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# Extending the Franchise: Prisoner Voting

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## **Extending the Franchise: Prisoner Voting**

**Ciara Merrick**

University of Bristol, on ESRC sponsored internship to Welsh Government

Views expressed in this report are those of the author and not necessarily those of the Welsh Government.

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## Glossary

<b>Acronym/ Keyword</b>	<b>Definition</b>
AEC	Australian Electoral Commission
“the Convention”	The European Convention of Human Rights
ECHR	European Community of Human Rights
EROs	Electoral registration officers
GPV	General postal voter
HMP	Her Majesty’s Prison
HMPPS	Her Majesty’s Prison and Probation Service
IPP	Imprisoned for public protection
LHB	Local Health Board
NOMS	National Offender Management Service
PHPBs	Prison Health Partnership Boards
ROs	Returning officers
SCHs	Secure Children’s Homes
STCs	Secure Training Centres
UNCRC	United Nations Convention on the Rights of the Child
VEC	Victorian Electoral Commission
YOI	Young Offender Institutions
YJB	Youth Justice Board
ARP	Automatic release date
CED	Custody end date
CRD	Conditional release date
LED	Licence expiry date
NPD	Non-parole date
PED	Parole eligibility date
SED	Sentence expiry date
SOPC	Special custodial sentence for offenders of particular concern
TUSED	Top-up supervision end date

# 1. Introduction

## Background

- 1.1 Following a referendum in 1997, Wales acquired a representative Assembly and an executive (the “Welsh Government”), both with devolved responsibility under the Government of Wales Act 1998. Since 1998 the Welsh Government has gradually gained more powers, with the Wales Act 2017 considerably extending the National Assembly’s and Welsh Government’s devolved functions. The Wales Act 2017 brought forth a new set of powers for the Assembly and the Welsh Government, including the power to make provisions regarding elections. Thus, for the first time responsibility of Assembly and local elections sit with Wales, rather than Westminster. This responsibility includes the administration of elections to the Assembly and local government, as well as legislative competence for registering electors who are eligible to vote and the franchise applying to these elections. Responsibilities for elections to the Westminster Parliament remain with the UK Government.
- 1.2 Currently, the Welsh Government is in the process of drafting a Local Government Bill for introduction to the National Assembly in the autumn of 2018. Primarily this Bill sets out a range of proposals seeking to improve the operation of local government in Wales, by delivering services in a collaborative fashion and through improvements to governance and public accountability. In addition to changes in local government, any legislation relating to electoral reform is also due to be included in this bill.
- 1.3 There are a range of electoral proposals that have been put forward for potential inclusion in the Local Government Bill. Primarily, the electoral reform proposal addresses the way in which people become eligible to vote, how people register to vote and how electors cast their vote, as well as reviewing how elections are held and the overall functioning of democracy in Wales. Key within the proposal is the building of the local government franchise, whereby voting rights are to be extended to sixteen and seventeen year olds, to all foreign nationals legally resident in Wales and to prisoners who meet the determined terms of eligibility – it is the enfranchising of the last category of persons that this report focuses upon.

## **The Proposal**

- 1.4 In July 2017 the Welsh Government published a consultation paper Electoral Reform in Local Government in Wales, enquiring into the various elements of the electoral reform proposal that are currently being explored. In this paper the proposal to enfranchise Welsh prisoners was broached. However, the consultation paper acknowledged the inherent complexity of enfranchising prisoners and, thus, stated whilst legal consideration continued to be explored no firm proposals were being advanced. Then in March 2018, as part of the Assembly Reform Bill, the Cabinet Secretary for Local Government and Public Services, Alun Davies, indicated his firm intention to enfranchise Welsh prisoners for local government elections in Wales and, what is more, sketched the terms of his proposal. Currently, the Welsh Government is proposing to enable prisoners from Wales to vote provided that their due release date falls within the term of office of the council being elected. Prisoners who are serving an indeterminate sentence, which has no set release date, will not be eligible to vote, even if their tariff period falls within the terms of office of the council being elected. The proposal sets forth provisions whereby prisoners who meet the criteria proposed would be eligible to register to vote at a connected address, which would normally be a prisoner's home address, their last known address or another address in Wales to which they have a connection. It is integral that eligible prisoners can register on the basis of a connected address to ensure there is a mechanism in place whereby prisoners from Wales, who are imprisoned outside of Wales, retain their voting rights. This is particularly pertinent considering no prisons in Wales have the capacity to accommodate female prisoners and, thus, if female prisoners from Wales are to exercise their voting right they will need to be eligible to register at a connected address. The connected address, however, would not be the prison address and, so, prisoners in Wales will not be eligible to register to vote in the local authority in which the prisoner is accommodated. The proposal sets forth a vision whereby eligible prisoners, who have successfully registered, will vote via post or an appointed proxy, with there being no provisions in place for prisoners to vote in person at a polling station, via temporary release for the sole purpose of voting or by a mobile polling station in the prison.

## **The Project Brief**

1.5 Guided by the proposal, this report aims to provide a better understanding of how prisoners from Wales could be practically enabled to vote, in order to develop policy around the proposal. This will require a broad exploration of the history of prisoner voting and sentencing policy and practice for both adult and youth offenders. In addition, it will be necessary to look to other countries that have enfranchised prisoners and explore the practical provisions they have put in place. With this in mind, the principle objectives of this report are:

- to map out the arguments for and against prisoner voting, drawing upon international debates and court decisions
- to examine the extent to which prisoner voting takes place internationally, the difficulties confronted in introducing it and the extent to which the entitlement is taken up
- to provide an in-depth reading of custodial sentencing policy and practice in England and Wales, for both adult offenders and youth offenders
- to consider the main technical obstacles of introducing prisoner voting, which primarily include: addressing the question of how a prisoner's due release date is determined; whether the same principles regarding the enfranchisement of prisoner voting can be justifiably applied to young offenders; and the question posed by prisoners as "ordinarily resident" in terms of service provision.

1.6 Meeting the project brief does not require carrying out any first hand research, rather the aim of the report is to provide the necessary background information and detail required to develop policy. As elections are a new area of policy for the Welsh Government, the detail provided needs to be both broad and in-depth. This is the same or perhaps even more so in relation to the information regarding the justice system, the powers for which still remain in Westminster. Thus, the report is much more exploratory and comprehensive in nature than systematic, with the text being largely descriptive and informative. Due to the proposal still being in the research stage, the report does not seek nor desire to make recommendations or policy

proposals. However, the report will produce a series of conclusions to be considered in the development of the associated policy.

### **Mapping the Report**

- 1.7 This report navigates a handful of the different elements that will need to be considered, from both a political and practical perspective, in developing policy and legislation guaranteeing voting rights for prisoners. Firstly, a brief methodology is provided illustrating how and from where the information contained in the report was gleaned. The report is then split into four sections. The first section discusses “where we stand today” and seeks to, drawing upon the legislative background, illustrate the modern history and controversy of prisoner voting in the UK and Wales and how the handful of prisoners currently eligible to vote exercise that right. The second part of this section takes a step back and maps the arguments for and against prisoner voting. Whilst the arguments in favour of prisoner voting appear to be more developed – largely because disenfranchisement has traditionally been the default position and, thus, has not had to be justified in the robust manner prisoner enfranchisement has – at their core the positions for and against prisoner voting tend to be grounded in what one believes a prison to be: an establishment for punishing offenders who are no longer full citizens or, alternatively, a place of rehabilitation where inclusion, responsibility and participation should be promoted and encouraged.
- 1.8 The second section looks to prisoner voting internationally. As the Welsh Government has clearly articulated their commitment to enfranchising prisoners, this section concentrates less on the degree to which prisoners having voting rights internationally and more on the process by which prisoners are practically enfranchised. This requires both an exploration of legislation and the practical processes that have been put in place to provide mechanisms for prisoners to register to vote and to exercise their voting rights. Before examining two cases in detail, the offence-based approach to prisoner voting is examined. Although the Welsh Government have proposed to enfranchise prisoners based on sentence-length, it is important to be aware of the alternative approach – both its advantages and shortcomings. The section then explores, in turn, the case of prisoner voting in

the Republic of Ireland and in Australia, focussing particularly on the state of Victoria. Ireland was selected as a case study because it enfranchised all prisoners back in 2006 and, thus, more than a decade later it can be expected today that they have a relatively robust system in place. Australia was chosen as the second case study because, in contrast to Ireland, prisoners in Australia are enfranchised based on sentence length and so is comparable to the Welsh Government's proposal. In addition, the status of prisoner voting varies from state to state in Australia, with the consequence whilst a prisoner may be eligible to vote in a federal election they may not be permitted to vote in a state or local election and vice versa. If prisoners are enfranchised in Wales, a situation will be created whereby prisoners will be eligible to vote in a local government elections but not the UK general election.

1.9 The next section maps out the justice system in England and Wales. As stated previously, the Welsh Assembly have not, to date, been granted devolved powers over crime and justice. Thus, this is a novel area of policy development that is not normally engaged with separately from Westminster. However, the proposal to enfranchise prisoners necessarily requires an understanding of this area and, at the very least, cooperation will be needed across the England and Wales justice system to practically guarantee mechanisms and processes by which Welsh prisoners in England and Wales can vote. First, the section considers custodial sentences in England and Wales, detailing the different types of custodial sentences, the process of passing a sentence in court and procedure for releasing prisoners. This background information will be integral to developing policy that allows for the necessary persons to determine if a prisoner's release date falls within the term of the office being elected. As the Welsh Government's initial assumption is not to enfranchise prisoners serving an indeterminate sentence because of perceived problems in identifying a clear end of sentence date, an understanding of custodial sentences – the difference between an indeterminate sentence and a determinate sentence and the role of the Parole Board – is needed to first examine the circumstances of indeterminate sentencing, in particular where the stated minimum tariff period falls within the term of office of the council being elected and, secondly, if prisoners serving indeterminate sentences are not enfranchised to ensure the final policy does not incidentally enfranchise such prisoners. The second part to this

section explores the youth justice system. As part of their commitment to extend the franchise the Welsh Government has also proposed to enfranchise sixteen and seventeen years olds and, thus, it is necessary to explore the interaction between prisoner enfranchisement and decreasing the minimum voting age to sixteen. Largely, there is a political question as to whether the same principles of adult voting – primarily the terms of eligibility and the address options available or registering to vote – should be applied to young offenders. To begin to answer this question an understanding of the principles and workings of the youth justice system will be needed.

- 1.10 The final section of the report, aims to delve deeper into the political and practical challenges that will be faced in developing policy that enfranchises Welsh prisoners whose due release date falls within the term of office of the council being elected. Touched upon in the previous section, the first challenge relates to determining the due release date and developing a correspondence process that ensures this information is known by the relevant persons and kept up to date. The second challenge to consider, which once again has been touched upon in the previous section, is the implications of the different principles guiding the youth justice system and, specifically, the “children first, offenders second” principle. The third challenge, relates to how, in certain circumstances, prisoners are legally termed “ordinarily resident” for the purpose of service provision. If a prisoner is termed ordinarily resident, then there is the potential to advance a case that argues all prisoners in Welsh prisons should be enfranchised as these prisoners are considered to be resident in Wales. This chapter seeks to provide a preliminary examination of the strengths of such a case. Finally, the report will offer a series of conclusion drawn from the detail presented. These conclusions should inform and assist the policy that will give Welsh prisoners, where eligible, voting rights.

## **2. Methodology**

2.1 Primarily the project brief relies on in-depth desk based research. First, it was necessary to carry out a broad scoping exercise. By reading around the area of prisoner voting generally, a basic understanding was developed before more specific research was carried out. The reports and consultations engaged with to develop this initial understanding included:

- The 2017 Welsh Government Consultation Document Electoral Reform in Local Government in Wales
- UK Parliament's Draft Voting Eligibility (Prisoners) Bill
- UK Government Response to the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill
- Draft Voting Eligibility (Prisoners) Bill – Evidence
- House of Commons Library Standard Note Prisoners' voting rights (2005 to May 2015)
- House of Commons Briefing Paper Prisoner's Voting Rights: Developments since May 2015
- Case of Hirst v. the United Kingdom 2005 Judgement.

2.2 Following the initial scoping exercise, the bulk of the desk based research was conducted using a range of search engines – including Google, Google Scholar, Web of Science and SpringerLink – and relevant websites, particularly the website of interested parties and various government websites. The online search strategy employed terms relevant to the particular element or issue of the project brief that was being researched at the time. For example, when exploring the arguments for and against prisoner voting the search terms employed included: 'arguments in favour of prisoner voting', 'arguments against prisoner voting', 'should prisoners be entitled to vote?', 'human rights and prisoner voting', 'court judgements and prisoner voting', 'prisoner's rights' and 'opinions on prisoner voting'. The desk-based research drew from reputable newspaper articles, consultation documents and the associated responses/evidence, briefing papers, academic journal and books,

legislation, government documents and reports and Prisoner Service Instructions (PSI) and Prison Service Orders.

### 2.3 The principle websites used included:

- Liberty – a cross party, non-party membership organisation campaigning for fundamental rights and freedoms in the UK
- Justice – a law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom
- Prison Reform Trust – a UK charity working to create a just, humane and effective penal system
- Nacro – a social justice charity
- Criminal Justice Alliance – a membership organisation working to improve the criminal justice system
- The Electoral Commission – the independent commission responsible for all elections in the United Kingdom
- The Electoral Commission Wales – the independent commission responsible for all elections in Wales
- Australian Electoral Commission – the commission responsible for conducting federal elections and referendums in Australia and maintaining the Commonwealth electoral roll
- Victorian Electoral Commission – the government agency responsible for the running of state, municipal and various non-government elections in Victoria
- Sentencing Council – who work to promote greater transparency and consistency in sentencing across England and Wales
- Crown Prosecution Service – the principal public prosecuting agency for conducting criminal prosecutions in England and Wales
- Ministry of Justice – the major UK government department at the heart of the England and Wales justice system

- Gov.uk – a website providing government information and detailing government services
- Unlock – a national charity supporting people with convictions
- nidirect – a government website providing information on crime prevention, the justice system, what to do if you are a victim or witness of crime, and what to expect if you are going to court
- Howard League – a national charity working for less crime, safer communities and fewer people in prison
- Secure Children’s Homes – a website provided by the Secure Accommodation Network to support and provide information regarding Secure Children’s Homes for social workers, local authorities, commissioners, partner organisations and young people and their families and guardians
- Hillside Secure Children’s Home – the website for Hillside Secure Children’s Home in Neath Port Talbot
- OFSTED – government office with the responsibility for inspecting and regulating services that care for children and young people, and services providing education and skills for learners of all ages
- HMP and YOI Parc – the website for Her Majesty’s Prison and Young Offenders Institute Parc Prison in Bridgend.

#### 2.4 Government reports engaged with included:

- Draft Voting Eligibility (Prisoners) Bill. UK Government
- Draft Voting Eligibility (Prisoners) Bill – Evidence. UK Government
- Voting by Convicted Prisoners: Summary of Evidence. Fifth Report of Session 2010-11. House of Commons: Political and Constitutional Reform Committee. UK Government
- Prisoner’s Voting Rights (2005 to May 2015). House of Commons Briefing Paper. UK Government

- Review of the Youth Justice System in England and Wales. UK Government
- Youth Justice Statistics 2016/17 England and Wales: Statistics Bulletin. UK Government
- Youth Custody Data: December 2017. UK Government
- Postnote: Education in Youth Custody. UK Government
- Extending Entitlements: Support for 11 to 25 year olds in Wales. Direction and Guidance. Welsh Government
- Welsh Government Consultation – Summary of Responses. Electoral Reform in Local Government in Wales. Welsh Government
- Children and Young People First: Welsh Government/Youth Justice Board joint strategy to improve services for young people from Wales at risk of becoming involved in, or in, the youth justice system. Welsh Government and the Youth Justice Board
- Select Committee on Environment and Local Government Debate. 2 November, 2006. Republic of Ireland Government.

## 2.5 Legislation that was reviewed included:

- Representation of the Peoples Act 1983. UK legislation
- Representation of the Peoples Act 2000. UK legislation
- Crime and Disorder Act 1998. UK legislation
- Criminal Justice Act 2003. UK legislation
- Criminal Justice and Immigration Act 2008. United Kingdom Crime and Disorder Act 1998
- Care Standards Act 2000. UK legislation
- The Children (Secure Accommodation) Regulations 1991. UK legislation
- Secure Training Centres, England and Wales: The Secure Training Rules 1998. UK legislation
- Wales Act 2017. UK legislation

- Care Act 2014. UK legislation
- Social Service and Wellbeing (Wales) Act 2014. Welsh legislation
- Electoral (Amendment) Act 2006. Irish legislation
- Commonwealth Electoral Act 1917. Australian legislation
- Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011. Australian legislation
- Corrections Act 1986. Victorian state legislation
- Electoral Act 2002. Victorian state legislation.

## 2.6 Court judgements:

- Hirst v. United Kingdom 2005. European Court of Human Rights
- August and another v Electoral Commission and Others 1999. Constitutional Court of South Africa
- Richard Sauvé v Attorney General of Canada and Others 2002. Supreme Court of Canada
- Greens and MT v. The United Kingdom 2010. European Court of Human Rights
- Roach v. Electoral Commission 2007. High Court of Australia.

## 2.7 Academic reports, articles and books:

- Behan, C. (2015). Punishment, Prisoners and the Franchise. Howard League What is Justice? Working Papers 20/2015
- Ramsay, P. (2013). Faking Democracy with Prisoners' Voting Rights. London School of Economics Legal Working Paper 7/2013
- Behan, C. (2014). Citizen convicts: Prisoners, politics and the vote. Manchester: Manchester University Press

- Behan, C. and O'Donnell. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. *British Journal of Criminology*. 48, 319-336.

## 2.8 Other resources:

- UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)
- Prisons Handbook 2003/4
- Prison Service Order: Prisoners' Voting Right
- Prison Service Order: Parole Release and Recall
- The Electoral Commission: Guidance for Electoral Registration Officers
- European Convention on Human Rights
- David Lidington MP, Sentencing, Statement to the House of Commons, November 2017
- Select Committee on Environment and Local Government Debate – Republic of Ireland
- Halsbury's Laws of England: Sentencing
- Criminal Procedure Rules: The Criminal Practice Directions.
- National Offender Management Service: Sentence Calculation – Determinate Sentenced Prisoners
- 50 Years 1967-2017 – Parole Board for England and Wales: Annual Report and Accounts 2016/17
- The Parole Board Rules – Statutory Legislation: Prisons, England and Wales
- The Youth Justice Board for England and Wales Annual Report and Accounts 2016/17
- Howard League – Youth Justice in Wales: Thinking Beyond the Prison Bars

- Sentencing Council – Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines
- United Nations Convention on the Rights of the Child.

2.9 To ensure the detail collected was reliable and trustworthy information was only draw from reputable sources. Thus, the websites used were either governmental websites or websites of registered charities and official organisations. All the reports that are referred to have been produced by governments, charities, different electoral commissions and from organisations involved in the crime and justice sector. When referring to legislation, Prison Orders and Prison Instructions, it was integral to ensure the most up to date version was referred to and any relevant amendments had been taken into consideration.

2.10 In addition to relying on desk-based research, the report also draws on and takes guidance from a variety of correspondence with interested parties:

- Australian Electoral Commission (AEC)
- Victorian Electoral Commission (VEC)
- Republic of Ireland Department of Housing, Planning and Local Government
- Welsh Government’s Crime and Justice Team.

2.11 Correspondence with interested parties and organisations was engaged with to clarify detail, glean more in-depth information and to develop a greater understanding of viewpoints, concerns and positions.

2.12 I have also attended several meetings discussing and sharing knowledge regarding elections and electoral reform, including meetings with the:

- Welsh Electoral Commission
- Scottish Government’s Election Team
- Electoral Reform Programme working group
- electoral specialists.

2.13 These meetings provided valuable insights into the electoral system broadly and, more specifically, the issues and challenges faced in meeting the proposal to enfranchise prisoners. They have provided a space where I have been able to sketch out the proposed term of enfranchising prisoners and, in turn, received feedback regarding the challenges and possible courses of action that have then been followed up in the research conducted.

### **3. Where We Stand Today**

- 3.1 In order to consider how to develop a working policy around the proposals it is necessary to be aware of where Wales stands today in terms of prisoner voting rights. Thus this chapter maps out the history of prisoner voting in the UK, detailing the legislative background, the process by which prisoners who are currently eligible exercise their voting rights and the controversy around the *Hirst v. United Kingdom* case in which the European Court of Human Rights (ECHR) ruled the UK's then legislation on prisoner rights was not compatible with the European Convention on Human Rights ("the Convention"). As meeting the proposal to enfranchise prisoners for any elections will require legislative changes, it is necessary to have a sound understanding of the current legislation that is in place. With the Welsh Government only gaining electoral powers on April 1st 2018, this is a new and detailed policy subject for the Assembly Government and, thus, one they are unfamiliar with. In addition, it is essential to be aware of what categories of prisoners who are currently enfranchised and how the small numbers of prisoners who are currently eligible to vote exercise that right. Not only may the mechanisms that are currently in place potentially provide a model from which Welsh policy can be developed, more importantly this information will highlight any dissonance between the process currently in place and the preliminary Welsh policy being developed. Any divergence in processes will then need to be addressed and the associated challenges worked through.
- 3.2 Taking a step back, this section then considers the argument for and against prisoner voting. Prisoner voting has been a controversial subject for a number of decades, but it became widely and hotly debated following the *Hirst* judgment and as part of the government reports and papers published subsequently. Most prominently the debate was formalised in the report produced, and the associated evidence collated, by the Joint Select Committee of the Draft Voting Eligibility (Prisoners) Bill in 2013. Prisoner voting continues to be a controversial issue in 2018 and the arguments that have developed around and following the *Hirst* judgment continue to ring true today. Whilst the Welsh Government has already committed to enfranchising some prisoners, it is still necessary to be aware of the

counter arguments due to the social sensitivity surrounding prisoner voting and the political controversy.

