup>18</sup> The Committee should carefully consider whether the restriction is arbitrary and proportionate to the aims set out by the Government. The Court adopts a flexible approach to this assessment in available case law. A number of possible factors still to be determined could affect this assessment, including:

- The level of discretion that may be introduced, how is this to be exercised, and the effects<sup>19</sup>
- The availability of safeguards and routes to challenge the application of a disqualification<sup>20</sup>
- The rationale for proposals applying only to sexual harms and not other forms of physical or mental abuse<sup>21</sup>
- The lasting strength of the relationship of proportionality between the offence and rationale for disqualification over time,<sup>22</sup> e.g. the length of SONR requirements and the reassessment process
- Individual penalties for non-disclosure of the existence of SONR and routes for information sharing (privacy and disclosure obligations also relate to Article 8 and Article 10)
- The effect of disqualification for the electorate
- The obligations on non-candidates to manage the disqualification - management or political institutions are supported to apply any disqualification requirements fairly and in line with human rights.

3.6 Any obligation on political parties to conduct pre-election checks would likely have a high burden for smaller parties. This could have effects which limit their participation in a given election, raising the possibility of an interference with the free expression of the opinion of the people.

3.7 A final consideration may be potential parallels between the consequential loss of voting rights as an implicit result of sentencing that has been questioned by the ECtHR, notably in the *Hirst v. UK* judgement and associated cases.<sup>23</sup> This case evidences concerns that disenfranchisement as a de facto consequence should be subject to explicit parliamentary consideration. The loss of voting rights was not an explicit part of the sentencing considerations, and the Court could not determine a rational link between deprivation of the right to vote and punishment for a crime. The lack of parliamentary consideration of the competing interests involved formed a key element of the Court's reasoning.<sup>24</sup>

3.8 Although not an exact parallel, currently the loss of candidacy rights does not feature in sentencing policy. Introducing the disqualification would add a new consequence that the Committee may wish to consider for its proportionality. For persons subject to SONR as a result of a sentencing decision before any amendment became law, issues under Article 7 should be considered, which precludes retroactive application of criminal penalties.<sup>1</sup> A draft amicus curiae briefing by the Venice Commission (an independent advisory body to the Council of Europe) on the subject considers some of the interests in depth.<sup>25</sup>

## 4. Conclusion

4.1 The standard of review of P1-3 issues potentially imposed by a Court is not likely to be intensive, given the wide margin of appreciation that exists in political rights. Regardless, the Scottish Parliament should be able to demonstrate that it has considered whether the specific amendments are drafted so as to prevent arbitrariness and that they are proportionate to the Scottish Government's aim, as

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<sup>1</sup> A similar issue was raised before the ECtHR in [Berlusconi v. Italy \(application no. 58428/13\)](#). Mr Berlusconi was required to forfeit his seat as a result of sentencing in October 2012 for crimes committed earlier, and before the entry into force of a 2012 Italian law in December 2012. The case was struck out at the request of Mr Berlusconi prior to any consideration of the court, and it is not known how the court would have applied P1-3 and Article 7.

set out in the correspondence from the Minister to the Committee of 12th September 2024.

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- <sup>1</sup> European Convention on Human Rights (coe.int)
- <sup>2</sup> Scotland Act 1998 (legislation.gov.uk) s.29
- <sup>3</sup> Human Rights Act 1998 (legislation.gov.uk) s.6
- <sup>4</sup> Timke v. Germany, European Commission Decision
- <sup>5</sup> Although the issue was not decisively considered in Ahmed and Others v. the United Kingdom - 22954/93.
- <sup>6</sup> Xuereb v. Malta, Application no. 50867/09
- <sup>7</sup> Mathieu-Mohin and Clerfayt v. Belgium, Application no. 9267/81 1987, §§ 48-51
- <sup>8</sup> Ždanoka v. Latvia, Application No. 58278/00 §§ 103-104
- <sup>9</sup> Yumak and Sadak v Turkey Application no. 10226/03
- <sup>10</sup> Ždanoka v. Latvia, Application No. 58278/00
- <sup>11</sup> Gitonas and Others v Greece Application no. 18747/91; 19376/92 ; 19379/92) § 44
- <sup>12</sup> Standards, Procedures and Public Appointments Committee | Scottish Parliament Website
- <sup>13</sup> Letter from the Minister for Parliamentary Business to the SPPA convener
- <sup>14</sup> [European Commission For Democracy Through Law \(Venice Commission\)\(2015\) Report on Exclusion of Offenders from Parliament](#)
- <sup>15</sup> Lykourazos v Greece Application no. 33554/03
- <sup>16</sup> Abil v. Azerbaijan (No. 2) (coe.int)
- <sup>17</sup> [European Commission For Democracy Through Law \(Venice Commission\)\(2009\) Report on the Rule of Law .](#)
- <sup>18</sup> Letter from the Minister for Parliamentary Business to the SPPA convener
- <sup>19</sup> Ždanoka v. Latvia, (No. 2) Application no. [42221/18](#)) § 54
- <sup>20</sup> [Annagi Hajibeyli v. Azerbaijan \(application no. 2204/11\)](#)
- <sup>21</sup> AAbil v. Azerbaijan (No. 2) (coe.int)
- <sup>22</sup> Ādamsons v Latvia 3669/03 (in French)
- <sup>23</sup> Hirst v. the United Kingdom (No. 2) - 74025/01 [2005] ECHR 681 (6 October 2005) (bailii.org)
- <sup>24</sup> Hirst v UK (No.2) § 79
- <sup>25</sup> [CDL\(2017\)029-e](#)  
[Amicus Curiae brief for the European court of Human Rights in the case of Berlusconi v. Italy on the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office](#)