## **Current Prisoner Voting Rights England and Wales**

### *Legislative Background*

3.3 Prisoner voting in England and Wales has been a highly controversial subject over the last couple of decades. Linked to the notion of “civic death”, the disenfranchisement of prisoners in Great Britain dates back to the Forfeiture Act 1870 that denied offenders in England, Wales and Ireland their citizenship rights. Despite evidence of partial enfranchisement between 1948 and 1969, the Representation of the People Act 1969 introduced a specific provision confirming the legal incapacity of convicted persons to vote whilst detained, which was later enshrined under the Representation of the People Act 1983.<sup>1</sup> Although the current situation regarding prisoner’s voting rights in England and Wales is commonly described as a “blanket ban”, the blanket ban refers to convicted detained prisoners with there being a restricted number of circumstances in which prisoners are eligible to vote. Prisoners who are currently eligible to exercise voting rights by law are:

- unconvicted prisoners (i.e. those on remand)
- convicted but unsentenced prisoners
- persons imprisoned for contempt of court or under Prison Rule 7(3)<sup>2</sup>
- those serving a term of imprisonment in default of payment of a sum of money, adjudged to be paid on conviction.

3.4 A prisoner from another country who is detained but eligible to vote under the criteria above, can vote if they would be eligible to vote were they not detained i.e. prisoners from the European Union countries can vote in all elections apart from the

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<sup>1</sup> Horne, A. and White, I. (2015). Prisoner’s Voting Rights (2005 to May 2015). House of Commons Briefing Paper SN01764. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

<sup>2</sup> Prison Rule 7(3) determines prisoners who are committed or attached for contempt of court or failing to do or abstaining from doing anything required to be done or left undone: (a) shall be treated as a separate class for the purpose of this rule; (b) notwithstanding anything in this rule, may be permitted to associate with any other class of prisoners if they are willing to do so; and (c) shall have the same privileges as an unconvicted prisoner under rules 20(5), 23(1) and 35(1). See: The Prison Rules 1999. Part Two, Section 7(3): Classification of Prisoners. Available from: <http://www.legislation.gov.uk/ukSI/1999/728/contents/made>

UK parliament election, nationals from the Republic of Ireland can vote in all elections and nationals of the Commonwealth countries can vote in all elections.

- 3.5 Section 3 of the Representations of the People Act 1983, as amended by the Representations of the Peoples Act 1985, determined any person who, on the date of the poll, is subject to any legal incapacity to vote (age apart) is not entitled to vote in parliamentary elections or local government elections. This provision captures prisoners who, by virtue of their imprisonment, are automatically and without question subject to a legal incapacity to vote regardless of sentence length or the severity of the offence. Under the Act a convicted prisoner is defined as a person found guilty of an offence (whether under the law of the United Kingdom or not), but does not include a person dealt with by committal or other summary process for contempt of the court.<sup>3</sup> The disqualification constructed and sustained under these Acts extends to the disenfranchisement of prisoners who have been released on temporary license and those who have been deemed to be unlawfully at large.<sup>4</sup>
- 3.6 In 1999, the Home Office Working Party on Electoral Procedures identified the residence criteria to register as an elector resulted in the accidental disenfranchisement of convicted but unsentenced prisoners and of prisoners detained on remand. The Representation of the People Act 1983 determined a person detained at any place in legal custody cannot, for electoral registration purposes, be treated as a resident of the penal institution in which they are incarcerated.<sup>5</sup> Thus, as there was no provision established by which another address could be used for registration, unsentenced prisoners and prisoners detained on remand were disenfranchised by default. After consideration, the Working Party declared there was no argument in principle which justified the disenfranchisement of unconvicted prisoners and, thus, concluded: ‘unconvicted remand prisoners should be allowed to continue to be registered on the original register until such time as they are released from remand, or sentenced to a

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<sup>3</sup> Representation of the People Act 1983. Chapter Two: Part One: Parliamentary and Local Government Franchise and its Exercise. Section three. Available online: [http://www.legislation.gov.uk/ukpga/1983/2/pdfs/ukpga\\_19830002\\_en.pdf](http://www.legislation.gov.uk/ukpga/1983/2/pdfs/ukpga_19830002_en.pdf)

<sup>4</sup> Her Majesty's Prison Service. (2001). Prison Service Order: Prisoners' Voting Right. Order Number: 4650. Available from: [https://view.officeapps.live.com/op/view.aspx?src=http%3Aper%2Fper%2Fwww.justice.gov.uk%2Fdownload%2Foffenders%2Fpsipsoper%2Fpsoper%2FPSO\\_4650\\_prisoners\\_voting\\_rights.doc](https://view.officeapps.live.com/op/view.aspx?src=http%3Aper%2Fper%2Fwww.justice.gov.uk%2Fdownload%2Foffenders%2Fpsipsoper%2Fpsoper%2FPSO_4650_prisoners_voting_rights.doc)

<sup>5</sup> Representation of the People Act 1983. Chapter Two: Part One: Parliamentary and Local Government Franchise and its Exercise. Section five. Available online: [http://www.legislation.gov.uk/ukpga/1983/2/pdfs/ukpga\\_19830002\\_en.pdf](http://www.legislation.gov.uk/ukpga/1983/2/pdfs/ukpga_19830002_en.pdf)

custodial sentence'.<sup>6</sup> Recognising the potential for a remand prisoner's home circumstance to alter during a period of detention, the Working Party recommended that remanded prisoners should be eligible to enter the electoral register as "other electors" rather than against a fixed address. The Working Party made no recommendations regarding convicted but unsentenced prisoners, due to the present ambiguity as to whether the offence for which the prisoner had been found guilty was serious enough to justify a custodial sentence. The recommendations that were put forward by the Working Party were implemented under the Representation of the People Act 2000. Section 5 of Act set out provisions of residence for electoral registration purposes for persons remanded in custody. It refers to a person who is detained at any place pursuant to a relevant order or direction and is so detained otherwise than after being convicted of any other offence or a finding in criminal proceedings that they did the act or made the omission charged. For the purpose of applying to the electoral register, persons to whom section five applies are to be regarded as being resident at the place in which they are detained.<sup>7</sup> However, the Act also states registration at the place of detention shall not preclude residence at another address other than the place at which they are detained or in pursuance of a local connection. Thus, under the Representation of the People Act 2000 prisoners who are eligible to vote are entitled to make an application to register to vote at three different addresses: their home address where they would otherwise be living were they not detained; in pursuance of a declaration of local connection; and the address of the establishment in which they are detained.

### *Registering Eligible Prisoners to Vote in England and Wales*

- 3.7 Primarily, a prisoner who is eligible to vote will register at their home address, where they would normally be living, were they not detained in custody. This is the address to which the Electoral Registrations Officer (ERO) sends the household enquiry registration form during the annual voting canvas and which would usually have the

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<sup>6</sup> Horne, A. and White, I. (2015). Prisoner's Voting Rights (2005 to May 2015). House of Commons Briefing Paper SN01764. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

<sup>7</sup> Representation of the People Act 2000. Chapter Two: Part One: Electoral Registration and Franchise. Section four: Residence: Persons remanded in custody etc. Available online: [http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga\\_20000002\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga_20000002_en.pdf)

name of the prisoner in question if they were already registered. Where an eligible prisoner is already registered to vote, they are generally not required to take any further action until an election is announced, when they are required to complete an application for an absent vote. However, where an eligible prisoner is already registered but expects to spend six months or more in prison, they are advised to directly contact the relevant ERO who will have the duty of checking whether or not the registration in question is still valid.

3.8 Eligible prisoners who cannot establish an appropriate home address have two alternative options, both introduced under the Representation of the Peoples Act 2000. Following the recommendations of the Home Office Working Party on Electoral Procedures, the Representation of the People Act 2000 created two new ways by which eligible prisoners can register to vote if there are unable to register at a suitable home address: a declaration of local connection or using the address of the prison establishment in which they are detained. A declaration of local connection allows prisoners who are eligible to vote to register at an address where they have previously lived. Thus, it recognises the potential difficulties that may arise in maintaining a home address whilst imprisoned, by extending a declaration of local connection beyond the home address where a prisoner would usually be residing to also encompass a declaration on the basis of a significant link to a particular locality. The significant link required can be demonstrated in various ways, including: the address of a relative or friend where a prisoner has stayed; the regular use of a guesthouse, bed and breakfast or hotel by a prisoner; or the contact details of an agency working with the homeless who is aware of and has assisted the prisoner in question.<sup>8</sup> Alternatively, a prisoner has the option to register to vote using the address of establishment in which they are detained, provided that the period of detention at that address is sufficient to enable the prisoner to be regarded as resident there for the purpose of electoral registration.<sup>9</sup> Using the address of the prison establishment, allows an eligible prisoner to vote in the

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<sup>8</sup> Her Majesty's Prison Service. (2001). Prison Service Order: Prisoners' Voting Right. Order Number: 4650. Available from: [https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadspers cent2Foffendersper cent2Fpsipoper cent2Fpsoper cent2FFPSO\\_4650\\_prisoners\\_voting\\_rights.doc](https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadspers cent2Foffendersper cent2Fpsipoper cent2Fpsoper cent2FFPSO_4650_prisoners_voting_rights.doc)

<sup>9</sup> The Electoral Commission. (2009). Part F – Special Category of Electors. Available from: [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf)

constituency in which the prison is located. This option is most commonly used by eligible prisoners who are expecting to spend six months or more in custody, as well as by those prisoners who are unable to establish a declaration of local connection.

3.9 When making an application using an address of local connection, the application should be submitted alongside the declaration that clearly states:

- the name of the declarant and their address of correspondence
- the date of declaration
- why they are eligible for a declaration of local connection
- the local connected address
- a statement declaring them to be a commonwealth citizen, citizen of the republic of Ireland or a relevant citizen of the Union
- a statement proclaiming the declarant has on the date of the declaration attained the age of 18 years and, if they have not, their date of birth.<sup>10</sup>

3.10 When making an application using the prison address, the prisoner is additionally required to submit a brief statement providing a reason as why their place of detention, opposed to an address of local connection, is being used for registration purposes.

3.11 The Representation of the People Act 2000 introduced a system of rolling registration, with the effect any eligible prisoner can apply to register to vote any time of year (with the usual cut off date for an application of registration to be received by an ERO continuing to be in force). Where there is no reason to ask for evidence of age or nationality or for more information in support of the application, the application should be processed prior to the next determination deadline. If the qualifying address does not fall within the area covered by the ERO it has been sent to, the application should be forwarded to the relevant ERO without delay. In all cases, an applicant should be noted of the acceptance or rejection of their application and where there was been a rejection an explanation detailing of the

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<sup>10</sup> Representation of the People Act 2000. Chapter Two: Part One: Electoral Registration and Franchise. Section 6(3): New system of registration. Available online: [http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga\\_20000002\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga_20000002_en.pdf)

grounds of rejection should be provided. Successful applications will be added to the register on the basis of the timetable for registration, which require EROs to publish an updated copy of the register, inclusive of all alterations, on a monthly basis.<sup>11</sup>

- 3.12 An eligible prisoner, who successfully registers to vote on the basis of a declaration of local connection or using the prison address, will have their registration in effect for a maximum of twelve months following the date of registration or until another entry takes effect in respect of the person in question. It is the duty of the ERO to issue every person registered in pursuance of a declaration of local connection, reminder that their registration will soon expire; and if they wish to remain registered and their circumstances are unchanged they must make a fresh declaration.<sup>12</sup> Following an amendment originating with the Elections Administration Act 2006, a provision was created whereby a registration would no longer be in effect where the registration officer determines, in accordance with the relevant regulations, that the person was not entitled to be registered. Following an electoral registration no longer being in effect, the person is required to make a further application for registration. Where there is a failure to make this further application, the prisoner will have their name deleted from the register and, so, will be unable to vote.<sup>13</sup>
- 3.13 Whilst the Working Party identified both remand prisoners and convicted unsentenced prisoners to be unintentionally disqualified from voting, no provisions aiding convicted unsentenced prisoners with a mechanism for exerting their right to vote have been introduced. Following the Working Party's decision to not make any recommendations relating to convicted unsentenced prisoners due to the present ambiguity surrounding their sentence, this class of prisoners have been disqualified from registering to vote via a declaration of local connection or the address of the place of detention. As this class of prisoners are about to be sentenced and, so, will either lose their eligibility to vote where a custodial sentence is imposed or,

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<sup>11</sup> The Electoral Commission. (2009). Part F – Special Category of Electors. Available from: [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf)

<sup>12</sup> *ibid.*

<sup>13</sup> Her Majesty's Prison Service. (2001). Prison Service Order: Prisoners' Voting Right. Order Number: 4650. Available from: [https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadsper cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FPSO\\_4650\\_prisoners\\_voting\\_rights.doc](https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadsper cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FPSO_4650_prisoners_voting_rights.doc)

following a noncustodial sentence, will be released and thereby able to register at their home address, it was concluded unnecessary to make the new provisions.

- 3.14 Following the changes introduced by the Representation of the People Act 2000, it became the duty of prison Governors to ensure eligible prisoners were made aware of their right to vote. Prison Governors are required to obtain display signs from HMP Coldingley, which inform eligible prisoners of their voting rights. Where a prisoner expresses an interest in voting, the Governor of the prison must provide the prisoner with the relevant information explaining the registration procedure.<sup>14</sup>

#### *Special Category Electors*

- 3.15 Primarily, special category electors are those who are unable to meet the usual residency qualification but are still eligible to obtain registration due the provision in place providing for their particular circumstances. In addition, special category electors include persons whose safety would be at risk if they were to be registered as ordinary electors.<sup>15</sup> Persons registered as special category electors are:

- overseas electors which refers to British citizens living outside the UK
- HM Forces service voters and their spouses or civil partners
- Crown servants and British Council employees and their spouses or civil partners
- electors who have a declaration of local connection, which includes people living in the UK who do not have a permanent address or a fixed address
- anonymously registered electors, which refers to those who are eligible for an anonymous registration because their safety would be at risk if they appeared on the register using their name
- patients in mental health hospitals whose stay at the hospital is sufficient for them to be regarded as resident there

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<sup>14</sup> Her Majesty's Prison Service. (2001). Prison Service Order: Prisoners' Voting Right. Order Number: 4650. Available from: [https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadper cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FFPSO\\_4650\\_prisoners\\_voting\\_rights.doc](https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadper cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FFPSO_4650_prisoners_voting_rights.doc)

<sup>15</sup> The Electoral Commission. (2009). Part F – Special Category of Electors. Available from: [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0011/43958/Part-F-Special-category-electors-March-2010.pdf)

- remand prisoners whose stay at a penal institution is sufficient for them to be regarded as resident there.<sup>16</sup>

3.16 All persons registered in pursuance of a declaration of local connection, under an address at which they have resided or would reside but for their circumstances, are included at the end of each relevant part of the register under the heading “other electors” where they appear without an address. The names appear in alphabetical order and are grouped together with any overseas electors and service voters, but before any anonymously registered electors.<sup>17</sup> Prisoners registered in pursuance of the address where they are detained, also appear on the register as part of the special category of electors. Once again, the address of the establishment used for registration purposes is not disclosed on the register.

#### *Exercising the Right to Vote*

3.17 Once an eligible prisoner has registered to vote, they are required to apply as an absent voter, which allows them to vote either by post or by proxy. Prison Governors hold information detailing the absent voting process and this should be readily available to eligible prisoners who have expressed an interest in exercising their voting rights. On acceptance of a proxy vote application, a proxy voter’s poll card is sent to the appointed proxy ahead of polling day. Following a successful postal vote application, a postal ballot paper will automatically be sent to the postal address specified in the registration. In respect of each election, an absent vote application must be made as soon as possible following the announcement of an election to give time for the postal ballot paper or proxy voter’s poll card to be sent to the specified address. For a parliamentary or local government election, absent voter applications must be received by the relevant ERO by 5pm on the sixth working day before the election is due to be held. Where a prisoner is already registered to vote by post prior to their detention, they can change the address where they wish the postal ballot paper to be sent either by completing the relevant form and sending it to the ERO or by writing a brief written statement to the ERO

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<sup>16</sup> The Electoral Commission. (2018). Guidance for Electoral Registration Officers: Part Four – Maintaining the register throughout the year. Available from: [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/162578/Part-4-Maintaining-the-register-throughout-the-year.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/162578/Part-4-Maintaining-the-register-throughout-the-year.pdf)

<sup>17</sup> *ibid.*

which, in both cases, must be received on the 11<sup>th</sup> working day before the date of an election.<sup>18</sup>

3.18 Where an eligible prisoner has made an apparently genuine application for a postal or proxy vote, they are entitled to have access to any relevant election literature. In addition, on application to the governor, an eligible prison is permitted to write to candidates' in the relevant constituency to request election literature or further details.<sup>19</sup> Prisoners who have successfully applied for an absent postal vote will, a few days prior to the election, receive an envelope from the relevant Returning Officer (RO). The envelope contains:

- The ballot paper
- The ballot paper envelop marked "A"
- A declaration of identity
- An envelope, marked "B", for returning the completed ballot paper sealed in envelope "A" and the declaration of identity to the relevant RO.

3.19 The envelop containing these documents will be marked in such a way that it is clearly identifiable as a postal ballot, ensuring the envelope is received unopened by the prisoner to whom it is addressed. For security reasons, prisons hold the discretion to open and examine a prisoner's post. Where this discretion is exercised the principle of secrecy is not compromised, as the ballot paper has not yet been completed. If a prisoner has made a successful postal vote application but has been discharged before it has been received, the unopened envelope must be forward to the address specified on the discharge.

3.20 On receiving their postal vote, a prisoner should complete the ballot paper and seal it in the envelope marked "A". Along with the declaration of identity, the sealed envelope "A" should then be sealed by the prisoner in the envelope marked "B". Envelope "B" must then be posted promptly to ensure that it reaches the RO on or before the date the election is due to be held. If the postal vote is not received on or

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<sup>18</sup> Her Majesty's Prison Service. (2001). Prison Service Order: Prisoners' Voting Right. Order Number: 4650. Available from: [https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadspers cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FFPSO\\_4650\\_prisoners\\_voting\\_rights.doc](https://view.officeapps.live.com/op/view.aspx?src=httpper cent3Aper cent2Fper cent2Fwww.justice.gov.ukper cent2Fdownloadspers cent2Foffendersper cent2Fpsipsoper cent2Fpsoper cent2FFPSO_4650_prisoners_voting_rights.doc)

<sup>19</sup> *ibid.*

prior to the close of the polls, the ballot paper will not be counted. As the outgoing envelope “B” is already addressed to the RO, it is unlikely to contain anything other than envelope “A” holding the ballot paper and the declaration of identity.<sup>20</sup> Thus, it is not expected that the outgoing envelope will require examination prior to posting.

### *Westminster Extending the Franchise*

- 3.21 In the 2005 case of *Hirst v the United Kingdom*, the ECHR ruled the United Kingdom’s current blanket ban on prisoner voting to be unlawful. The case was brought to the ECHR in 2005 by John Hirst, who was convicted of manslaughter in 1980 and sentenced to fifteen years of imprisonment. Hirst brought his case to Strasbourg under Article 3 of Protocol 1 of the Convention. Article 3 of Protocol 1 provides for the right to free elections, it 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.’<sup>21</sup> Under this Article, Hirst claimed the UK Government are abusing fundamental rights by denying prisoners of the right to vote.
- 3.22 In October 2005, the majority of the Grand Chamber of the ECHR held, by 12 to 5, that UK law violated Article 3. The Strasbourg judgement made three principle arguments in support of their conclusion. Firstly, the majority observed ‘when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote.’<sup>22</sup> The second argument centred on proportionality, with the majority concluding the broad and general disenfranchisement of prisoners to be disproportionate to any legitimate criminal justice aim. The judgement stated ‘there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote...it cannot be said that there was any substantive debate by members of the legislature

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<sup>20</sup> *ibid.*

<sup>21</sup> Council of Europe and European Court of Human Rights. (1950). European Convention on Human Rights. Article 3 of Protocol 1. Available from: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>22</sup> Case of *Hirst v. The United Kingdom* (No. 2). (2005). Judgement. The Court’s Assessment, paragraph 77. Available from: <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.<sup>23</sup> Third, the court argued the ban was indiscriminate as ‘it applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.’<sup>24</sup> Thus, the majority concluded the ban, as it is currently exercised, is a blunt instrument violating the human right to free expression.

- 3.23 Despite the conclusion of the Hirst judgment and a number of other relevant judgements, successive UK Governments both delayed and refused to implement Strasbourg’s judgement or to enact changes to national law to guarantee compliance. The Hirst judgment sparked a bitter debate over: the role and autonomy of the Strasbourg Court, the ability of the court to influence and determine national laws, the function of the Convention, the UK’s capacity to ignore ECHR’s ruling without undermining the rule of law, democratic legitimacy generally, the UK’s future relationship with the ECHR and the status of free elections as a fundamental and universal human right.<sup>25</sup> In a subsequent case, *Greens and MT v UK* taken to Strasbourg in 2010, the ECHR unanimously upheld the Hirst judgment, stating the continued violation of Article 3 originated with the failure of the UK state to execute the Hirst judgment. The ECHR concluded the UK Government must ‘bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant.’<sup>26</sup> This order, despite a further vote in the House of Commons against changing the law, resulted in a Draft Voting Eligibility (Prisoners) Bill that was published in 2012.
- 3.24 In November 2012 the then Lord Chancellor, Chris Grayling, published the Draft Voting Eligibility (Prisoners) Bill and announced the establishment of a Joint Committee of the two Houses of Parliament in May 2013 tasked with conducting pre-legislative scrutiny. The draft Bill had been brought forward by the Government

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<sup>23</sup> *ibid*, paragraph 79.

<sup>24</sup> *ibid*, paragraph 82

<sup>25</sup> Raab, D. (2011). *Strasbourg in the Docks: Prisoner Voting, Human Rights and the Case for Democracy*. Civitas: London. Available from: <http://civitas.org.uk/pdf/StrasbourgInTheDock.pdf>

<sup>26</sup> *Case of Greens and MT v. The United Kingdom*. (2010). Judgement. Available from: <http://www.bailii.org/eu/cases/ECHR/2010/1826.html>

in response to the Hirst judgment. The report by the Joint Committee commented on the damage created by successive UK Government's refusing to implement Strasbourg's judgement, stating it both damages the standing of the UK and gave succour to those states in the Council of Europe who have a poor record of protecting human rights. Furthermore, the report stated the impossibility of reconciling the principle of the rule of law with remaining in the Conventions, whilst the UK persistently declined to implement the ECHR's judgement. Thus, the report recommended the Government introduce a Bill at the start of the 2014-2015 session, setting out provision for all prisoners serving sentences of 12 months or less to be enfranchised in all UK parliamentary, local and European elections and, moreover, prisoner should be entitled to apply, up to six month before their scheduled release date, to register to vote in the constituency they are due to be released.<sup>27</sup> However, despite the Joint Committee's report, inaction and delay continued to characterise the Government's response to the Strasbourg judgement.

3.25 After twelve years of standoff between Strasbourg and London, in November 2017 David Lidington, the then Lord Chancellor and Secretary of State for Justice, made a statement to the House of Commons regarding sentencing and the Government's response to the Hirst judgment.<sup>28</sup> Lidington stated the implications of the 2005 Hirst judgment have been considered by successive governments, with the Labour, coalition and Conservative Governments all holding the view that national laws are a matter for elected lawmakers in the United Kingdom and, thus, not enacted any changes to legislation. Lidington clearly expressed the current Conservative Government's view that convicted prisoners detained in prison should not be permitted the right to vote, whilst simultaneously recognising the need for the Government to respond to the ECHR's judgement. The statement announced the administrative changes proposed by the Government to address the 2005 judgement, while maintaining the voting ban on convicted prisoners in custody. The Government stated its commitment to work with the judiciary to ensure clarity in the sentencing process; making it clear to convicted offenders their terms of

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<sup>27</sup> House of Lord and House of Commons Joint Committee on the Draft Voting Eligibility (Prisoners) Bill. (2013) Report. Available from: <https://publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf>

<sup>28</sup> Lidington. D. (2017). Sentencing. Statement to the House of Commons, November 2017, volume 630. Available from: <https://hansard.parliament.uk/commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing>

imprisonment automatically include the loss of the right to vote whilst detained. Secondly, Lidington communicated the Government's commitment to amending an anomaly in the current system, whereby a person released back into the community under a home detention curfew scheme is eligible to vote while those who are active in the community under a temporary license cannot vote. Release to temporary licence is primarily a tool utilised to allow offenders to prepare for their return to society. Thus, reinstating the civic right of voting for these prisoners is consistent with this resettlement approach. Lidington clearly asserted this change would have no impact upon the criteria for temporary release and that no offenders would be granted temporary release in order to vote.

3.26 Following consideration, on the 7<sup>th</sup> December 2017 the Council of Europe gave notice of its acceptance of the proposals put forth by the UK Government. As the changes proposed are purely administrative, they do not require any legislative amendments. Rather, the Cabinet Office intends to issue fresh guidance to prison Governors in England and Wales, which will advise and instruct the categories of prisoners that are entitled to vote and under what circumstances. This guidance is expected to be in place for the 2019 round of elections. It was originally believed the Conservative Government's administration proposal would enfranchise an additional one hundred prisoners at any one time.<sup>29</sup> Yet, prisoners enfranchised under these changes will be unable to vote from prison or to register using the address of the place that they are detained. In light of these caveats, the additional prisoners who will be enfranchised when the proposals come into force will only be able to vote in person at a polling station and, thus, the proposal is likely to enfranchise only a handful of prisoners at any one time.<sup>30</sup>

### **Arguments For and Against Prisoner Voting**

3.27 The issue of prisoner voting has resulted in a heated, broad and emotive debate. Surrounding the Hirst case and the subsequent judgement from the ECHR, prisoner voting became a key issue of political and moral debate across the UK. Taking a

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<sup>29</sup> Lidington, D. (2017). Sentencing. Statement to the House of Commons, November 2017, volume 630. Available from: <https://hansard.parliament.uk/commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing>

<sup>30</sup> Foster, A. (2017). Prisoner Voting: The Right to Vote: But is it Enough? Criminal Law and Justice Weekly. Available from: <https://www.criminalawandjustice.co.uk/features/Prisoner-Voting-Right-Vote-it-Enough>

step back from where we are today and from the UK Government's proposals to make administrative changes to address the "blanket ban" on voting for detained convicted prisoners, it is necessary to consider the arguments that have been advanced both for and against prisoner voting. Although the debate has been centred around the Hirst judgment which, it could now be argued, has been addressed by the UK Government, with the understanding the UK Government's administrative changes are to practically make very little difference when they come into force and the Welsh Government proposal seeking to extend prisoner voting rights far beyond the terms set forth by the UK Government, it is necessary to have a sound understanding of the arguments both for and against the enfranchisement of prisoners.

- 3.28 Overwhelmingly the debate coalesces around two polarised positions: the first takes the stance prisoners, having removed themselves from society as a consequence of their own criminal activity, must forgo their voting rights; and, at the other end of the spectrum, are those arguing that despite their detainment prisoners retain basic rights, which must necessarily include the right to vote, and as voting has the potential to positively contribute to a prisoner rehabilitation it should be actively promoted. The debate reached its height in 2013 with the UK Government establishing a Joint Select Committee to scrutinise the Draft Voting Eligibility (Prisoners) Bill introduced in 2012. Several MPs gave oral evidence to the Joint Select Committee, as well as many interested organisations and charities formalising their position in written and oral evidence. Several charities also produced independent reports and papers addressing prisoner enfranchisement, most notably the Howard League What is Justice? Working Paper: *Punishment, Prisoners and the Franchise* written by law scholar Dr Behan, which thoroughly collated the main arguments for and against prisoner voting. Drawing from a range of different sources – including but not limited to the report and evidence of the Joint Select Committee Draft Voting Eligibility (Prisoners) Bill – I map out, in turn, the principle arguments for and against prisoner voting that have been advanced in the associated debates.

*Arguments against enfranchising incarcerated prisoners*

3.29 Argument 1: Voting is not an absolute, universal right.

Although voting may be regarded as a right, it is not an absolute right granted to the whole population with no reservation. Article three of Protocol one of the European Convention on Human Rights is not phrased in terms of an individual right and nor does it contain any reference to universal suffrage: 'The High Contracting Parties undertake to hold free election as 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.' Thus, there is and there always has been a general acceptance that certain categories of person can justifiably be excluded from voting.<sup>31</sup> Voting is a qualified right and it is the view of successive UK Governments that those who have committed crimes serious enough to warrant imprisonment have lost the moral authority to vote.<sup>32</sup> Furthermore, many decent and responsible liberal democracies do not permit **all** prisoners to vote.

3.30 Argument 2: Disenfranchisement strengthens the social contract.

Prisoners should be stripped of their rights of citizenship, including the right to vote. Those who have committed crimes deserving of imprisonment have broken the social contract. They have by the course of their own actions put themselves outside of the law and, so, have broken the contract by which their rights are guaranteed protection. Prisoners have through their own behaviour lost their citizenship. Peter Ramsay, a modern theorist, has stated prisoners have 'repudiated their democratic citizenships rights by the implicit denial of citizenship entailed in their offence.'<sup>33</sup> Furthermore, if the social contract has been broken there must be a resulting sanction. Disenfranchisement is an important tool for reminding prisoner, and the wider society, that citizenship is a privilege granted with civic virtue. Thus, removing voting capacities from prisoners upholds and strengthens the social contract. Professor Christopher Manfredi, who specialises in judicial politics, has argued: 'The nexus between prisoner disenfranchisement and the preservation and promotion of liberal democratic values is thus found in the exclusion from political

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<sup>31</sup> Policy Exchange. (2017). Human Rights and Political Wrongs: A new approach to human rights law. London: Policy Exchange.

<sup>32</sup> Liberty. (2016). Liberty's Briefing on Prisoners' Voting Rights. London: Liberty.

<sup>33</sup> Ramsay, P. (2013). Faking Democracy with Prisoners' Voting Rights. London School of Economics Legal Working Paper 7/2013.

participation of individuals who manifestly demonstrated that their character is self-regarding, present orientated, and impulsive.’<sup>34</sup>

3.31 Argument 3: Prisoner voting corrupts the democratic process.

In allowing prisoners to vote there is a risk the entire democratic process will be tainted. The right to vote is qualified in a commitment of respect to the will of the people and the law. Those who have been convicted of a crime deserving of incarceration have distanced themselves so far from the values of civil society, to allow them to participate in its governance would be a travesty of justice.<sup>35</sup>

3.32 Argument 4: A proportionate punishment.

Removing prisoners’ voting rights is an integral part of punishing offenders. Successive UK Governments have justified disenfranchisement on the grounds that it prevents crime and punishes offenders, whilst enhancing civic responsibility and respect for the rule of law.<sup>36</sup> What is more, there is an obligation upon the government by those who obey the law to punish those who break the law. Given the custodial threshold in the UK is such that a custodial sentence is only given for the most serious of offences and where it is appropriate and proportionate to do so, prisoners who reach that custodial threshold should lose their capacity to vote – disenfranchisement is a direct and justified punishment. To deny prisoners the vote is an opportunity to promote respect for the law and, potentially, even deter criminal activity. It sends a real and symbolic message both to law-abiding citizens and to non-law-abiding citizens of the importance placed by society on obeying the rules created by representatives of the people.<sup>37</sup>

3.33 For those who have clearly demonstrated they are not willing to accept the outcome of the democratic process – the passing of law by elected representatives – exclude themselves from the right to participate in it. As David Davis MP (Haltemprice and Howden) has argued ‘if you break the law, you cannot make the law.’<sup>38</sup>

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<sup>34</sup> Manfredi, C. (2009). In Defence of Prisoner Enfranchisement. In: A, Ewald and B, Rottinghaus, eds., *Criminal Disenfranchisement in an International Perspective*. Cambridge: Cambridge University Press.

<sup>35</sup> *ibid.*

<sup>36</sup> *Hirst v. United Kingdom (NO. 2): Judgment*. (2005). Paragraph 50.

<sup>37</sup> Behan, C. (2015). *Punishment, Prisoners and the Franchise*. Howard League What is Justice? Working Papers 20/2015.

<sup>38</sup> Hansard, HC Debates, 10 February 2011, vol. 523, col. 494. (2011).

- 3.34 Argument 5: Guaranteed low uptake minimises any potential positive effect. As the uptake of prisoner voting will be minimal, enfranchising prisoners is unlikely to have any positive effect. Eoin McLennan Murray, former President of Prisoners Governors Association and now chair of the Howard League, has stated the number of prisoners likely to vote would be very low.<sup>39</sup> This position has also been reiterated by Her Majesty's Inspectorate of Prison, who has stated prisoners rarely enquire about their voting rights.<sup>40</sup> Looking to the states where prisoners have been enfranchised, there is strong evidence to suggesting few prisoners would exercise voting rights. Prisoners were enfranchised in the Republic of Ireland in 2006, but despite prisoners acknowledging the ease of voting from prison only 6.2 per cent exercised their voting rights in the 2016 Dáil Éireann election (the general election), whilst the national turnout was 65.2 per cent. Due to the strong likelihood of a low uptake it is doubtful enfranchisement would be a positive contribution to a prisoner's rehabilitation, with Digby Griffith from the National Offender Management Service stating although a positive connection between voting and rehabilitation can technically be made the reality is highly unlikely.<sup>41</sup> David Strang, Her Majesty's Chief Inspector of Prisons for Scotland, has also argued 'putting an X in a box is not an effective way for someone to raise a particular issue' and that there are many and more appropriate avenues open to prisoners for raising important issues.<sup>42</sup>
- 3.35 Argument 6: Public opinion does not favour prisoner voting. Overwhelmingly, the general public do not support enfranchising prisoners. In the Joint Select Committee on Drafting Voting Eligibility, Nick Gibb Conservative MP stated: 'All the main parties in the UK, and the vast majority of Members of Parliament and the public, are opposed to allowing prisoners to vote.'<sup>43</sup> Research carried out by the YouGov in 2015 illustrates 69 per cent of the public do not support a change in the law to allow prisoner to vote. In addition, 68 per cent of the general public are unfavourable to the argument that prisoner voting will help

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<sup>39</sup> Nacro, National Offender Management Service and Prison Governors Association – Oral Evidence (QC 126-136). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013)

<sup>40</sup> Her Majesty's Inspectorate of Prisons – Written Evidence (VEP 0017). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>41</sup> Nacro, National Offender Management Service and Prison Governors Association – Oral Evidence (QC 126-136). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>42</sup> Scottish Parliament Equalities and Humans Rights Committee. Official Report: Session 5. (2017).

<sup>43</sup> Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

rehabilitation, with 71 per cent agreeing that criminals do not deserve a say in elections whilst 50 per cent of the public support disenfranchisement as an effective punishment.<sup>44</sup> David Lidington, the Secretary of State, in his 2017 oral statement on sentencing argued: ‘The UK has a proud constitutional tradition and it is clearly right that we uphold our obligations, but the British public expect us to uphold our obligations, consistent with British values of rights and responsibilities.’<sup>45</sup> Thus, those taking this perspective argue in a legitimate democratic state, it should be the citizens of that society who have a broad collective right to order affairs as they choose.

### *Arguments in favour of enfranchising incarcerated prisoners*

#### 3.36 Argument 1: Voting is a right the state must protect.

Voting is not a privilege but a right. Agreeing with this statement, the law reform and human rights organisation JUSTICE has argued as a right the presumption must be in favour of universal suffrage and inclusion.<sup>46</sup> Also taking this view, the Prison Reform Trust have stated voting cannot be selectively rewarded to those who have been judged to be morally decent by a government.<sup>47</sup> Thus, to deny prisoners the vote without good reason could potentially undermine democratic legitimacy. If the political objective is to widen the franchise to engage as many citizens in the political process as possible – as was stated by Cabinet Secretary Alun Davies in his recent plenary statement and illustrated in the proposal to extend the enfranchise to 16 and 17 year olds and to foreign nationals – then to deny the vote to any section of the population, which includes prisoners, is antithetical to this aspiration.

#### 3.37 Although, prisoner voting may be unpopular with the general public, the AIRE Centre – a charity who promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights – argue such a serious interference with democratic rights cannot be dictated

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<sup>44</sup> Faulkner Rogers, J. and Warr, W. (2015). Prisoner Voting: Via the ‘civic death’ penalty? London: YouGov UK.

<sup>45</sup> Rt Hon David Lidington MP, the Lord Chancellor and Secretary of State for Justice. Oral statement to Parliament: Secretary of State’s oral statement on sentencing. (2017).

<sup>46</sup> JUSTICE – Written Evidence (VEP 0027). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>47</sup> Prison Reform Trust. (2010). Barred from Voting: The right to vote for sentenced prisoners. London: Prison Reform Trust.

by the vagaries of public opinion, but should rather be the subject of thoughtful consideration by elected representatives of the people.<sup>48</sup> The High Court in Nairobi stated the Kenyan Electoral and Boundaries Commission cannot to be a passive actor, but must take an activist position in ensuring fundamental rights are promoted and guaranteed.<sup>49</sup> When debating the status of prisoner voting rights, the South African Constitutional Court stated: ‘A fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving fundamental rights that they retain despite their incarceration.’<sup>50</sup>

### 3.38 Argument 2: Views are changing.

Despite the Conservative Party and Plaid Cymru supporting the continued disenfranchisement of prisoners, there are signs – both politically and among the general public – that the traditional views on prisoner voting are changing. Successive governments – the Labour government, the coalition government and the Conservative government – have failed to make legal changes to meet the Hirst judgment and, thus, have upheld the automatic disenfranchisement of all detained and convicted offenders. However alongside the support of enfranchisement from Welsh Labour, the Shadow Home Secretary, Dianne Abbott, has stated: ‘The European court of human rights has been saying for some years that we can’t stop all prisoners having the vote and the Labour Party believes that ... in the end, we have to support the position of the European court of human rights.’<sup>51</sup> Similarly, whilst the traditional mantra is that the general public are overwhelmingly and strongly against prisoner voting rights, the recent consultation report by the Welsh Government, Electoral Reform in Local Government in Wales, suggests this may be changing. The consultation report found 50 per cent of respondents were in favour of allowing prisoners to vote in local elections, with 47 per cent disagreeing with this statement and 3 per cent not expressing a view either way.<sup>52</sup> One the basis of these

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<sup>48</sup> The Aire Centre – Written Evidence (VEP 0042). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013)

<sup>49</sup> Kituo Cha Sheria v. Independent Electoral and Boundaries Commission, Constitutional Petition 574 of 2012. (2013).

<sup>50</sup> National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO), Erasmus and Schwagerl v Minister of Home Affairs (CCT 03/04 2004).

<sup>51</sup> Siddique, H. (2017). Government reportedly planning to allow some UK prisoners to vote. The Guardian. Available from: <https://www.theguardian.com/society/2017/oct/29/government-planning-to-allow-some-prisoners-to-vote-european-court-human-rights>

<sup>52</sup> Welsh Government. (2018). Welsh Government Consultation – Summary of Responses. Electoral Reform in Local Government in Wales.

findings, the conclusion the general public, at least in Wales, are overwhelmingly and strongly against prisoner voting is seriously weakened.

- 3.39 Argument 3: Prisoner voting is successful in many states across the world. Prisoners have been successfully enfranchised across the world, with almost all of our European neighbours guaranteeing partial or unrestricted voting for prisoners. From the experience of these states, there is no evidence the inclusion of prisoners in the franchise undermines the democratic process or taints elections. There is no evidence of voting blocs amongst prisoners; with the only national survey of prisoners' voting preferences – carried out in the Republic of Ireland – concluding the most favoured party amongst prisoners was also the most popular party among the whole voting population.<sup>53</sup>
- 3.40 Both the Prison Governors Association and Criminal Justice Alliance have indicated no significant practical problems will arise in extending voting rights to prisoners. This position was reiterated by the report produced and the evidence collated by UK Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill. Dr Eric Metcalfe, the Human Rights Policy Director of Justice from 2003-2011, stated: 'I do not imagine that administratively it is very difficult merely to extend the administration system that already exists in relation to remand prisoners and draw in prisoners generally. You are increasing the piles of paper, I would guess, but I cannot foresee that the administrative costs would dramatically increase.'<sup>54</sup>
- 3.41 Argument 4: Civic death - The "othering" of prisoners. Denying prisoners of their right to vote is an active process of "othering", which not only effects how prisoners are perceived whilst incarcerated but additionally hinders their resettlement. The Caritas Social Action Network has argued disenfranchisement further extends the divide between prisoners and the rest of society. It marks the beginning of a political underclass and reinforces the negative public perception of prisoners as undeserving "others" who should be placed

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<sup>53</sup> Behan, C. (2014). *Citizen convicts: Prisoners, politics and the vote*. Manchester: Manchester University Press.

<sup>54</sup> Voting by Convicted Prisoners: Summary of Evidence. Fifth Report of Session 2010-11. House of Commons: Political and Constitutional Reform Committee. (2011).

outside of the electoral process.<sup>55</sup> Dr Peter Selby, former Bishop to HM Prisons and then President of the National Council for Independent Monitoring Boards from 2008-2013, has articulated disenfranchisement of prisoners states: ‘in the clearest terms society’s belief that once convicted you are a non-person, one who should have no say in how our society is to develop, whose opinion is to count for nothing. It is making someone an “outlaw”, and as such has no place in expressing a civilised attitude towards those in prisons.’<sup>56</sup> As the Prison Reform Trust has argued in removing their right to vote prisoners, at least for the duration of their sentence, are dead to society.<sup>57</sup>

### 3.42 Argument 5: Still citizens with rights if not liberty.

The idea of civic death is broadly considered to be an antiquated and out-dated concept, which is in direct contrast to the modern ideals of universal representative government.<sup>58</sup> Although upon imprisonment prisoners lose their right to liberty they do not cease to be citizens and, like everyone else, prisoners continue to possess human dignity. Whilst people can and do act in an undignified manner, the Caritas Social Action Network have determined human dignity to be inalienable and irreducible of human persons. Human dignity must be respected; it is not at disposal of the state.<sup>59</sup> Handing down a landmark ruling on prison voting rights in 1999, the Constitutional Court of South Africa declared: ‘The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.’<sup>60</sup>

### 3.43 To enfranchise prisoner is to restore the universality and mutuality of citizenship and human dignity. It is in universal dignity that rights and obligations, including the right to vote, are ultimately grounded. Prisoners remain subject to the protection afforded by the laws of the country whilst remaining bound by obligations imposed by law, including continuing liability for taxation on earnings and savings. The Prison

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<sup>55</sup> Caritas Social Action Network (CSAN), the domestic action agency of Bishops’ Conference and Catholic Bishops’ Conference of England and Wales Department for Christian Responsibility and Citizenship – Written Evidence (VEP 0003). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>56</sup> Prison Reform Trust and Unlock press release. (2004). Barred From Voting: Coalition calls for prisoners to be given the vote.

<sup>57</sup> Prison Reform Trust. (2010). Barred from Voting: The right to vote for sentenced prisoners. London: Prison Reform Trust.

<sup>58</sup> Behan, C. (2015). Punishment, Prisoners and the Franchise. Howard League What is Justice? Working Papers 20/2015.

<sup>59</sup> Caritas Social Action Network (CSAN), the domestic action agency of Bishops’ Conference and Catholic Bishops’ Conference of England and Wales Department for Christian Responsibility and Citizenship – Written Evidence (VEP 0003). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>60</sup> Constitutional Court of South Africa (1 April 1999). August and another v Electoral Commission and Others CCT8/99.

Reform Trust has argued: 'If they [prisoners] are civically alive when it comes to financial contributions, they should be treated in the same way when it comes to basic human rights.'<sup>61</sup>

#### 3.44 Argument 6: Undermining the social contract.

As citizens with human dignity, prisoners remain part of democracy. The Supreme Court of Canada in the 2002 *Sauvé v. Canada* case stated: 'Denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.'<sup>62</sup> Disenfranchisement of prisoners undermines the social contract, which is a mutual and universally agreed contract that is central to modern democracy. When the social contract is diminished there is a question as to whether individuals should be obliged to obey laws created by governments who were not given authority to rule over them.<sup>63</sup> To deny the right to vote and fortify the social contract undermines the democratic legitimacy and effectiveness of the government and dissolves the rule of law.

#### 3.45 Argument 7: Rehabilitation, responsibility and inclusion.

Giving prisoners voting rights not only restores the social contract but also potentially benefits rehabilitation. The objective of enfranchisement is not to be soft on crime or the criminal. Rather, giving prisoners the vote can contribute to their path of reform by showing them they have a continued stake in society as – in the words of the former Secretary of State for Justice Michael Gove – 'citizens who can contribute'.<sup>64</sup> Practically and symbolically voting enhances civic responsibility. It requires prisoners to confront their own role in society and to make an active contribution by way of fulfilling a civic duty. Denying prisoners their voting right forecloses an important means for teaching democratic values and social responsibility. The UN Nelson Mandela Rules for the Treatment of Prisoners declares: 'The prison regime should seek to minimise any difference between prison

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<sup>61</sup> Prison Reform Trust. (2010). *Barred from Voting: The right to vote for sentenced prisoners*. London: Prison Reform Trust.

<sup>62</sup> Supreme Court of Canada. (31 Oct 2002). *Richard Sauvé v Attorney General of Canada and Others* 2002 SCC 68.

<sup>63</sup> Behan, C. (2015). *Punishment, Prisoners and the Franchise*. Howard League What is Justice? Working Papers 20/2015.

<sup>64</sup> Gove, M. (2015). *The Treasure in the Heart of Man - Making prisons work*. Speech given at Prisoners Learning Alliance, 17 July.

life and life at liberty that tend to lessen the responsibility of the prisoners; and the treatment of prisoners should emphasise not their exclusion from the community but the continuing part in it.<sup>65</sup>

3.46 An important factor in reducing reoffending is maintaining a connection to family and to a community. Voting can help facilitate a relationship with the local community to which a prisoner will ultimately return. Paul McDowell, former Chief Inspector of the social justice charity Nacro and former Chief Inspector of Prisons, has argued giving prisoners the vote can draw them back into society, give them a stake in that society and ultimately reduced feelings of exclusion.<sup>66</sup> Thus, disenfranchisement can be counter-productive to reintegration. The UN Standard Minimum Rules for the Treatment of Prisoners – widely recognised as the blueprint for prison management – declares the purpose of imprisonment can be achieved only if it is used to support, ‘so far as is possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.’<sup>67</sup>

3.47 Argument 8: Diversity in Democracy.

Without the right to vote prisoners are devoid of a formal, organised and protected voice. The situation and condition of prisons, in particular the high rates of self-harm and suicide is a key political and social issue of society today. With voting rights removed, prisoners lose an integral means of registering views and issues with the government, with the consequence prisoners are left with a limited, if any, recourse to challenging their worsening situation. Enfranchising at least some prisoners provides an important avenue for guaranteeing important social and political issues of today’s prisons receive the attention they urgently require. The former Conservative Home Secretary, Lord Hurd, has argued: ‘If prisoners had the vote then MPs would take a good deal more interest in the conditions in prisons.’<sup>68</sup> Furthermore, including those with direct experience of the criminal justice system in the democratic process opens an avenue for informing the public and enriching

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<sup>65</sup> UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175.

<sup>66</sup> Nacro, National Offender Management Service and Prison Governors Association – Oral Evidence (QC 126-136). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>67</sup> UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175.

<sup>68</sup> Leech, M and Shepherd, J, eds. (2003). Prisons Handbook 2003/4. Manchester: MLA press.

policy debates regarding the penal system. Enfranchisement will stimulate an informed public debate of penal reform and lead to a more humane prison environment.<sup>69</sup>

3.48 Argument 9: Disenfranchisement fails to guarantee the objective of punishment. Disenfranchisement of prisoners is primarily a penal policy seeking to satisfy public demands for retribution. It fails to achieve the objectives of the criminal system that aims to maintain public order and/or enhance public safety. Nacro, the Prison Reform Trust and Criminal Justice Alliance all indicate disenfranchisement does not act as an effective deterrent and is not regarded by prisoners as a punishment. Criminal Justice Alliance push this argument further, stating the removal of voting rights serves no useful purpose whilst damaging rehabilitation efforts and impact reoffending rates through stigmatisation and alienation.<sup>70</sup> Deprivation of the right to vote is not an inherent or necessary aspect of criminal punishment, but as the Prison Reform Trust describes an unjust additional punishment imposed at the point of sentence that bears no relation to the causes of crime.<sup>71</sup>

3.49 Argument 10: Unequal distribution of disenfranchisement as punishment. What is more, disenfranchisement is anomalous: it is not the sentence passed that determines the loss of the right to vote but the circumstances and timings of imprisonment.<sup>72</sup> A prisoner serving a short-term sentence may lose their vote purely because their sentence falls during the election period, whilst another prisoner with the same sentence may be able to vote because their sentence started a few months, weeks, or days earlier. Similarly, a prisoner serving a longer three-year sentence may be able to vote if their release coincides with the election period, whereas a prisoner serving a seven day sentence may lose their right if that week falls during the election period. The Voting by Convicted Prisoners Report 2010-2011 declared a problem with automaticity: a prisoner immediately loses the right at the point of sentencing and then will immediately regain the right when out of prison

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<sup>69</sup> Behan, C. (2015). Punishment, Prisoners and the Franchise. Howard League What is Justice? Working Papers 20/2015.

<sup>70</sup> Criminal Justice Alliance – Written Evidence (VEP 0002). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

<sup>71</sup> Prison Reform Trust. (2010). Barred from Voting: The right to vote for sentenced prisoners. London: Prison Reform Trust.

<sup>72</sup> Caritas Social Action Network (CSAN), the domestic action agency of Bishops' Conference and Catholic Bishops' Conference of England and Wales Department for Christian Responsibility and Citizenship – Written Evidence (VEP 0003). Joint Committee on the draft Voting Eligibility (Prisoners) Bill: Oral and Written Evidence. (2013).

on life license or on parole. Aidan O’Neil, Queens Council at both English and Scottish bars, who gave oral evidence informing the report, argued this this automaticity suggests the right to vote is not being taken seriously.<sup>73</sup>

### 3.50 Argument 11: Social Constructions of Criminality.

The issue of prisoner voting is at the heart of the issue regarding those who are given the power to participate in the political process and those who, both intentionally and unintentionally, are dis-empowered.<sup>74</sup> Overwhelmingly, prisoners are from poorer socio-economic areas and minority racial groups, communities who are already under-represented in the political arena.<sup>75</sup> Findings by the Hansard Society, in their annual Audit of Political Engagement 14: The 2017 Report, found less affluent social classes, those with no formal qualification and those from minority racial and ethnic groups are, when compared to the average levels across society, lacking in political knowledge and are less likely to participate in politics.<sup>76</sup> Thus, disenfranchisement contributes to the increasing marginalisation of these socio-economic groups and communities. From an egalitarian perspective, enfranchisement of prisoner is not only preferable but also necessary. Prison potentially provides a space to promote political knowledge and participation among groups who historically lack knowledge and activity in this area and, thus, give them a voice within the political arena.

### *Conclusion*

3.51 The case of prisoner voting is clearly a highly emotive political issue, which draws upon many moral and social arguments. Considering the default position in the UK has traditionally been the disenfranchisement of detained convicted prisoners, the arguments in favour of prisoner voting tends to be more developed and advanced. Those supporting prisoner enfranchisement have had to justify their position, clearly and strongly articulating why a change from the status quo is needed and morally justified. At its core, I would argue the two polar positions on prisoner voting

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<sup>73</sup> Voting by Convicted Prisoners: Summary of Evidence. Fifth Report of Session 2010-11. House of Commons: Political and Constitutional Reform Committee. (2011).

<sup>74</sup> Cheney, D. (2008) ‘Prisoners as Citizens in a Democracy’, Howard Journal, 47, 2, pp. 134–45.

<sup>75</sup> Behan, C. (2015). Punishment, Prisoners and the Franchise. Howard League What is Justice? Working Papers 20/2015.

<sup>76</sup> Hansard Society. (2017). Audit of Political Engagement 14: The 2017 Report. Available from: [https://assets.contentful.com/xkbace0jm9pp/1vNBTsOEiYciKEAqWAmEKi/c9cc36b98f60328c0327e313ab37ae0c/Audit\\_of\\_political\\_engagement\\_14\\_\\_2017\\_.pdf](https://assets.contentful.com/xkbace0jm9pp/1vNBTsOEiYciKEAqWAmEKi/c9cc36b98f60328c0327e313ab37ae0c/Audit_of_political_engagement_14__2017_.pdf)

originate with what one believes a penal institution to be: a place of punishment or a place of rehabilitation. If a prison is regarded as a place of punishment then, ancillary, to the punishment of detainment is the automatic and necessary loss of voting rights as a consequence of ones own criminal activity. In contrast, if prisons are regarded as a place of rehabilitation, where offenders should be given the means to return to normal life then, by encouraging responsibility and promoting inclusion and participation, voting can be part of an effective programme of rehabilitation and, thus, prisoner should retain their voting rights whilst detained.

3.52 The proposal by the Welsh Government suggests a broad agreement with the arguments in favour of prisoner voting and clearly acknowledges the issues with an automatic ban of prisoner voting. However, it is important to note that the proposal does not intend to enfranchise all prisoners with no consideration for the severity of the crime. In mapping out the arguments for and against prisoner voting, it is clear the proposal that has been advanced – by enfranchising those prisoners whose due release date falls within the term of the office being elected – balances the argument that voting positively contributed to a prisoner’s rehabilitation with the argument disenfranchisement is an effective and necessary punishment for the most serious of offences.

#### **4. Learning from Other Countries**

4.1 The debate on prisoner voting extends far beyond the UK. Many countries, both across Europe and further a field, have considered the issue of prisoner voting in the last couple of decades. What is more, cases from across Europe have been brought to the ECHR challenge prisoner disenfranchisement as a breach of human rights. In all these cases – most recently *Frodl v. Austria* in 2010 and *Scoppola v. Italy* in 2012 – the Grand Chamber has upheld the judgement they made in the 2005 *Hirst v. United Kingdom* case, stating a blanket ban constitutes an automatic and indiscriminate restriction on prisoner voting rights that violates the European Convention of Human Rights. Thus, across Europe many countries have recently addressed their legislation regarding prisoner voting, with the consequence most countries in Europe today permit prisoner voting in some capacity (see table 1).

Country	Full or Partial Right	Ban (legal or de facto)	Comment
Albania	✓		
Andorra		✓	
Armenia		✓	
Austria	✓		After losing a case before the ECHR in 2010 Austria passed laws to enfranchise prisoners.
Azerbaijan	✓		
Belgium	✓		Judicial discretion to enfranchise offenders sentenced to life-imprisonment or serving a sentence exceeding ten years, either permanently or for a period between 20 or 30 years. Judicial discretion to enfranchise those imprisoned for between five or ten years or offenders who have committed a misdemeanour either permanently or between 10 and 20 years.
Bosnia and Herzegovina	✓		
Bulgaria		✓	
Croatia	✓		
Cyprus	✓		Default position is all prisoners have voting rights, although these can be removed as part of the sentence.
Czech Republic	✓		
Denmark	✓		
Estonia		✓	
Finland	✓		
France	✓		Disenfranchisement is applied as an additional penalty by the courts at the judge's discretion, even where it is a mandatory consequence of a specified offence.
Georgia		✓	
Germany	✓		Where an offence targets the integrity of the state or the constitutional democratic order, voting rights will be lost.
Greece	✓		Certain categories of convicted and sentenced prisoners lose their right to vote as part of their forfeiture of "political rights" more generally. Those sentenced to life imprisonment lose their right to vote permanently.

Country	Full or Partial Right	Ban (legal or de facto)	Comment
Hungary		✓	
Iceland	✓		Loose voting rights if committed a felony (regarded as a more serious crime than a misdemeanour) where the defendant is eighteen years of age at the time the offence was committed and where the sentence is at least four years in length.
Ireland	✓		Introduced prisoner voting in 2006.
Italy	✓		Where applied disenfranchisement, which can be permanent or temporary, occurs by law rather than judicial discretion. Life-sentences and custodial sentences of more than five years attract permanent disenfranchisement, whilst custodial sentence between three and five years attract disenfranchisement for five years. In addition, certain specified offences or habitual offenders may be disenfranchised.
Latvia	✓		Following Hirst judgment, introduced prisoner voting in 2008.
Liechtenstein	✓		Following Hirst judgment, introduced partial prisoner voting.
Lithuania	✓		
Luxembourg	✓		Unless decided otherwise by the courts, prisoners retain voting rights. However, if sentenced to more than ten years voting rights are automatically lost and where sentenced to between five and ten years the judge can bar prisoner from voting for sentence duration, for 10-20 years or for life.
Macedonia	✓		
Malta	✓		Remain enfranchised if serving a sentence of 12 months or less or if imprisoned due to failure to pay a fine.
Moldova	✓		Since 2010 all prisoners have had the right to vote, unless the courts decided otherwise.
Monaco	✓		In principle all prisoners can vote, but this right can be revoked in individual cases.
Montenegro	✓		
Netherlands	✓		At full judicial discretion, voting rights can be removed if the sentence is for one year or more and where the offence

Country	Full or Partial Right	Ban (legal or de facto)	Comment
			affected the foundations of the state. However, in practice the courts have not exercised this right for sometime.
Norway	✓		All prisoners have voting rights, but this right can be removed in cases of treason, electoral fraud or national security. Yet, rarely practised.
Poland	✓		At the judge's discretion, an offender may be disenfranchised when the crime was committed with intent and when they have been sentenced for more than three years of imprisonment.
Portugal	✓		Unless deprived of their political rights as part of their sentence, prisoners are entitled to vote.
Romania	✓		Sentenced prisoner may be enfranchised where explicitly stated by the court or serving more than two years imprisonment.
Russia		✓	
San Marino		✓	
Serbia	✓		
Slovakia	✓		Disenfranchisement is based on sentence length and it is effective for the whole of the sentence but does not continue after release.
Slovenia	✓		
Spain	✓		
Sweden	✓		
Switzerland	✓		
Turkey	✓		Prisoners can vote if they are serving a sentence of less than a year, if they are on pre-trial detention and if they have committed minor offences.
Ukraine	✓		Permitted to vote in presidential and parliamentary elections but not local elections, as they are not regarded as members of the local community whilst detained.

**Table 1: Prisoners' Voting Right in Council of Europe Countries.<sup>77</sup>**

<sup>77</sup> Adapted from: Horne and White. (2015). Prisoner's Voting Rights (2005 to May 2015). House of Commons Briefing Paper SN01764. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

- 4.2 Whilst there are a handful of states that permit universal prisoner voting, generally most countries place restrictions on this right and disenfranchise prisoners in certain circumstances. There are two approaches by which restrictions on prisoner voting rights are advanced: the first approach disenfranchises prisoners based on sentence length and the second approach disenfranchises prisoners based on the type of offence committed. What is more, whilst in certain jurisdictions the circumstances of disenfranchisement are provided for in law, in other states there is complete judicial discretion with regards to disenfranchisement.
- 4.3 This section of the report, firstly, considers the offence-based approach for disenfranchisement drawing, in particular, on the case of Germany. The proposal by the Welsh Government is driven, in contrast, by the sentence length approach, however it is necessary to consider the alternative option and to map out the merits and advantages of this approach. Then the (limited) offence-based approach that is active in the UK will be discussed, whereby under legislation automatic disenfranchisement results due to the nature of the crime committed. The Welsh proposal does not intend to reform the current legislation in which certain offences, based on electoral malpractice, result in automatic disenfranchisement for five years from the date of conviction, regardless of sentence length.
- 4.4 The report, then, moves on to consider two case studies: the first from the Republic of Ireland and the second from Australia. Understanding how other states have enfranchised prisoners and of the practical mechanism that they have put in place to guarantee voting rights can be exercised by prisoners, can provide potential models for the Welsh Government to consider in developing their own policy, as well as forewarning of possible challenges in practically guaranteeing prisoner voting rights.

### **An Offence Based-Approach to Prisoner Voting**

- 4.5 When limiting a prisoner's right to vote there are two approaches that can be adopted. First, limitations may be based on the length of the sentence and, thus, the gravity of the offence, which is the approach that has been adopted in Australia and the approach the Welsh Government are proposing. Alternatively, limitations may be a result of the type of offence that is committed, whereby disenfranchisement is

an automatic resulting punishment of certain offences as provided for in the relevant legislation or arises with judicial discretion following a sentence for a specified offence. Overwhelmingly, the offences that entail a loss of voting rights tend to be those where the state or democratic order has been targeted or harmed. Where a state places limitation on a prisoner's voting right based on the offence committed, the legislation may restrict the potential for disenfranchisement based on the length of the sentence passed by the courts. In the Netherlands a prisoner sentenced to a year imprisonment or more may have their right to vote removed by the courts where the a crime has been committed against the state and, similarly, in Norway there is legislation permitting disenfranchisement in the case of treason, electoral fraud or national security.<sup>78</sup> In Germany, where all persons imprisoned retain their voting rights, disenfranchisements are preserved in legislation as an ancillary penalty applicable to only certain categories of offences such as rebellion, treason and electoral fraud. Disenfranchisement in Germany is only applicable to sentences over one-year imprisonment, with legislation determining a prisoner can only endure disenfranchisement for a period of two to five years and the removal of their voting right must be a response to the crime as specifically ordered by the sentencing judge.<sup>79</sup>

#### *A Justified and Appropriate Response*

- 4.6 Disenfranchisement as a response to a certain type of offence is generally regarded as justified and appropriate. What is more, as an ancillary punishment disenfranchisement may potentially act as a deterrent where it fits the offence committed. Thus, in circumstances where an offender has attacked the democratic structure of the state it would then appear justified that they are punished with the deprivation of their right to vote, which is the democratic tool par excellence. No relevant cases have been brought to the ECHR against a state limiting

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<sup>78</sup> Horne, A. and White, I. (2015). Prisoner's Voting Rights (2005 to May 2015). House of Commons Briefing Paper SN01764. Available from:

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

<sup>79</sup> Demleitner, N. V. (2009). U.S. Felon Disenfranchisement: Parting Ways with Western Europe. In: A. C. Ewald and B. Rottinghaus, eds. Criminal Disenfranchisement in an International Perspective. Cambridge: Cambridge University Press. 79-108.

enfranchisement under an offence-based approach.<sup>80</sup> Therefore, it can be reasonably assumed that an offence-based approach meets the ECHR's position as stated in the Hirst judgment by, firstly, not being an automatic blanked ban and, secondly, by taking the principle of proportionality into consideration with aligning disenfranchisement to the crime committed.<sup>81</sup> Furthermore, the European Council applauded Germany's offence-based approach to prisoner voting as both fair and proportional.

4.7 Whilst an offence-based approach to prisoner voting may be justified and legitimate, it is questionable as to whether it truly acts as a deterrent due to its lack of occurrence. As an offence-based approach tends to impose disenfranchisement as part of the punishment for a very specific number of offences that are not often committed, in jurisdictions applying a purely offence-based approach there tend to be few court rulings where disenfranchisement composes part of the sentence. In both the Netherlands and Norway the court holds full judicial discretion to apply legislation relating to the disenfranchisement of prisoners and rarely, in either country, is legislation permitting disenfranchisement actively used.<sup>82</sup> Whilst in Germany on average only 1.4 sentences per year involve the withdrawal of the right to vote. Although this questions the offence-based approach as a possible deterrent, on other hand it has been argued the limited number of cases evidencing disenfranchisement suggest it is in fact a highly efficient approach for utilising disenfranchisement as a punishment.<sup>83</sup>

4.8 As an offence-based approach result in very few cases of prisoners actually being disenfranchisement, there is a question of how well it would be received in a jurisdiction sceptical of prisoner voting. Throughout the UK prisoner voting has been a highly controversial topic and, although there is evidence views in Wales views may be changing, any research that has been carried out tends to indicate the

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<sup>80</sup> Scordia, V. (2018). Prisoner Voting Rights on a European Perspective: The cases of McHugh and Other v. The United Kingdom and the Thierry Delvinge v. Commune de Lesparre Médoc. In: D. Archibugi and A. E. Benli. Claiming Citizenship Rights in Europe: Emerging Challenges and Political Agents. Abingdon: Routledge.

<sup>81</sup> Case of Hirst v. The United Kingdom (No. 2). (2005). Judgement. The Court's Assessment. Available from: <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

<sup>82</sup> Horne, A. and White, I. (2015). Prisoner's Voting Rights (2005 to May 2015). House of Commons Briefing Paper SN01764. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764>

<sup>83</sup> Scordia, V. (2018). Prisoner Voting Rights on a European Perspective: The cases of McHugh and Other v. The United Kingdom and the Thierry Delvinge v. Commune de Lesparre Médoc. In: D. Archibugi and A. E. Benli. Claiming Citizenship Rights in Europe: Emerging Challenges and Political Agents. Abingdon: Routledge.

general public are overwhelmingly in favour of the detained convicted prisoners remaining disenfranchised. Furthermore, the recent Welsh Government Consultation Report regarding electoral reform indicated very view responses were in favour of disenfranchisement based on nature or severity of the crime committed. In contrast, the report illustrated strong support for disenfranchisement based on a sentence-length approach.<sup>84</sup> This suggests developing proposals under an offence-based approach of prisoner voting, which from experience in other jurisdictions can be regarded as more symbolic than a practical and real punishment, may be both politically and socially contentious.

#### *England and Wales and an Offence-Based Approach*

- 4.9 In England and Wales, there is also a series of crimes that result in automatic disenfranchisement. The Representation of the People Act 1983 determines that a person who has been found guilty of a corrupt practice of personation or of a corrupt practice relating to applications for postal and proxy votes automatically has their voting right removed and, so, will be ineligible to appear on the electoral register for five years from the date of the conviction or from the date the election court report was published.<sup>85</sup>
- 4.10 There is a lack of research regarding electoral malpractice across the UK, with no central bodies collecting and collating such information. To address this void The Joseph Rowntree Reform Trust commissioned a report, Purity of Elections in the UK: Causes for Concern,<sup>86</sup> which was published in 2008 and sought to uncover the level and potential for electoral malpractice across the UK. Although the lack of data prevents statistical analysis, data analysed by the Electoral Commission indicates of the 402 allegations of electoral offences made during the period of 2000-2006, approximately 23 per cent concerned alleged voting offences (including

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<sup>84</sup> Welsh Government. (2018). Welsh Government Consultation – Summary of Responses. Electoral Reform in Local Government in Wales.

<sup>85</sup> The Electoral Commission. (2018). Guidance for Electoral Registration Officers. Part Two – The Registration Framework. Available from: [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/162573/Part-2-Registration-framework.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/162573/Part-2-Registration-framework.pdf)

<sup>86</sup> Wilks-Heeg. (2008). Purity of Elections in the UK: Causes for Concern. A report commissioned by The Joseph Rowntree Reform Trust Ltd. York: The Joseph Rowntree Reform Trust Ltd. Available from: [http://www.jrrt.org.uk/sites/jrrt.org.uk/files/documents/Purityper cent20ofper cent20Electionsper cent20inper cent20theper cent20UK.pdf](http://www.jrrt.org.uk/sites/jrrt.org.uk/files/documents/Purityper%20ofper%20Electionsper%20inper%20theper%20UK.pdf)

personation, treating and undue influence).<sup>87</sup> However, following subsequent analysis by the Electoral Commission, where the number of cases was reduced from 402 cases to 383 “entries” to the Crown Prosecution Service files, only 24 of these entries resulted in prosecution under the Representation of the People Act 1983.<sup>88</sup> The report, however, does indicate the limited analysis that has been conducted only refers to cases tried under the Representation of the People Act (1983) and illustrates the increasing tendency for convictions of electoral fraud to be brought under alternative legislation.<sup>89</sup> Nevertheless, the UK’s experience does seem to mirror the experience across Europe, with it practically being very rare a person in England or Wales would be disenfranchised on the basis of a specific crime.

4.11 It is important to note, in contrast to the examples from mainland Europe previously discussed, the UK operates an offence-based approach in a limited capacity and in tandem with a broad ban on voting for all detained convicted prisoners, with the latter approach being the centre of the controversy around prisoner voting in England and Wales. As restriction based on an offence-based approach tends to be regarded as legitimate and justified, the electoral proposals that have been set forth by the Welsh Government do not seek to make any changes in relation to the electoral based offences resulting in automatic disenfranchisement.

### **Prisoner Voting Rights in the Republic of Ireland**

4.12 The electoral law in the Republic of Ireland grants voting rights to different people depending upon the type of election:

- Irish citizens including prisoners, aged eighteen or over, may vote at every election and referendum

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<sup>87</sup> Electoral Commission. (2007). *Allegations of Electoral Malpractice in England and Wales, 2000-2006*. London: The Electoral Commission. Available from: [http://www.electoralcommission.org.uk/data/assets/pdf\\_file/0009/60498/Allegations-of-electoral-malpractice-in-England-and-Wales-2000-06.pdf](http://www.electoralcommission.org.uk/data/assets/pdf_file/0009/60498/Allegations-of-electoral-malpractice-in-England-and-Wales-2000-06.pdf)

<sup>88</sup> Electoral Commission. (2007). *Further Analysis of CPS Files on Allegations of Electoral Malpractice in England and Wales, 2000-2006*. London: The Electoral Commission.

<sup>89</sup> Wilks-Heeg. (2008). *Purity of Elections in the UK: Causes for Concern*. A report commissioned by The Joseph Rowntree Reform Trust Ltd. York: The Joseph Rowntree Reform Trust Ltd. Available from: <http://www.jrrt.org.uk/sites/jrrt.org.uk/files/documents/Purityper cent20ofper cent20Electionsper cent20inper cent20theper cent20UK.pdf>

- British citizens may vote at Dáil elections, European elections and local elections
- Other European Union (EU) citizens may vote at European and local elections
- Non-EU citizens may vote at local elections only.

4.13 All prisoners, if Irish citizens and aged eighteen or above, can vote in local, national and European elections and referendums regardless of length of imprisonment or type of offence. Prisoners in Ireland have technically always had the right to vote, but historically no mechanism was in place through which prisoners could exercise this right. The Electoral (Amendment) Act 2006 altered this by putting in place procedures enabling prisoners to vote by post.<sup>90</sup> Following the passing of the 2006 Act, prisoners in Ireland were granted the right to vote by post. This clearly demonstrates that if voting rights are to be extended to prisoners, there needs to be the provisions and systems in place to ensure this right can be availed of.

4.14 It is important to note Irish citizens living abroad cannot be entered on the register of electors and, so, are not entitled to vote in any election or referendum. The only exception relates to Irish officials, and their spouses, on duty abroad who are entitled to register on the postal voters list. In terms of prisoner voting, this means Irish prisoners detained abroad, including in Northern Ireland, do not have voting rights.

#### *Postal Voting in Ireland*

4.15 Irish citizens are required to vote in person at official voting centres, however approximately 17,000 people voted by post in the 2017 Irish Parliamentary Elections. In Ireland, you are eligible to vote by post if you are:

- An Irish diplomat or his/her spouse posted abroad
- A member of the Garda Síochána
- A whole-time member of the Defence Forces.

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<sup>90</sup> Electoral (Amendment) Act 2006. (2006). Number 33.

4.16 There are also people eligible for postal voting if they are unable to go to a polling station in person because:

- Of a physical illness or disability
- You are studying full time at an educational institution in Ireland, which is away from your home address where you are registered
- You are unable to vote at your polling station because of your occupation
- You are unable to vote at your polling station because you are in prison as a result of an order of a court.

4.17 The Electoral (Amendment) Act 2006 granted prisoners eligibility to the postal voters list.<sup>91</sup> Once someone has been registered as a postal voter, they can no longer vote at a polling station but must vote by post.

#### *Knowing their Rights*

4.18 On entering prison, prisoners receive information in the form of leaflets and posters detailing their right to vote and the mechanisms in place that allow them to exercise that right. Application forms to register as a postal voter are made available in every prison by the local authority and these forms contain the relevant explanatory information to assist with their completion. Rather than responsibility falling to the individual prisoner, the onus is on authorities to make sure prisoners are aware of their rights and have the capacity to exercise their voting right accordingly. The Prison Service, in partnership with what at the time was the Department on Environment and Local Government, developed posters and leaflets informing prisoners of their voting rights. The Select Committee examining the Electoral (Amendment) Act 2006, stated there was also a role for national parties to play in encouraging prisoners to see voting as part of their duty as citizens.<sup>92</sup>

#### *Registering to Vote*

4.19 The Irish Prison Service is not only responsible for informing prisoners of their right to vote, but is also responsible for detailing to prisoners how they can register to

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<sup>91</sup> *ibid.*

<sup>92</sup> Select Committee on Environment and Local Government Debate. 2 November, 2006. Available from: [https://beta.oireachtas.ie/en/debates/debate/select\\_committee\\_on\\_environment\\_and\\_local\\_government/2006-11-02/](https://beta.oireachtas.ie/en/debates/debate/select_committee_on_environment_and_local_government/2006-11-02/)

vote. Registration forms are available in all prisons and all forms contain the necessary explanatory information to assist with their completion. However, the Prison Service has a duty, where required, to provide support to prisoners wishing to fill out the application form/s. If an applicant is unable to write, an appropriate person in the Prison Service may fill out the form on behalf of the prisoner, with the applicant placing his or her mark on the application form where required.

- 4.20 Prisoners, who are not already registered to vote, must apply for inclusion in the supplement to the register of electors.<sup>93</sup> Prisoners have the right to be registered in the political constituency in which they would normally be living if they were not in prison. Therefore, in order for prisoners to exercise their right to vote they must be able to register using the address where they had previously been living; this requirement prohibits the voting capacity of prisoners who are homeless, for those who did not have a fixed address prior to their imprisonment and for prisoners whose home situation alters whilst they are detained. The form requires a certification of the applicant's identity by the relevant official of the prison in which the prisoner is detained. The "relevant official" is the Governor or a person appointed by him or her to carry out registration and voting-related duties. If the prisoner is applying after an election or referendum has been called, to be considered for inclusion in that up and coming election or referendum the application must reach the City, County or City and County Council concerned prior to the fourteenth day (Sundays, public holidays and Good Friday excluded) before polling day. It is the duty of the Prison Service to send off the completed application form to the relevant local authority. If a prisoner is not already registered as an elector the registration authority will not be in a position to consider their application for inclusion in the Supplement to the Postal Voters List.
- 4.21 All prisoners, whether already on the electoral register or applying to the register, must apply for inclusion in the Supplement to the Postal Voters List. There is a specific application form for prisoners to apply for the postal vote, which certified that the applicant is detained in a prison pursuant to an order of the court and is by

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<sup>93</sup> Application for inclusion in the 2015/2016 Supplement to the Register of Electors by electors detained in a prison pursuant to an order of a court. (RFA 4). Form Version: 18/08/2015. Available from: <https://www.limerick.ie/sites/default/files/media/documents/2017-05/RFAper cent204per cent20Application.pdf>

virtue of their circumstances unable to vote in person at a polling station on the day of the election/referendum.<sup>94</sup> There are no restrictions in place with regards to when this form can be completed and sent to the registration authority in the area in which the application is either registered or has applied for registration. However, the latest date for receipt of an application by a registration authority for inclusion in the supplement to the postal voters list is two days after the date of dissolution of the Dáil, in the case of a general election, and two days after the polling day order is made for other elections and referendums. Once the application form has been completed and is handed to the appropriate prison official, it is their responsibility to send it to the relevant registration authority. The relevant authority will notify prisoners of the success of their application and, if the application is refused, the registration authority is required to supply a reason for the refusal. In some circumstances, the registration authority may require additional information or documents to reach a conclusion on eligibility for inclusion. Failure to supply the requested documents in the timeframe stated will result in the application being withdrawn.

- 4.22 Those who have had their application granted and are included on the Supplement to the Postal Voters List, can only vote by post. On leaving prison it is the responsibility of the prisoner to inform the registration authority they have been released and to request their name to be deleted from the postal voters list. Electors who have been released need to write to the relevant registration authority within four days of the dissolution of the Dáil for a general election or within two days of the making of an order appointing polling day at a Dáil by-election or a Presidential, European or local election or a referendum. If, however, an elector who has been released from prison remains on the postal voter list on the day of an election or referendum, and where there is time to do so, the RO can re-address the envelope containing, among other things, the ballot paper to the home address on receipt of the returned envelope from the prison authorities. An elector in these circumstances can then vote at their local Garda station as other postal voter do. If a prisoner has

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<sup>94</sup> Application for inclusion in the Supplement to the Postal Voters List by electors detained in a prison pursuant to an order of a court. (RFG 1). Form Version: 19/08/2015. Available from: <http://www.sdcc.ie/sites/default/files/form/rfg1-postal-supplement-prisoners-english.pdf>

been transferred to another prison, the prison authorities re-address the envelope to the new prison where the vote can then be cast.

### *Informed Voters*

- 4.23 The Irish Prison Service actively encourages prisoners to exercise their voting rights as informed citizens. As prisoners can often be isolated from the relevant issues in their local constituencies and society more broadly, there needs to be the necessary provisions to ensure prisoners are informed about what each candidate stands for in an election and the main points of debates of a referendum. Prisoners in Ireland have access to generic election literature and the Prison Service will provide assistance in obtaining material from particular candidates if that is required. Prisoners have access to television and radio, which can be used to listen to election and referendum debates and to hear the latest progress from the election on the national news. In addition, prisoners also have access to newspapers and this helps maintain knowledge of issues within local constituencies and across Ireland. Educational facilities in prisons are an integral source for prisoners to keep up to date with the latest developments at a time of an election or referendum. Families have also been identified as an important avenue for prisoners staying up to date with election and referendum debates, with families being actively encouraged to discuss local and national issue with their relative detained in prison. Although no prison has ever been canvassed by an electoral candidate during an election, the Prison Service have said it would welcome any candidates who did want to canvas in any of its prisons and would ensure the necessary arrangement would be made to allow for this to successfully happen.<sup>95</sup>
- 4.24 Prisoners in general tend to have lower literacy levels, with approximately 80 per cent of Irish prisoners being unable to read.<sup>96</sup> Poor literary levels needs to be taken into consideration when prisoners are seeking information about an election or referendum and, thus, information and developments should not only be available in written form. It has been advised that the educational section of the prison should

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<sup>95</sup> Gallagher, C. (2016). Prisoners Show Little Interest in Using the Vote, The Irish Times.

<sup>96</sup> Select Committee on Environment and Local Government Debate. 2 November, 2006. Available from: [https://beta.oireachtas.ie/en/debates/debate/select\\_committee\\_on\\_environment\\_and\\_local\\_government/2006-11-02/](https://beta.oireachtas.ie/en/debates/debate/select_committee_on_environment_and_local_government/2006-11-02/)

produce helpful information a week or two before the ballot, using a range of different mediums.<sup>97</sup>

### *How Prisoner's Vote*

- 4.25 Electors entered onto the supplement to the postal list are sent a ballot paper and declaration of identity before polling day. In the presence of the prison official the elector must sign or mark the declaration of identity; the prison official, on being satisfied with the elector's identity, witnesses the declaration and stamps the declaration form with the prison stamp as required. To maintain the secrecy of the ballot, the vote can be cast in the in the prisoner's cell in the absence of any other prisoners. Voting can also take place in the common area, such as a landing, library or recreation areas, which will need to be cleared during voting. The prisoner can then mark the ballot paper in secret and put it into the ballot paper envelope. The ballot paper envelope is then put by the prisoner into the covering envelope with the declaration of identity that they seal. The sealed envelope is then handed back to the relevant prison official, who holds the responsibility of sending it off to the R0 as soon as possible. There is also the potential for prisoners to post their ballot into ballot boxes, mirroring the usual election process.
- 4.26 The prison official who oversees the process will be at a senior level, such as a governor or deputy governor. As governors and deputy governors are responsible for all other aspects of the prisoner's lives, they have been deemed to be the most appropriate people to oversee the voting process. During the Select Committee Debate, there was a discussion as to whether someone from outside of the Prison Service association with the electoral process should also be present during the voting to ensure transparency. It was suggested there could be an independent person who would be required to liaise with all the fourteen prisons in Ireland to sign off on voting. However, as the main role of the official overseeing the process is the certification of the identity of the elector, someone within the Prison Service was determined to be the most appropriate person for the role.<sup>98</sup>

### *Secrecy*

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<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

4.27 As for all voters, prisoners also have a right to secrecy of the ballot. The right of prisoners to cast their vote in privacy is protected and, as far as is possible, the voting process in prisons replicates the situation in regular polling booths. Although no one would request for CCTV systems to be turned off at times of voting, CCTV does not scrutinise the voting process to ensure secrecy is not compromised.<sup>99</sup> In addition, prison censors are banned from examining envelopes containing voting papers.<sup>100</sup>

#### *Data Protection*

4.28 In addition to secrecy, there is also a question of data protection that arises in enfranchising prisoners. The electoral register in Ireland does not flag up prisoners, but simply specifies which electors vote by post. The address that appears on the electoral register is not the prison address but the prisoner's home address, which prevents prisoners from being identified by prison locations. The only person who has access to the prison address is the RO, as part of their role requires them to send out ballot papers for postal voters. This information cannot be subject to the Freedom of Information Act or made available to political parties for the purpose of canvassing, as this would compromise confidentiality.<sup>101</sup>

#### *Reporting and Reviewing the Process*

4.29 In Ireland prison inspectors are required to report at regular intervals on the success of the system put in place for prisoner voting. The Department of Housing, Planning and Local Government, which was formerly the Department of Environment and Local Government, is required to collate data on the number of prisoners availing of postal voting facilities. Such data was deemed essential by the Select Committee Debate to provide an indirect assessment on the workings of the system.<sup>102</sup>

4.30 Despite the efforts of the Irish Prison Service and even with prisoners stating it is far easier for them to vote in prison,<sup>103</sup> prisoner voting in Ireland has tended to be very

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<sup>99</sup> Select Committee on Environment and Local Government Debate. 2 November, 2006. Available from: [https://beta.oireachtas.ie/en/debates/debate/select\\_committee\\_on\\_environment\\_and\\_local\\_government/2006-11-02/](https://beta.oireachtas.ie/en/debates/debate/select_committee_on_environment_and_local_government/2006-11-02/)

<sup>100</sup> Brady, T. (2011). Only 191 Prisoners Out of 4,500 Register to Vote in Jail. The Irish Independent.

<sup>101</sup> Select Committee on Environment and Local Government Debate. 2 November, 2006. Available from: [https://beta.oireachtas.ie/en/debates/debate/select\\_committee\\_on\\_environment\\_and\\_local\\_government/2006-11-02/](https://beta.oireachtas.ie/en/debates/debate/select_committee_on_environment_and_local_government/2006-11-02/)

<sup>102</sup> *ibid.*

<sup>103</sup> Hennessey, M. (2016). Prisoners Can Vote – So Why Don't They? [thejournal.ie](http://thejournal.ie).

low. In 2016 the Irish Times reported just 6.2 per cent of Irish prisoners exercised the right to vote in the last general election (national turnout was 65.2 per cent). It is interesting to note that voting rates differ across Ireland's fourteen prisons, with Wheatfield prison having a turnout of 16.1 per cent whilst no prisoners detained in Cork prison or in Castlerea prison voted.<sup>104</sup> The general pattern suggests greater registration levels in institutions that house long-term and more mature prisoners. Portlaoise prison houses offenders who have been convicted for more serious crimes and the remnants of the paramilitary republican movement (who are likely to be more politically active) and 50 per cent of its prisoners were registered to vote in 2008. In comparison, in Shelton Abbey – an open prison where many inmates leave on a daily basis for work, education and training – just 1 per cent of prisoners were registered.<sup>105</sup> However, this trend can be questioned as in the 2016 General Election the highest turnouts were in Wheatfield Prison (16.1 per cent) and Shelton Abbey (11.7 per cent), the former a closed medium-security facility and the latter, as stated before, an open, low-security prison. Voting participation alters whether the vote is for an election or a referendum and with the type of election or with the referendum issue.<sup>106</sup> Only one in five of prisoners who are registered to vote actually voted in the 2012 Children's Rights Referendum, however nationally turnout was low at 33.5 per cent.<sup>107</sup> In contrast, 71.4 per cent of prisoners who were registered to vote exercised this right in the 2007 General Election, whilst only 67% of the registered national population voted.<sup>108</sup> However, it is important to note, that this was the first election in which prisoners were enfranchised and, thus, the novelty of gaining voting rights may have resulted in the high turnout among prisoners.

4.31 The Prison Service has attributed low participation levels to registration only taking place once a year, with the consequence the prison population may be totally

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<sup>104</sup> Gallagher, C. (2016). Prisoners Show Little Interest in Using the Vote. The Irish Times. Available from: <https://www.thetimes.co.uk/article/prisoners-show-little-interest-in-using-votes-cqckl3djr>

<sup>105</sup> Behan, C. and O'Donnell. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. British Journal of Criminology. 48, 319-336.

<sup>106</sup> Gallagher, C. (2016). Prisoners Show Little Interest in Using the Vote. The Irish Times. Available from: <https://www.thetimes.co.uk/article/prisoners-show-little-interest-in-using-votes-cqckl3djr>

<sup>107</sup> Hennessey, M. (2016). Prisoners Can Vote – So Why Don't They? thejournal.ie. Available from: <http://www.thejournal.ie/prisoners-voting-2622117-Feb2016/>

<sup>108</sup> Behan, C. and O'Donnell. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. British Journal of Criminology. 48, 319-336.

different at the time of the election.<sup>109</sup> As sentences in Ireland tend to be short, with the majority being for less than six months, those who may have registered in prison could actually be out of prison by the time the election takes place.<sup>110</sup> Additionally, the registration procedure for the supplementary register allows for only a two-day window for registration after an election is called. Such a tight turn around can put prisoners off from applying or, by the time they come to register, prisoners find out they are too late. Thus, it is likely a high proportion of applications fail to meet the deadline.

### **Prisoner Voting Rights in Australia**

4.32 In Australia it is compulsory to vote in federal elections if you are:

- 18 years of older
- An Australian citizen (or a British subject who was on the commonwealth electoral roll on 25 January 1984).

4.33 This includes prisoners who are serving a prison sentence of less than three years. Prisoners serving sentences that are three years or longer can remain on the electoral roll, but they are not entitled to vote until they are released from prison. Thus, the entitlement to vote is based on the sentence that has been passed in the court, not on the remaining length of detainment to be served by a prisoner. If a person has been convicted of treason or treachery and has not been pardoned, they are not entitled to have their name placed or retained on any electoral roll at any Senate or House of Representatives election.

4.34 For state and local elections, voting rights for prisoners are different in each state and territory, with disenfranchisement of prisoners relating to the length of their sentence (see table 2). What is more it can also differ from state to state as to whether a prisoner is eligible to vote whilst on parole (which is equivalent to licence in England and Wales) for state elections and federal elections. For example, for federal elections a prisoner who is on parole or home detention is eligible to vote,

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<sup>109</sup> Hennessey, M. (2016). Prisoners Can Vote – So Why Don't They? [thejournal.ie](http://www.thejournal.ie/prisoners-voting-2622117-Feb2016/). Available from: <http://www.thejournal.ie/prisoners-voting-2622117-Feb2016/>

<sup>110</sup> Behan, C. and O'Donnell. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. *British Journal of Criminology*. 48, 319-336.

whilst in the state of Victoria parole is included in length of imprisonment and, so, a prisoner is only eligible to vote if their “top sentence” (including parole) is less than five years.<sup>111</sup> It is important to note – especially considering the Welsh Government proposals will result in a situation whereby prisoners can vote in local government elections but not in general elections or assembly elections (although the latter is also being reviewed) – that in Australia prisoner voting rights varying between states and for different elections does create a large amount of confusion.<sup>112</sup>

Jurisdiction	Point of Disqualification
Commonwealth	3 years or more
New South Wales	1 year or more
Victoria	5 years or more
Queensland	Any prison sentence
Western Australia	1 year or more
South Australia	No restriction
Tasmania	3 years or more
Australian Central Territory	No restriction
Northern Territory	1 years or more

**Table 2: Length of sentence disqualifying prisoners from voting by Australian jurisdiction.<sup>113</sup>**

*History of Prisoner Voting in Australia*

4.35 The 1902 Commonwealth Franchise Act disenfranchised persons who have been convicted and are under sentence or subject to be sentenced for any offence punishable under the law of any part of the King’s dominions by imprisonment for one year or longer.<sup>114</sup> This provision remained substantially the same when the

<sup>111</sup> Personal communication with the Victorian Electoral Commission. 09/04/2018.

<sup>112</sup> *ibid.*

<sup>113</sup> Hill, L. (2009). Prisoner Voting Rights. Symposium: Protecting Human Rights in Australia: Challenges and Strategies.

<sup>114</sup> Commonwealth Franchise Act. No. 8 of 1902.

Commonwealth Electoral Act was enacted in 1918 and so it stood for six and half decades. In 1983 the disqualification was amended and anyone sentenced for an offence punishable under the law of the commonwealth or of a state or territory by imprisonment for five years or longer was disenfranchised (Davidson, 2004).<sup>115</sup> Both this provision, and its predecessor, applied to offences **punishable by** a given period, which is not necessarily, and in fact is usually not, a reference to the actual period served by the prisoner. This changed in 1995 when the provision was altered to exclude persons **serving a sentence** of five years or more and, thus, increased the number of prisoners who were enfranchised.

4.36 In 1995 the government introduced legislation enfranchising all prisoners irrespective of sentence length. However, following considerable opposition this provision was withdrawn. In 2004 there was another electoral change that reversed the blanket ban and enfranchised prisoners serving less than three years, whilst those serving three years or more were not entitled to vote or to enrol. Then in 2006 the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act, disqualified all prisoners serving full-time sentence regardless of sentence length, from voting in elections for both the House of Representatives and the Senate. Although disqualified from voting, under this amendment all prisoners serving a full-time sentence, irrespective of sentence length, were entitled to remain on or to be added to the electoral roll. In practical terms, prisoner disqualification was achieved by ensuring that prisoners did not appear on the certified lists of voters. Prisoners serving sentences of imprisonment were identified in monthly lists of convictions, forwarded by the Controllers-General of Prisons to each state and territory who then removed the names given on the conviction list from the certified list of voters. The Explanatory Memorandum to the 2006 Act explained prisoners serving alternative sentences – such as periodic or home detention, non-custodial sentences and parole – would not be disqualified from voting.<sup>116</sup>

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<sup>115</sup> Davidson, J. (2004). Prisoners and the Right to Vote in Australia. Current Issue Brief no. 12 2003-04. Available from: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/cib0304/04cib12](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0304/04cib12)

<sup>116</sup> House of Representatives. (2006). Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006: Explanatory Memorandum.

4.37 Following an Australian High Court decision in 2007, the government introduced new legislation in 2011. The Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011 reinstated the right to vote for prisoners serving a sentence of less than three years, which had been constitutionally mandated by the High Court in 2007.<sup>117</sup> When removing political rights, it is of integral importance the principle of proportionality takes into consideration the seriousness of the offence and it was concluded sentences of three years or longer are indicative of the seriousness of the offence.<sup>118</sup> The 2011 Act did, however, retain the previous ruling in that whilst 'prisoners serving a sentence of imprisonment of three years or longer will not be permitted to vote, the legislation will provide that prisoners may enrol or continue to be enrolled.'<sup>119</sup>

*The Electoral Roll and Prisoners (Federal Elections)*

4.38 All prisoners are entitled to remain enrolled or to enter onto the electoral roll while they are detained in prison, regardless of whether or not they are eligible to vote. Prisoners who are already enrolled remain on the electoral roll at the same address they were previously registered at. However, they are advised to write to the AEC to inform them they are absent from their enrolled address, to ensure they are not removed from the roll while detained in prison. Section 96A of the Commonwealth Electoral Act states:

4.39 An eligible person who is serving a sentence of imprisonment but who was not enrolled when he or she began serving the sentence is entitled to be enrolled for:

- a) the Subdivision for which the person was entitled to be enrolled at that time
- b) if the person was not so entitled, a Subdivision for which any of the person's next of kin is enrolled
- c) if neither of paragraphs (a) and (b) is applicable, the Subdivision in which the person was born; and

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<sup>117</sup> Roach v. Electoral Commission. (2007) HCA 43. High court of Australia. Available from: <http://eresources.hcourt.gov.au/downloadPdf/2007/HCA/43>

<sup>118</sup> House of Representatives. (2010). Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010: Explanatory Memorandum.

<sup>119</sup> Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010. Bills Digest no. 71 2010–11. Available from: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1011a/11bd071](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd071)

d) if none of the preceding paragraphs is applicable, the Subdivision with which the person has the closest connection.<sup>120</sup>

4.40 It should be noted under option (d) and the provision of the Subdivision of closest connection, prisoners are eligible to register using the address of the prison in which they are detained.<sup>121</sup> However, as the registration options are hierarchical and, so, option (d) is only permitted where the former options are not available, few prisoners register using the address of their place of detainment. The hierarchical nature of the possible addresses of registration prevents prisoners from overwhelmingly registering at their place of detainment and, thus, having an undue influence on the election within that locality.<sup>122</sup> The enrolment form requires a witness declaration by someone who is on the electoral roll and applicants enrol with their state for federal elections. When a prisoner is released they must complete a new enrolment form to advise the AEC of their new address, so the electoral roll can be updated accordingly.

4.41 It is through legally mandated correspondence between the Controller-General of Prisons of a state and the Electoral Commissioner that a list of certified voters is established. The duty of the Controller-General to correspond directly Electoral Commissioner is provided for in law under Section 109 of the Commonwealth Electoral Act 1918, as amended by the 2011 Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act, which states:

4.42 The Controller-General of Prisons of a State must, as soon as practicable after the beginning of each month, forward to the Electoral Commissioner (or to an officer nominated by the Electoral Commissioner) a list of:

- a) the names, addresses, occupations and sexes of all persons who began serving a sentence of imprisonment of three years or longer in the state; and
- b) the names, addresses, occupations and sexes of all persons who ceased to serve a sentence of imprisonment of three years or longer in the State;

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<sup>120</sup> Commonwealth Electoral Act 1918. No 27, 1918. Compilation date: 14 March 2018. Section 96A. Available from: <https://www.legislation.gov.au/Details/C2018C00062>

<sup>121</sup> Personal communication with the Australian Electoral Commission. 13/04/2018.

<sup>122</sup> *ibid.*

during the preceding month.<sup>123</sup>

- 4.43 This ensures that the list of certified voter remains up to date. If an election is called, the Controller-General of Prisons of a state must, within four days of the close of the rolls for an election, send a list of persons to the Electoral Commissioner who, between the last monthly list forwarded and the day of the close of the rolls: (a) began serving a sentence of imprisonment of three years or longer in the state (or territory); and (b) ceased to serve a sentence of imprisonment of three years or longer in the state (or territory).<sup>124</sup> This correspondence is sent from the Controller General to the Electoral Commissioner via a secure data exchange.<sup>125</sup> Under section 90A of Commonwealth Electoral Act, a copy of the electoral roll must be made available for public inspection. The published electoral role specifies a persons name and address and, where a prisoner has registered on the basis of their place of detainment, there name will appear on the register alongside the prison address.<sup>126</sup> Thus, there are no special provisions in place to prevent prisoners being identified from the prison address.

#### *How Prisoners Vote*

- 4.44 Enrolled prisoners can vote in a federal election in two ways: by postal vote or by voting in person via a prison mobile polling team. However, there are currently only two jurisdictions conducting mobile voting in their state/territory.<sup>127</sup> In order to vote by post, prisoners must either apply at any time to become a General Postal Voter (GPV) or apply for a postal vote for each election. GPVs are voters who are routinely unable to attend a polling booth and, once registered as GPV, the elector is automatically sent a postal vote for every election in which they are eligible to vote. Alternatively, during election some prisons are visited by mobile polling teams where national electoral commission staff set up polling facilities to directly collect

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<sup>123</sup> Commonwealth Electoral Act 1918. No. 27, 1918. Compilation date: 14 March 2018. Section 109. Available from: <https://www.legislation.gov.au/Details/C2018C00062>

<sup>124</sup> Electoral and Referendum Amendment (Enrolment and Prisoner Voting Act) 2011. No. 29, 2011. Available from: <https://www.legislation.gov.au/Details/C2011A00029>

<sup>125</sup> Personal communication with the Victoria Electoral Commission. 09/04/2018.

<sup>126</sup> Personal communication with the Australian Electoral Commission. 13/04/2018.

<sup>127</sup> *ibid.*

votes from prisoners. These mobile polling booths operate in the same way as ordinary polling places, with both voting screens and ballot boxes.<sup>128</sup>

### **Prisoner Voting in the State of Victoria**

- 4.45 In Australia there is a different status of who can vote in federal elections and who can vote in state elections, with the situation for prisoners being no exception. In the state of Victoria a person serving a sentence of five years imprisonment or more for an offence against the law of Victoria, the commonwealth or another state or territory of the commonwealth is not entitled to vote **or** to be enrolled for the council or assembly elections.<sup>129</sup> Prisoners who are under the care of the Public Trustee and prisoners who by reason of unsound mind are incapable of understanding the nature and significance of voting are also disenfranchised from voting.
- 4.46 Aside to a difference in sentence length and a restricted capacity of prisoner enrolment in Victoria, there is a further important difference between commonwealth law and state law. The Commonwealth Act provides that a person is considered to be serving a sentence of imprisonment only if they are in detention on a full-time basis whilst, under state law, a person is regarded as still being under sentence until the parole period elapses or until the prisoner is otherwise discharged from the prison.<sup>130</sup> Thus, while a prisoner on parole can vote in a federal election regardless of sentence length, a prisoner serving a parole sentence of five years or more would not be eligible to vote in a Victorian council or assembly election.
- 4.47 Communication with the Victorian Electoral Commission (VEC) has illustrated the confusion that can arise due to prisoner voting rights varying from state to state and from local and state elections to federal elections. To prevent such confusion, the VEC is working with the AEC and Corrections Victoria to produce a “Voting in Prisons” resource for Victoria. The resource produced will be sent to all prisons in Victoria and will be supported by training for peer listeners in prison, which will ensure they have the knowledge to help fellow prisoners navigate the enrolling and

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<sup>128</sup> Australian Electoral Commission. (2007). Fact Sheet: Prisoner Voting.

<sup>129</sup> Electoral Act 2002. Act No. 23/2002. Victoria. Available from:

[http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/\\$FILE/02-023a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/$FILE/02-023a.pdf)

<sup>130</sup> Corrections Act 1986. No. 117 of 1986, version no. 083. Victoria. Available from:

[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/LTObject\\_Store/LTObjSt1.nsf/DDE300B846EED9C7CA257616000A3571/A9534E73927140B7CA257761001C7975/\\$FILE/86-117a083.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/LTObjSt1.nsf/DDE300B846EED9C7CA257616000A3571/A9534E73927140B7CA257761001C7975/$FILE/86-117a083.pdf)

voting procedure.<sup>131</sup> This illustrates prisoner voting can be a complex issue, especially when their voting rights are not uniform geographically or across all elections and indicates the need for clear guidance and instructions, particular for prisoners themselves and for those working in the Prison Service.

#### *The Electoral Roll and Prisoners in Victoria*

- 4.48 In contrast to federal elections, prisoners are only entitled to enrol for assembly and council Elections in Victoria if they are serving a sentence of less than five years. Prisons in Victoria will provide information to prisoners about their voting rights and how to register to the electoral roll. Prisons also hold the Victorian Election Commission form which prisoners must complete to vote in state and federal elections. Prisoners already on the electoral roll can inform the Electoral Commission they are absent from their enrolled address by completing this form, which will ensure they are not removed from the roll while imprisoned. If an elector's home address changes while they are imprisoned or on release of imprisonment the VEC should be noted. Prisoners serving a five-year sentence or more will automatically be removed from the state electoral roll, preventing them from voting in assembly or council elections for the State of Victoria. Section 26 of the Electoral Act 2002 requires the Secretary to the Department of Justice must, as soon as is practicable, after the beginning of each month forward to the Commission a list specifying the name, date of birth, sex and last known place of residence of each person, who during the preceding month, has been convicted in Victoria and is serving a sentence of five years imprisonment or more for an offence against the law of Victoria, the commonwealth or another state or territory of the commonwealth.<sup>132</sup> On the basis of this list the relevant prisoners will be removed from the electoral roll. However, an administrative notation is added to the record to identify the date from which the prisoner in question will be eligible to reenrol, which is the date their sentence is due to end.<sup>133</sup> Once prisoners who have been

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<sup>131</sup> Personal communication with the Victoria Electoral Commission. 09/04/2018.

<sup>132</sup> Electoral Act 2002. Act No. 23/2002. Victoria. Available from:

[http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/\\$FILE/02-023a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/$FILE/02-023a.pdf)

<sup>133</sup> Personal communication with the Victorian Electoral Commission. 09/04/2018.

disenfranchised have completed their sentence, including parole, they should re-register to vote for state assembly and council elections.

4.49 If a prisoner is already enrolled, their enrolment address remains the same. As for federal elections, prisoners who are eligible to vote but are not already on the electoral roll will need to register at the address where:

- a) I was last eligible to be enrolled
- b) one of my next of kin is currently enrolled, as I have not previously been eligible to enrol (the full name of the next of kin must be provided on the enrolment application)
- c) I was born, as neither a) nor b) applies
- d) I have the closest connection, as none of the above statements apply.<sup>134</sup>

4.50 What is more, a person detained in a prison in, for example Queensland (where under state legislation no prisoners have the right to vote in state or local elections), but whose residential address at the point when the offence was committed was in Victoria, is eligible to enrol to vote in Victorian State elections as long as their sentence length is less than five years.

4.51 Although the address options for federal elections and assembly and council elections in Victoria are the same, this is not the case across Australia. In the state of South Australia prisoners can vote regardless of the length of sentence and can be registered at one address for federal elections and a different address for state elections. At the state level the following options are available:

4.52 I am serving a full-time sentence of imprisonment and I am applying to enrol for South Australian State elections at the address:

Please select the FIRST statement that applied to you and show the relevant address below

- e) that was my principal place of residence immediately before the commencement of my imprisonment;

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<sup>134</sup> Enrol to Vote or Update or Update your Details as a Prisoner in Victoria. (2016). Victoria n Electoral Commission. Available from: [http://www.aec.gov.au/Enrolling\\_to\\_vote/pdf/forms/prisoners/er016pw-vic-0416.pdf](http://www.aec.gov.au/Enrolling_to_vote/pdf/forms/prisoners/er016pw-vic-0416.pdf)

- f) of a new place of residence acquired during my imprisonment, by me or a parent, spouse, domestic partner or child who I resided with immediately before the commencement of my imprisonment, and at which I intend to reside on release from prison;  
OR, if neither of the two previous options do not apply and you have been imprisoned for two years or more
- g) at which I am imprisoned.<sup>135</sup>

#### *How Prisoners in Victoria Vote*

- 4.53 As in federal elections, prisoners can vote by post or via mobile polling stations for Victorian assembly and council elections. With regards to postal voting, prisoners are eligible to apply for a postal vote and have the ballot paper sent out to their stated postal address automatically. Any postal mail is classified as exempt mail, with the consequence mail sent to or received by a prisoner from the Electoral Commission Office or Divisional Office must not be opened or censored. If voting by post, general prison managers are required to provide a room or area for prisoners to vote in private while under the necessary supervision of prison staff. Once prisoners have recorded their vote in privacy, which prison staff must not influence under any circumstances, they are required to complete the details on the envelope and have this witnessed by another person, preferably a prison staff member, who is eligible to vote.<sup>136</sup>
- 4.54 Eligible prisoners, like all other Australians, are obliged to enrol to vote and once enrolled they are required to vote in both state and federal elections. Failing to vote at a federal election without a valid and sufficient reason is an offence under section 245 of the Commonwealth Electoral Act and will result in a \$20.00 fine.<sup>137</sup> In the state of Victoria failure to vote without a valid or sufficient reason, will incur a fine of \$79.00. However, given the unique circumstances of prisoners, the VEC has stated it would not make sense to fine prisons for a failure to vote. Not only do prisoners

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<sup>135</sup> Enrol to Vote or Update or Update your Details as a Prisoner in South Australia. (2016). Electoral Commission of South Australia. Available from: [http://www.aec.gov.au/Enrolling\\_to\\_vote/pdf/forms/prisoners/er016pw-sa-0416.pdf](http://www.aec.gov.au/Enrolling_to_vote/pdf/forms/prisoners/er016pw-sa-0416.pdf)

<sup>136</sup> Department of Justice and Regulation – Correction Victoria. (2017). Commissioner's Requirements – Part 4 prison Services. Section 4.3.2. Available from:

<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/commissioners+requirements+part+4>

<sup>137</sup> Commonwealth Electoral Act 1918. Completion date: 14 March 2018. Section 245. Available from:

<https://www.legislation.gov.au/Details/C2018C00062>

tend to have limited access to money to pay fines, fining prisoners is also likely to be counterproductive in that it would be perceived as an additional punishment, which may further confirm their alienation from the rest of society.<sup>138</sup> Rather than punishing prisoners for not voting, prisoners should be encouraged to enrol and vote.

### *Engaging Prisoners in Victoria*

- 4.55 The Prison Service has a responsibility to encourage prisoners to vote and assist them with the enrolling process. Information about enrolment and voting is included in the induction kit provided by the prison administration to new inmates. In addition, orientation sessions for newly arrived prisoners cover the topic of voting entitlements.<sup>139</sup> It has further been suggested that information about enrolling and voting should also be included in the package prisoners receive when they exit prison. During the period before release and for about twelve months after release, prison service organisations have a significant degree of involvement with prisoners, as they assist with their rehabilitation. Therefore, the VEC have suggested holding information sessions for case workers, and providing them with relevant material, so they can encourage prisoners to vote and assist them where required.<sup>140</sup> This could potentially have a positive effect with regards to representation amongst Australian voters: the incarceration rate of Aboriginal people, who have been identified as having low participation rates in the democratic process, is sixteen times higher than the national average.<sup>141</sup>
- 4.56 The most recent statistics suggests prisoner enrolment in Victoria is relatively low, with approximately just over one in four prisoners who are eligible to vote actually enrolled (see table 3). Prisoners need to be encouraged both to register to the electoral roll and to vote. The logical time to encourage enrolment is shortly before an election. Under the Electoral Act 2002 (Victoria) the commission have a legislative mandate ‘to promote public awareness of electoral matters that are in the

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<sup>138</sup> Victorian Election Commission. Prisoners and Voting. Available at: <https://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf>

<sup>139</sup> Department of Justice and Regulation – Correction Victoria. (2018). Going to Prison: Arrival. Available from: <http://www.corrections.vic.gov.au/home/prison/going+to+prison/arrival/>

<sup>140</sup> Victorian Election Commission. Prisoners and Voting. Available at: <https://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf>

<sup>141</sup> Hill, L. (2009). Prisoner Voting Rights. Symposium: Protecting Human Rights in Australia: Challenges and Strategies.

general public interest by means of the conduct of education and information programs.<sup>142</sup> Although prisoners are not mentioned specifically, the Victoria Electoral Commission has identified prisoners as a target group of their education and inclusion strategy.<sup>143</sup> Outreach programmes, focussing on both enrolment and voting, have been developed and implemented by the VEC for Aboriginal groups, the homeless, cultural and linguistically diverse communities and prisoner groups. The aim of the outreach programme, which is generally offered in the lead up to a state election, is to encourage greater voting participating among the targeted groups, who traditionally have been identified as generally having lower participation rates.<sup>144</sup> These sessions are advertised and promoted within prisons and prisoners are informed of the required proof of identity prior to forthcoming sessions; this give prisoners the time to ensure they have the necessary documents to be able to fill out the registration form in the session. However, the roll out of these programmes is dependent upon resources and the consent and cooperation of prison administrations.

Prisoner Term	Enrolled	Total	Percentage Enrolled
Less than 3 years	396	1,521	26 per cent
3 -5 years	186	683	27.2 per cent
Less than 5 years	582	2,204	26.4 per cent
More than 5 years	99	1,488	Undisclosed
<b>Total</b>	<b>681</b>	<b>3,692</b>	<b>Undisclosed</b>

**Table 3: Enrolment statistics for prisoner in Victoria as at 3rd June 2010.**<sup>145</sup>

4.57 Considering the poor literacy rates among prisoners, it is widely acknowledged that a face-to-face approach is the most effective for engaging prisoners in the democratic process. Not only does this mean, where possible, the VEC teams should visit prisons and assist prisoners in the completion of enrolment forms, but also the need to advance and increase mobile voting in prisons. As literacy issues prohibit the capacity of eligible prisoner to vote via post, research carried out by the

<sup>142</sup> Electoral Act 2002. Act No. 23/2002. Victoria. Available from: [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/\\$FILE/02-023a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264BF1DE203C08ACA256E5B00213FFB/$FILE/02-023a.pdf)

<sup>143</sup> Personal communication with the Victorian Electoral Commission. 09/04/2018.

<sup>144</sup> Victorian Electoral Commission. Annual Report 2009-10: Every Vote Will Shape Victoria. Available from: <https://www.vec.vic.gov.au/files/AR-2010-Full.pdf>

<sup>145</sup> *ibid.*

VEC indicates mobile voting in prisons offers the best prospect of ensuring enrolled prisoner exercise their voting rights.<sup>146</sup>

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<sup>146</sup> Victorian Election Commission. Prisoners and Voting. Available at: <https://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf>

## **5. The Justice System in England and Wales**

- 5.1 In order to create policy enfranchising Welsh prisoners, it is necessary to develop a sound understanding of the criminal justice system in England and Wales. The discussion in this section largely focuses on custodial sentences, as these are the sentences resulting in a period of imprisonment. The need to understand the workings of the criminal justice system is particularly acute considering the terms of the proposal – the enfranchisement of all Welsh prisoners whose due release date falls within the term of the office being elected. Thus, it is necessary to not only map out how criminal sentences are passed and how the terms of the sentence passed are legalised and communicated to the Her Majesty Prison and Probation Service (HMPPS), but also how a prisoners release date is calculated and by who.
- 5.2 The second part of this section shifts focus from general criminal justice system to explore the workings of the youth justice system. The youth justice system is inherently different from the general criminal justice system, both in terms of the principles that underpin it and its practical working. This section first maps out these principles and practical workings before detailing, in turn, the specificities of the youth court, the types of sentences that can be received by youth offenders and the types of establishments where young juveniles are housed. Such detail should help create an understanding of where the youth justice system and adult justice system differ. Due to the associated proposal to enfranchise sixteen and seventeen year olds, information on both the workings and the principles of the youth justice system are integral to developing policy relating to prisoners' enfranchisement. Lowering the minimum voting age to sixteen years in the context of prisoner enfranchisement, poses the question as to whether the same principles regarding adult prisoner voting can be applied to young offenders. Thus, it is necessary to develop a good understanding of the penal institutions for young offenders. In addition, the Welsh accommodation for young offenders – Hillside Secure Children's Home in Neath Port Talbot and the Young Persons Unit at HMP Parc in Bridgend – are detailed. As developing political education and engagement programmes will be an essential policy component to successfully lowering the voting age to sixteen years generally, it will be essential to know about the level and types of education offered to

detained young juveniles. The detail and background of this section intends to provide the necessary information needed for developing policy that set out the terms of voting for young juveniles.

### **The Custodial Justice System**

5.3 There are many types of sentences imposed by the courts ranging from discharges and fines to indeterminate and whole-life custodial sentences. Generally the purposes of sentencing, which the court is required to take into consideration when passing judgement, are:

- the punishment of offenders
- the reduction of crime
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons and/or communities affected by their offences.<sup>147</sup>

5.4 Community sentences are given to offenders who are convicted of a crime but are not sentenced to prison. Crime such as damaging property, benefit fraud or assault may receive a community sentence where the court believes an offender is more likely: to re-offend if they were given a custodial sentence, if it is the first crime committed by the offender or if the offender has a mental health condition affecting their behaviour.<sup>148</sup> Custodial sentences, reserved for the most serious offences, are the most severe form of sentencing available to the courts and are imposed where either a fine or a community sentence would not be a justified response to the committed offence.<sup>149</sup> A person who is sentenced to a period of imprisonment in a public prison or a young offender institute will be under the supervision of Her Majesty's Prison Service, which is an executive agency of HMPPS who is sponsored by the Ministry of Justice. In principle, all powers and jurisdictions on

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<sup>147</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>148</sup> gov.uk. Community Sentences. Available from: <https://www.gov.uk/community-sentences>

<sup>149</sup> Criminal Justice Act 2003. Section 152(2).

prisons and prisoners, under section 1 of the Prison Act 1952, are vested with the Secretary of State.<sup>150</sup>

5.5 On the 6<sup>th</sup> April 2018 the total prison population in England and Wales totalled 83,617. There are currently six prisons operative across Wales

- HMP Usk – a Category C prison for vulnerable males in Monmouthshire.
- HMO Prescoed – a satellite site of Usk prison that is a Category D resettlement open establishment for male offenders comprised on eleven modern, purpose built accommodation blocks housing approximately twenty offenders each.
- HMP Cardiff – a Category B/training prison for male offenders who are predominantly serving court catchment area in South East Wales.
- HMP and YOI Parc – a Category B male private prison and Young Offenders Institution, based in Bridgend.
- HMP Swansea - a Category B prison for male offenders.
- HMP Berwyn – a Category C prison for male offenders located in Wrexham and opened in 2017.

5.6 It is important to note, there are no penal institutions in Wales that have the capacity to accommodate female offenders or high-risk offenders and, thus, these offenders must be housed in prisons in England. In addition, in certain circumstances Welsh prisoners may not be accommodated in prisons in Wales due to the HMPPS's placement policy. Within this policy there are provisions set out where individual prisoners from the south of England who have gang backgrounds are often sent to HMP Parc in Bridgend, with the intention that they are removed from their current locality. At times, this policy and the associated provisions impact the ability to accommodate prisoners from south Wales who, subsequently, have had to be housed in a prison in England. As of March 2017 4,787 prisoners were identified as Welsh on the basis of their home address being in Wales, with 1,970 of these

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<sup>150</sup> Prison Act 1952. Section One. Available from: <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/52/contents>

prisoners recorded as serving their sentence in prisons in England.<sup>151</sup> Although these figures were not broken down by gender, figure provided by HMPPS in September 2016 indicated, at this time, there were 229 female prisoners in Wales who were all housed in English prisons.

### *The Courts*

- 5.7 Sentencing can take place in a magistrates' court or a Crown Court. Cases which can be heard in both the magistrates' court and the Crown Court are known as "either way" offences. Magistrates' courts hold the power to fine and to imprison certain offenders. Normally, magistrates' courts handle cases known as summary offence, which include offences involving minor criminal damage and drunk and disorderly offences. A magistrates' court cannot impose imprisonment or detention in a young offender's institution for a period exceeding six months in respect of any one offence. Otherwise, for any either way offences the maximum term of imprisonment imposed in a magistrates' court is 12 months or a fine not exceeding the proscribed sum or both. The minimum term of imprisonment a magistrates' court can impose is five days. More serious offences will always be trialled and sentenced in a Crown Court, with a magistrates' court holding the ability to commit an offender to the Crown Court for sentencing where it regards its own sentencing powers as inadequate.<sup>152</sup> What is more, when a magistrates' court sentences an offender for an either way case, the Crown Court must enquire into the circumstances of the case and, where necessary, to deal with the offence as if the offender had originally been convicted of an offence on indictment before the higher court.
- 5.8 Before sentencing takes place a pre-sentence report is produced. The pre-sentence report, prepared by either the Probation Service or the Youth Offending Team, assists the court in their duty of determining the most suitable method of dealing with the offender. It should include as assessment of the nature and seriousness of the offence, taking into consideration the impact upon the victim. For dangerous offenders, the pre-sentence report should be accompanied by the facts of previous

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<sup>151</sup> Personal communication with the Welsh Government Crime and Justice Team, who had obtained the figures from Her Majesty's Prison and Probation Service.

<sup>152</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

relevant convictions and information detailing the offender's pattern of behaviour.<sup>153</sup> However, no custodial or community sentence will be deemed invalid due to the failure of the court to obtain and consider the pre-sentence report. If a court did not obtain the pre-sentence report prior to passing a sentence and this sentence is subsequently appealed, the appeal court must obtain the pre-sentence report before any other action is undertaken.<sup>154</sup>

### *Custodial Sentence*

5.9 There are five common types of custodial sentences: suspended sentences, determinate sentences, indeterminate sentence, extended sentences and life sentences, each of which will be discussed in turn. For many offences the starting point of a sentence is set in legislation that the judge, after taking all relevant factors into consideration, will then calculate up and down from. Sentencing Guidelines, which are issued for most offences by the Sentencing Council for England and Wales, provide the courts with detailed guidance on how to make such calculations.<sup>155</sup> The length of a custodial sentence is dependent upon the nature of the crime and the seriousness of the offence. In addition, where an offender pleads guilty their sentence length may be reduced. Following a guilty plea, the appropriate reduction of the sentence should only be applied to the punitive component of the penalty. In determining what sentence to pass when an offender has pleaded guilty, the court must take into consideration the stage in proceeding when the offender indicated their intention to plead guilty and the circumstance in which this indication was given. The greatest reduction for a guilty plea, appropriate when indicated by the offender at the first reasonable opportunity, is one third and from this point the level of reduction is gauged on a sliding scale, reducing to a recommended one quarter if the trial date has been set and to a recommended reduction of one tenth for a plea entered at the door of the court or after the trial has begun. In addition, if the defendant admits to other outstanding offences against them, the judge in passing the sentence may, and often does, take these additional offences into consideration particularly when scrutinising the overall criminality of an offender and

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<sup>153</sup> Crown Prosecution Service. (2007). Pre-Sentence Reports – Legal Guidance. Available from: <https://www.cps.gov.uk/legal-guidance/pre-sentence-reports>

<sup>154</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>155</sup> Freer, E. (2017). Custodial Sentences: Minimum term.

the offence/s committed. Whilst a guilty plea can reduce the length of a sentence, aggravating factors may potentially increase the seriousness of the offence and, thus, the length of the sentence, by indicating a higher than usual level of culpability on the part of the offender (Banks and Elliot, 2015).<sup>156</sup>

- 5.10 Whilst sentencing is guaranteed in legislation, it is important to note the 2003 Criminal Justice Act has been amended on several occasions. Thus, whilst this report refers to the most up to date legislation, circumstances remain where current prisoners have been sentenced under alternative legislation and, so, are eligible for release at different points of their sentence to what is specified in the most recent legislation. For example, under the Criminal Justice Act 2003 there have been three different sentencing regimes relating to dangerous provisions and, while schemes one and two have been abolished, there are prisoners in the system who are about to appeal or have been advised to appeal against sentences imposed under these now redundant schemes.<sup>157</sup> Due to offences being sentenced under different legislation, the process of calculating release dates and licence terms are dependent upon when an offence was committed and/or when the sentence for an offence was passed. In addition, when an offender is sentenced to different sentences or to additional sentences whilst on release or supervision, how these sentences interact to effect sentencing dates is dependent upon the offending circumstances. What is more, there are any exceptions provided for in legislation.

#### *Suspended sentences*

- 5.11 When imposing a custodial sentence between 14 days and two years (or six months in the magistrates' court), the court can choose to suspend the sentence for up to two years. A suspended sentence does not require the offender to go to prison immediately, but permits the sentence to be carried out in the community. During the suspension period the offender is obliged to comply with up to 12 requirements set by the court, such as doing unpaid work, being subject to a curfew and undertaking a treatment programme for drugs or alcohol. However, if the offender does not meet the proscribed requirements or is convicted of another offence during

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<sup>156</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>157</sup> Thorne, K. and Arshad, F. (2015). Imprisonment for Public Protection.

the suspension period, it is likely they will have to serve the original custodial term in full in addition to the sentence imposed for the new offence.

### *Determinate and indeterminate sentences*

- 5.12 Determinate prison sentences are the most common form of custodial sentence. When issuing a determinate sentence the court sets a fixed length of imprisonment, which is the maximum period of time that a prisoner could spend detained in a penal institution.<sup>158</sup> In contrast the courts can impose an indeterminate prison sentence, which does not carry a determined period of detention. Although indeterminate sentences do not have a determined sentence-length, the court does impose a minimum term or tariff. Parliament has introduced a number of minimum fixed-term custodial sentences for the most serious crimes, for example section 110 of the Powers of the Criminal Courts (Sentencing) Act 2000 imposed a sentence of at least 7 years for a third class A drug trafficking offence and section 111 of the same act imposed a sentence of at least three years for a third domestic burglary.<sup>159</sup> For offences carrying a minimum mandatory term, the legislated minimum is not the starting point of sentencing. Rather the court must carry out the sentencing exercise as normal and in accordance with the Sentencing Council's Guidelines and, then, crosscheck to ensure the resulting sentence does not fall short of the minimum term. Although the proper reduction is still applicable following a guilty plea, the reduction applied cannot reduce the sentence to less than 80 per cent of the minimum term.
- 5.13 In recent years legislation in England and Wales has prescribed a minimum term for an increasing number of offences. The increasing introduction of mandatory minimum sentences has not been without debate, with a number of concerns regarding the increasing potential for injustice and inconsistency. However, the risk of disproportionately can be avoided through a broad reading of the "exceptional circumstance" provision entailed in the legislation, which allows the court to "read

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<sup>158</sup> Sentencing Council. Types of Sentence. Available from: <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/>

<sup>159</sup> Crown Prosecution Service. (2017). Sentencing: Mandatory and Minimum Custodial Sentences – Legal Guidance. Available from: <https://www.cps.gov.uk/legal-guidance/sentencing-mandatory-and-minimum-custodial-sentences>

down” legislation. In exceptional circumstances the sentencing judge is permitted to set a sentence that is less than the mandatory minimum.<sup>160</sup>

### *Extended sentences*

5.14 Extended sentences were introduced to provide extra protection to the public following a violent offence or a sexual offence. When an offender is found to be a significant risk to society but the courts do not believe a life sentence is appropriate, in order to protect the public from risk or harm the court can justifiably extend the licence period. The judge decides how long the offender should stay in prison and, also, fixes the extended licence period up to a maximum of eight years in respect of a sexual offence and five years in respect of a violent offence.<sup>161</sup> Thus, extended sentences comprise, first, the appropriate custodial term which is the term of imprisonment that would otherwise have been imposed and, secondly, the further extension period in which the offender is to be subject to licence. The licence element of the sentence is served in the community under the care of the Probation Service. A prisoner serving an extended sentence will serve at least two-thirds of the custodial element of the sentence in prison. Where the custodial element of an extended determinate sentence is less than ten years and the crime committed is not a Schedule 15B offence, the prisoner will automatically be released at the two-thirds point of the custodial period. In contrast, where the custodial element of an extended determinate sentence is ten years or more or the crime committed is a Schedule 15B offence, the prisoner in question will be eligible for discretionary release by the Parole Board at the two-third point of the custodial period. The review by the Parole Board will commence as the two-third point approaches.<sup>162</sup> If parole is rejected at this point, then a prisoner’s case will be subject to annual parole reviews until the expiry of their custodial term. Where the Parole Board has not released a prisoner serving a determinate sentence by the date of the end of

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<sup>160</sup> Freer, E. (2017). Custodial Sentences: Minimum term.

<sup>161</sup> The Parole Board for England and Wales. (2013). Guidance to Members on LASPO Act 2012 – Test for Release. Revised Guidance – December 2013. Available from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/317735/guidance-on-laspo.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317735/guidance-on-laspo.pdf)

<sup>162</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determinante-sentenced-prisoners.pdf>

their custodial period, the prisoner will be automatically released at this point.<sup>163</sup> An extended sentence cannot exceed the maximum penalty available for the offence in question, but in general they are only applied to offences attracting a maximum sentence of ten years and where the custodial sentence is at least 12 months.

### *Special custodial sentences*

- 5.15 In addition to extended sentence, under the Criminal Justice Act 2003 provisions are made for 'special custodial sentences for certain offenders of particular concern'. An offender may be of special concern when: (a) a person is convicted of an offence listed in Schedule 18A of the Criminal Justice Act 2003; (b) the offender was aged 18 or over when the offence was committed; and (c) the court has not imposed a sentence of life imprisonment or an extended sentence. When these conditions are satisfied and if the court imposes a sentence of imprisonment, the terms of the sentence must be equal to the aggregate of the appropriate custodial term, plus an additional period of one year where the offender is subject to a licence. After serving half of the custodial sentence, the offender becomes eligible for release by the Parole Board.<sup>164</sup>

### *Life sentences*

- 5.16 Life sentences are the most severe form of sentencing, subjecting the offender to the imposed sentence for the rest of their life. There are two types of life sentences, the first is a mandatory life sentence and, the other, is a discretionary life sentence that the courts can impose on offences that carry life as the maximum term of imprisonment. Murder is the only offence in England and Wales that has a mandatory life sentence fixed by law. When passing a mandatory life sentence the courts are required to set a tariff period, which is the minimum term an offender must serve before they can be considered for release on licence. For the most heinous murder offences the tariff period will be a whole-life order, whereby the prisoner may never be considered for release. At the end of September 2017 there were 59 offenders in England and Wales serving whole-life sentences.<sup>165</sup> There

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<sup>163</sup> insidetime: the National Newspaper for Prisoners and Detainees. (2016). Extended Determinate Sentence and the Impact they have on Prisoners. 01/07/2016. Available from: <https://insidetime.org/extended-determinate-sentences-and-the-impact-they-have-on-prisoners/>

<sup>164</sup> Hungerford-Welch, P. (2018). Extended Sentences.

<sup>165</sup> Ministry of Justice. (2017). Offender Management Statistics Quarterly, England and Wales. Available from:

have, however, been a number of cases against the UK taken to the ECHR in relation to whole-life imprisonment and, although the court's judgement has been successfully challenged in all cases to date, any case that is considering a whole-life sentence must be referred to the Appeals and Review Unit before any submissions are made and the sentence is passed by the court.<sup>166</sup>

- 5.17 Whole-life orders are reserved for the most serious murder crimes, with the courts generally setting a minimum tariff period for mandatory sentences often falling short of a whole-life order. The minimum tariff period for a whole life order must be served in full. A prisoner serving a mandatory life order will, under no circumstances, become eligible for early release. In contrast, juvenile offenders serving a mandatory life order will have their progress periodically reviewed and there is the potential for the minimum tariff period to be reduced. Only when the imposed minimum tariff has been served and if the Parole Board is satisfied the detention of the offender is no longer a necessity for public protection, can the Secretary of State order the release of the prisoner (Freer, 2017).<sup>167</sup>
- 5.18 In addition to mandatory life sentences there are discretionary life sentences for certain specified offences. Yet, this does not mean that all or even most persons convicted of these offences will have a life sentence imposed on them. Section 225 of the 2003 Criminal Justice Act Parliament entails provisions detailing how offenders who are considered dangerous and who have committed a specified crime, which carries life imprisonment as the maximum penalty, must be sentenced to imprisonment for life if justified. In addition, a life sentence can be imposed for second listed offences. Those who are convicted of a second very serious offence may be sentenced to life imprisonment if: the offence is a listed offence; the court would have otherwise imposed a sentence of imprisonment of ten years or more for the offence; and where the offender has a previous conviction for a listed offence for which they received a life sentence with a minimum term of at least five years.<sup>168</sup>

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655150/Offender\\_Management\\_Statistics\\_Bulletin\\_Q2\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655150/Offender_Management_Statistics_Bulletin_Q2_2017.pdf)

<sup>166</sup> Crown Prosecution Service. (2017). Sentencing: Mandatory and Minimum Custodial Sentences – Legal Guidance. Available from: <https://www.cps.gov.uk/legal-guidance/sentencing-mandatory-and-minimum-custodial-sentences>

<sup>167</sup> Freer, E. (2017). Custodial Sentences: Minimum term.

<sup>168</sup> Sentencing Council. (2018). Life Sentences. Available from: <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/>

Schedule 15B Part 1 of the Criminal Justice Act 2003, following amendments introduced in the Legal Aid, Sentencing and Punishment of Offenders Act 2011, details the “listed offence” of which there are 40, including murder, rape, grievous bodily harm and some terrorist offences.<sup>169</sup>

- 5.19 As for a mandatory life sentence, the judge is required to set a minimum term for a discretionary life sentence that the offender must serve in prison before they can be considered for release by the Parole Board. The Secretary of State is required to refer a case to the Parole Board, who will then make the decision as to whether the prisoner should be released. The Secretary of State can refer a prisoner’s case to the Board anytime: after the prisoner has served the minimum term set during their sentencing; where there has been a previous referral of the prisoner’s case to the Board after the end of two years beginning with the disposal of that reference; and at the half way point or the end of the custodial period for a sentence of imprisonment or detention for a specified term. A prisoner serving a life sentence will only be released if imprisonment is no longer deemed necessary for public protection. A prisoner who is serving two or more life sentences will not be released until a minimum term has been served in respect of each sentence and until they have served the relevant part of each sentence.<sup>170</sup> If released, an offender who has been sentenced to life imprisonment will remain on licence for the rest of their life. If they are considered, once again, to be a risk to the public they can be recalled to the prison at any time, regardless of whether or not a further crime has been committed.<sup>171</sup>

#### *Passing a Sentence in Court*

- 5.20 Following the introduction of new legislation on 4<sup>th</sup> April 2005, the courts are required to pass the minimum custodial sentence that in their opinion is commensurate with the seriousness of the offence/s. This, however, is not the case for custodial sentences which are fixed by law or life sentences for serious or second listed offences. A sentence can only be passed when the person who is

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<sup>169</sup> Criminal Justice Act 2003. Section 225. Life Sentence or Imprisonment for Public Protection for Serious Offences. Available from: [https://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga\\_20030044\\_en.pdf](https://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf)

<sup>170</sup> Banks, R. and Elliot, J. (2015). Halsbury’s Laws of England: Sentencing (Volume 92(2015)).

<sup>171</sup> Sentencing Council. Types of Sentence. Available from: <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/>

being sentenced is legally represented in court, unless legal representation was refused, withdrawn or where the defendant failed to make an application for legal representation. When passing the sentence the court must specify a period of imprisonment, commonly known as “the custodial period” that takes effect from the beginning of the day on which it was imposed. When the custodial period has been served, the offender must be released on licence. However, the court also states the licence will only to be granted subject to conditions that require the offender’s compliance during the remainder of the term. Additionally, when passing sentence the courts can recommend to the Secretary of State particular conditions which they view should be included in any licence served by the offender on their release from prison. For sentences that do not carry an end date, the release of the offender will be dependent upon the decision of the Parole Board once the custodial sentence has been partially or wholly served.

- 5.21 When a court is passing sentence for more than one offence, they must determine if each sentence passed should run concurrently or consecutively. As a rule, concurrent sentences tend to be deemed appropriate where offences occur from the same incident or fact or where there is a series of offences of the same or similar kind. Consecutive sentence are ordinarily appropriate where: offences arise out of facts or incidents that are unrelated; where despite offences being of the same or similar kind a concurrent sentence would not sufficiently reflect overall criminality; and where running multiple sentences concurrently would undermine the determined statutory minimum for one or more of the sentences.<sup>172</sup> Where a court passes multiple sentences, they are required to state if the sentences are to run concurrently or consecutively.
- 5.22 Once the sentence has been decided, the judge is required to explain the sentence decision in an open court. An explanation of the sentence decision is deemed necessary to ensure the defendant, the victim, the public generally, whether they are present in the court or are later informed by the media, and the Court of Appeal Criminal Division understand how the sentence was reached and why it is a justified response to the offence committed.<sup>173</sup> In addition, this explanation must detail: the

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<sup>172</sup> Banks, R. and Elliot, J. (2015). Halsbury’s Laws of England: Sentencing (Volume 92(2015)).

<sup>173</sup> Crown Court Bench Book: Companion. Part II – Sentencing. January 2013.

effect of the sentence, the effects of non-compliance, any power of the court to vary or review any order forming part of the sentence and, where the sentence consists of or includes a fine, the resulting effect of the failure to pay the fine.

5.23 The Attorney General is required to consider a sentence once it has been passed by the Crown Court. If it appears to the Attorney General that the sentence is unduly lenient and the case is susceptible to review, the case can be referred to the court where the sentencing of the person in question is reviewed.<sup>174</sup> In addition, an offender can appeal against the conviction they have received, the sentence that has been passed or against both the conviction and sentence. If sentenced in a magistrates' court an appeal has to be made within 21 days of the date the sentence was passed and where sentenced in a Crown Court the offender has 28 days to make an appeal. Upon review the Court of Appeal can quash the sentence or pass a new sentence that they deem to be an appropriate response to the offence which, then, overrides the original sentence. The Court of Appeal can only intervene when: it can demonstrate the sentence is defective in law, material was improperly taken into account in the original sentencing, the sentence was passed on an incorrect factual basis or the public interest would normally require a substantial penalty not provided for in the original sentence.<sup>175</sup> Thus, a sentence can only be justifiably changed when the appeal court concludes that a wrong sentence was originally passed.

### *Sentence Warrants*

5.24 After passing a sentence in court, the Crown Court produces an order/warrant of imprisonment (F5035) and the magistrates' court a warrant of commitment (F43 or F44). The terms of a warrant of imprisonment or a warrant of commitment require the persons, to whom it is directed, to detain the defendant until they are delivered to the appropriate court or place for a period of time, not exceeding the maximum permissible, specified in the warrant.<sup>176</sup> Sentencing warrants detail:

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<sup>174</sup> Crown Prosecution Service. (2017). Sentencing: Overview – Legal Guidance. Available from: <https://www.cps.gov.uk/legal-guidance/sentencing-overview>

<sup>175</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>176</sup> Criminal Procedure Rules: The Criminal Practice Directions. October 2015. Part 13: Warrants for Arrest, Detention or Imprisonment.

- the date of the hearing
- the defendant against whom the warrant is issued
- the person/prison to whom the warrant is directed
- the reasons for issuing the warrant
- the name of the court issuing the warrant
- the court office of the court issuing the warrant.

5.25 The warrant can be hand written but it should have the signature of the court clerk or the court stamp.<sup>177</sup> If the warrant is being issued against a young offender, under section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) it must also contain the following detail:

- whether the defendant must be detained in local authority accommodation or youth detention accommodation
- the local authority designated by the court
- any requirement imposed by the court on that authority
- any condition imposed by the court on the defendant
- the reason for any such requirement or condition.<sup>178</sup>

5.26 Following the Hirst judgment, the UK Government has accepted the need for more clarity in the sentencing process that explicitly states detained prisoners lose their right to vote. Thus, the UK Cabinet Office are liaising with the judiciary as a statement will need to be inserted in the sentence warrant explicitly declaring the loss of voting rights for all sentenced prisoner whilst they are detained.

5.27 A warrant can be executed by any persons to whom it is directed. The persons who execute the warrant must explain, in terms that can be understood by the defendant, what is required by the warrant and why. The persons to whom the warrant is directed must show it to the defendant, if the persons do not have the warrant and the defendant asks then arrangements should be made for the

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<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

defendant to see the warrant. The persons executing the warrant of detention or imprisonment are required to take the defendant to the place specified in the warrant or, if that is not immediately practicable, to any other place at which the defendant may be lawfully detained. In the latter case, the warrant then has the effect as if it had specified that place of detention. A receipt from the custodian must be obtained and the court officer should be notified that the defendant has arrived at the place specified in the warrant.

### *Releasing Prisoners*

#### 5.28 Calculating Release Dates

The duty of calculating release dates for detained prisoners falls to the Prison Service. Dependent on the sentence, the sentence calculation produced by the Prison Service determines the approved parole date, custody end date, conditional release date, licence expiry date, non-parole date, parole eligibility date, post recall release date, sentence expiry date, sentence and licence expiry date, and top up supervision end date. Depending upon length of the sentence imposed, the 2003 Criminal Justice Act includes provisions for different active release schemes. Due to amendments made to legislation, the sentence calculation will differ dependent upon whether the offence was sentenced and/or committed after the 1<sup>st</sup> February 2015. The following text will draw upon the current procedure as it was last updated in 2015<sup>179</sup>, but for all release dates see appendix one.

#### 5.29 For the Prison Service to complete the sentence calculation for each prisoner they need to have the following information:

- the order of imprisonment or warrant of commitment
- the trail record sheet which provides the key information of how the overall sentence has been made up
- indictments stating the key details of the offences and the dates committed
- details of prospective additional days awarded

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<sup>179</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

- remand warrants to help determine what remand time is relevant to the sentence
- police custody records (only required for sentences imposed before the 3<sup>rd</sup> December 2012 in respect of offences committed prior to the 4<sup>th</sup> April 2005)
- back records are needed in order to check any previous periods of remand that have an effect on the current sentence.

5.30 The sentence calculation for prisoners must be completed within five working days of their reception. If the prison does not have all the necessary documents to make an accurate calculation within this timescale, a calculation must still be made but it should be marked provisional and then recalculated when all the necessary information is available. Once the calculations have been made, a second member of staff is required to check all calculations. A prisoner must be formally notified of their release date in writing within one day and no later than five working days of the calculation, with a copy of the release date notification slip being retained on file. In addition to the formal written notification, the release date must also be orally explained to the prisoner. If a prisoner is transferred to another establishment, the new establishment must recalculate the sentence and notify the prisoner of their release dates within five days of their reception. A recalculation is necessary following the transfer of a prisoner as it is the Governor of the prison who is responsible for the lawful detention and discharge of all prisoners within their establishment.

5.31 Fourteen days before a prisoner is due to be released, a member of staff different from the person who made the original calculation must check the sentence calculation. The calculation must then be re-examined two days before the prisoner's release date. Although the Prison Service has the duty of carrying out the sentence calculation, they are not required to check or question the validity of sentences. The magistrates' court has the power to reopen a case at any time to rectify mistakes, whilst the Crown Court only holds the capacity to address mistakes within 56 days of passing a sentence. If any changes are made the Prison Service

is required to complete a new sentence calculation, with the new sentence usually taking effect from the same date as the original sentence.<sup>180</sup>

### 5.32 Temporary Release

Convicted and sentenced prisoner and youth offenders may be entitled to temporary release. Temporary release may be granted:

- on compassionate grounds or for the purpose of receiving medical treatment
- to engage in employment or voluntary work
- to receive instructions or training which cannot reasonably be provided in the prison or young offender institution (as the case may be)
- to enable him to participate in any proceedings before any court, tribunal or inquiry
- to enable him to consult with his legal adviser in circumstances where it is not reasonably practicable for the consultation to take place in the prison or young offender institution (as the case may be)
- to assist any police officer in any enquiries
- to facilitate the prisoner's transfer between prisons or (as the case may be) the inmate's transfer between the young offender institution and another penal establishment
- to assist him in maintaining family ties or in his transition from life in custody to freedom.

5.33 Temporary release is subject to predetermined conditions. A prisoner will only be temporarily release when the Secretary of State is satisfied there would not be an unacceptable risk of criminal activity when released or there would not be a failure to comply with the conditions of release. In addition, if the Secretary of State holds concern that the release of the prisoner could undermine public confidence in the administration of justice temporary release will not be granted. For prisoners serving

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<sup>180</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

determinate sentences the length left to serve in custody will be taken into consideration when deciding whether or not to grant temporary release. The Secretary of State holds administrative powers of release, whereby certain offenders serving determinate sentence can receive an order of release to make best use of the places available for detention.<sup>181</sup> A further power of the Secretary of State lies with their ability to order temporary and conditional discharge of prisoners on the grounds of ill health. Following consultation with the Parole Board, the Secretary of state can release, in exceptional circumstances, life prisoners on compassionate.

#### The Parole Board

- 5.34 The Parole Board for England and Wales, originally established under the Criminal Justice Act 1967, is an independent board responsible for protecting the public. Under the Criminal Justice Act 1991, amended by the Criminal Justice and Public Order Act 1994, the Parole Board carries out risk assessments of prisoners in England and Wales to determine if they can be safely released back into the community. Whilst the Parole Board originally held a purely advisory function, with the Home Secretary of the day holding the final decision of release, the Parole Board active today is much more “court-like” and has the power to direct release. Professor Nick Hardwick, the chair of the Parole Board, has stated this direction should be sustained and the Board should strive to establish increasing independence from the Ministry of Justice in its future work. On the 31<sup>st</sup> March 2017 there were 212 Parole Board member and 123 staff who, during the financial year 2016/17, dealt with a total of 17,827 paper cases alongside 7,377 oral hearings, which taken together averages to almost 500 cases every week.<sup>182</sup>
- 5.35 In addition, the cases coming before the Parole Board have changed overtime. The Board was created in the wake of capital punishment and the need for the advice regarding the release of prisoners serving life sentences. Today, however, the Parole Board’s work predominantly concerns the release of prisoners who have

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<sup>181</sup> Banks, R. and Elliot, J. (2015). Halsbury’s Laws of England: Sentencing (Volume 92(2015)).

<sup>182</sup> The Parole Board. (2017). 50 Years 1967-2017 – Parole Board for England and Wales: Annual Report and Accounts 2016/17. Available from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631425/Parole\\_Board\\_Annual\\_Review\\_Web\\_Accessible\\_Version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631425/Parole_Board_Annual_Review_Web_Accessible_Version.pdf)

received a custodial sentence for a violent or sexual offence and prisoner are have been recalled to custody following a break of their license condition. When considering cases, as directed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Parole Board is required to apply the same assessment of risk and the same criteria for release to cases relating to determinate sentence and those relating in indeterminate sentence.<sup>183</sup> Today, the Parole Board

- Considers, under the Criminal Justice Act 1991, the early release of prisoners serving a determinate sentence of four years or more. Under the Parole Board (Transfer of Functions) Order 1998 and Coroners and Justice Act 2009 the Board has delegated authority to decide all such applications.
- Has the authority, under the Crime (Sentences) Act 1997, to direct the release of prisoners sentenced with life, those serving an indeterminate sentence for public protection, and persons detained at Her Majesty's Pleasure.
- Considers, under the Crime (Sentences) Act 1997 in the case of life and indeterminate sentenced prisoners, cases of prisoners who have been recalled to custody, and considers, under the Criminal Justice Act 2003 as amended by the Criminal Justice and Immigration Act 2008, cases of determinate prisoners who have been recalled to custody and determines whether re-release is appropriate.
- Considers the release, at the two third stage, of extended determinate sentence prisoners imposed under the Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Considers the release, at the half way stage as determined by the Criminal Justice and Courts Act 2015, of those serving a sentence for offenders of particular concern.

5.36 In addition, there are a number of prisoners who remain in custody under a sentence of imprisonment for public protection (IPP). Following concern about the

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<sup>183</sup> *ibid.*

justice, fairness and cost of the IPP sentence, in 2012 it was abolished although this was not applied retrospectively. An IPP prisoner can only be released when: they have served the minimum tariff period imposed as part of their sentence; and when it has been demonstrated their release would not compromise public safety. Thus, many IPP prisoners continue to remain on custody long after their tariff has expired. There are currently more than 6,000 prisoners serving an IPP, each of who must have their case for release considered by the Parole Board.

- 5.37 When a matter has been referred to the Parole Board for its consideration, the Board is required to advise the Secretary of State on the early release or recall of prisoners. Where necessary, in addition to considering any documentation provided by the Secretary of State alongside any other oral information, the Board can interview the person to whom the case relates to before reaching a decision. The decision of the Parole Board must have regard to both the need to protect the public from serious harm and the desirability of preventing re-offending and securing a prisoner's rehabilitation. The Secretary of State holds the power to make rules regarding the proceedings of the Parole Board; including authorising the proscribed number of its members to deal with the case or requiring the case to be dealt with at specified times.<sup>184</sup>
- 5.38 Within fourteen weeks of the Secretary of State referring a case to the Parole Board relating to the initial release of a prisoner, a single member of the Board must consider the paper case and decide if the case should be referred to an oral panel or make a provisional decision that the prisoner is unsuitable for release.<sup>185</sup> The single member is required to record their decision in writing, which is then passed on to the relevant parties within a week of the decision being made.<sup>186</sup> If the outcome is a provisional decision that the prisoner is unsuitable for release, the prisoner has the right to request that an oral panel hear their case within 28 days of the initial decision. There is, however, no automatic right for an oral hearing to be granted. Rather, each request will be considered and judged on its own merits. In 2016/17 56per cent of requests for an oral hearing were granted, whilst 425 of 961

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<sup>184</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>185</sup> The Parole Board Rules. (2016). No. 1041. Statutory Legislation: Prisons, England and Wales. Available from: [http://www.legislation.gov.uk/uksi/2016/1041/pdfs/uksi\\_20161041\\_en.pdf](http://www.legislation.gov.uk/uksi/2016/1041/pdfs/uksi_20161041_en.pdf)

<sup>186</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

requests were denied. In 2016-17 the total number of paper hearings conducted by the Parole Board was 16,866, with 13,739 of these cases being completed and 3,127 being deferred or adjourned following a conclusion additional information was required to make an informed judgment. Of the total 13,739 paper hearings that were completed, 8,169 cases did not progress further and the prisoner remained detained in custody, 391 cases resulted in a direction of release or the Board recommended the prisoner was suitable to move or remain in open conditions. In 5,179 (38per cent) cases the Board directed the case required an oral hearing before a decision of release could be made.<sup>187</sup>

- 5.39 All oral hearings must be held within 26 weeks of the case being referred to the Board. Before deciding on the date of the hearing the Board are required to contact all relevant parties. The Board must then notify the parties of the selected hearing date within five working days of a case being listed and the panel must then give all parties at least three weeks notice of the date, time and venue scheduled for the hearing. If the hearing is to be via video link, telephone conference or another electronic means the oral panel must inform parties in advance. A prisoner is required to notify both the Board and the Secretary of State if they do not want an oral panel to consider their case or if they do not wish to attend the hearing that has been listed. Alternatively, if a prisoner wishes to attend their hearing they have 23 weeks from when the case is referred to the Board to make this known. A hearing can still take place in the absence of a prisoner where the Board have been notified of the prisoner desire not to attend. Any documentary evidence a party wishes to present at a hearing must be provided to the board and the other party at least fourteen days before the hearing.<sup>188</sup> In addition, a party can make a witness at a hearing, but the chair has the power to refuse an application to call a witness. The panel decision, along with the accompanying reasons explaining the decision, must be recorded in writing, signed by the chair and given to the parties no later than 14

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<sup>187</sup> The Parole Board. (2017). 50 Years 1967-2017 – Parole Board for England and Wales: Annual Report and Accounts 2016/17. Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631425/Parole\\_Board\\_Annual\\_Review\\_Web\\_Accessible\\_Version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631425/Parole_Board_Annual_Review_Web_Accessible_Version.pdf)

<sup>188</sup> The Parole Board Rules. (2016). No. 1041. Statutory Legislation: Prisons, England and Wales. Available from: [http://www.legislation.gov.uk/uksi/2016/1041/pdfs/uksi\\_20161041\\_en.pdf](http://www.legislation.gov.uk/uksi/2016/1041/pdfs/uksi_20161041_en.pdf)

days from the date of the end of the hearing.<sup>189</sup> Of the 7,377 oral hearings conducted by the Parole Board in 2016-17, 5,165 were completed (70per cent) and 2,212 were deferred (30per cent). Of the 5,165 completed oral hearings, 3,340 resulted in the Board directing the prisoner to be released (65per cent) whilst in 1,825 cases (35per cent) the Board directed no progression and the prisoner thus remained in custody.<sup>190</sup>

## Release

- 5.40 The Criminal Justice Act 2003 sets out the legislation for a prisoner's release and creates a general duty for the Secretary of State to release a person from prison.<sup>191</sup> Practically, it is the length of the sentence received for an offence will determine when a prisoner can be released. A prisoner who is serving a fixed-term sentence of less than 12 months must unconditionally be released as soon as they have served the requisite custodial period. If they are released on licence, the licence will remain in force until the date on which, but for release, the prisoner would have served one-half of the sentence. A person who has been committed to prison for contempt of court, default on a fine or any kindred offence must automatically be released when one-half of the custodial term has been served. A prisoner serving a fixed-term sentence of 12 months is to be released on licence when they have served the custodial period of their sentence, unless they are a prisoner of particular concern serving a special sentence or serving an extended sentence. In this case, the prisoner will remain on licence for the remainder of their sentence. An offender of particular concern or an offender serving an extended sentence must have their case referred to the Parole Board for consideration of their release once they have served the requisite custodial period. A fixed-term prisoner may be released by the Secretary of State on licence, incorporating a home detention curfew condition, at any point during the 135 days ending the day on which the prisoner will have served the requisite custodial period. There are, however, a number of exceptions. The

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<sup>189</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>190</sup> The Parole Board. (2017). 50 Years 1967-2017 – Parole Board for England and Wales: Annual Report and Accounts 2016/17. Available from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631425/Parole\\_Board\\_Annual\\_Review\\_Web\\_Accessible\\_Version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631425/Parole_Board_Annual_Review_Web_Accessible_Version.pdf)

<sup>191</sup> Criminal Justice Act 2003. Section 244. Available from:

[http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga\\_20030044\\_en.pdf](http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf)

Secretary of State, in the case of any determinate sentence prisoner or a prisoner released on home curfew, may revoke the prisoner's licence and recall them to prison at any time.<sup>192</sup>

- 5.41 Following recall for a fixed term sentence, it is the duty of the Secretary of State to consider whether the person is suitable for automatic release at the end of the automatic release period – 14 days beginning from the point at which the person is returned to custody in relation to a determinate sentence that is less than 12 months or 28 days from the beginning of the return to custody in relation to a determinate sentence that is for 12 month or more. If the Secretary of State does not deem the person to be eligible for automatic release, their case must be referred to the Parole Board.<sup>193</sup>

### **Young Offenders and the Justice System**

- 5.42 The principle aim of the youth justice system is to prevent offending or re-offending by children and young people. This aim, along with the welfare of the offender, is at the heart of the youth justice system and should be taken into consideration by the court when they are sentencing children and young people. Only after these two principle aims have been considered should the court give regard to the purposes of sentencing, which for children and young adults are: punishment of offenders, reform and rehabilitation of offenders, protection of the public and the making of reparation by offender to persons and/or communities affected by their offences.<sup>194</sup> Thus, rehabilitation and integration are crucial in sentencing children and young people. Whilst the seriousness of the offence is always the starting point for the courts, when sentencing children and young adults the sentence passed should not be offence focused but, rather, it should be individualistic. When passing sentence, the court should focus on the child or young person and, where possible, rehabilitation. Thus, a custodial sentence will always be a measure of last resort for a child and young person, a principle echoed by the Welsh Government.<sup>195</sup> Rather

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<sup>192</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>193</sup> *ibid.*

<sup>194</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>195</sup> Welsh Government and the Youth Justice Board. (2014). Children and Young People First: Welsh Government/Youth Justice Board joint strategy to improve services for young people from Wales at risk of becoming involved in, or in, the youth justice system. Available from: <http://gov.wales/docs/dsjlg/publications/commsafety/140710-youth-justice-strategyv2-en.pdf>

than seeking to criminalise and punish children and young people, the youth justice system promotes their reintegration into society and encourages them to take responsibility for their own actions.

- 5.43 From the financial year ending March 2006 to the financial year ending March 2016 there was a 75 per cent reduction in the number of children and young people arrested in England and Wales. In addition, there was an 83 per cent reduction in the number of children and young people who were first time entrants in the youth justice system, a reduction of 74 per cent in the number of proven offences relating to children and young people and a 66 per cent fall in the average youth custody population. Whilst the reoffending rate of children and young people has increased from 33.6 per cent in December 2005 to 38 per cent in March 2015, the number of reoffenders has decreased by 76 per cent and the number of re-offences by 72 per cent in the same time period.<sup>196</sup> On the 29<sup>th</sup> December 2017 there were 876 youth offenders detained in custody, of which 33 were Welsh children and young adults. As time has progressed, it has been widely acknowledge that the children and young adults involved in the youth justice system are those for whom offending manifests as a result of other things going wrong in their lives.<sup>197</sup>

#### *The Youth Justice System*

- 5.44 The youth justice system was established in 1998 in a response to the growing concern there was no systematic means for dealing with offending by children and young adults, with no one locally taking responsibility for young adults involved in crime.<sup>198</sup> The principle aim of the youth justice system, as legislated in the Crime and Disorder Act 1998, is to prevent offending by children and young persons.<sup>199</sup> Under the Crime and Disorder Act 1998, the role of the youth justice system is

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<sup>196</sup> The Youth Justice Board. (2017). The Youth Justice Board for England and Wales Annual Report and Accounts 2016/17. Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630201/YJB\\_Annual\\_Report\\_and\\_Accounts\\_2016-17\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630201/YJB_Annual_Report_and_Accounts_2016-17_Web.pdf)

<sup>197</sup> Taylor, C. (2016). Review of the Youth Justice System in England and Wales. Ministry of Justice. Available from: <http://dera.ioe.ac.uk/29212/1/youth-justice-review-final-report.pdf>

<sup>198</sup> *ibid.*

<sup>199</sup> Crime and Disorder Act 1998. Part III Criminal Justice System: Youth Justice, paragraph 37. Available from: <http://www.legislation.gov.uk/ukpga/1998/37/contents>

- the provision of persons to act as an appropriate adult to safeguard the interests of children and young people detained or questioned by police officers
- the assessment of children and young persons, and the provision for them of rehabilitation programmes
- the provision of support for children and young persons remanded or committed on bail whilst awaiting trial or sentence
- the placement in local authority accommodation of children and young persons remanded or committed to such accommodation under section 23 of the Children and Young Persons Act 1969
- the provision of reports or other information required by courts in criminal proceedings against children and young people
- the provision of young persons to act as responsible officers in relation to parenting orders, child safety orders, reparation orders and action plan orders
- the supervision of children and young persons sentenced to a probation order, a community service order or a combination order
- the supervision of children and young people sentenced to a detention and training order or a supervision order
- the post-release supervision of children and young people
- the performance of functions as may be authorised by the Secretary of State in relation to the release of children and young adults.<sup>200</sup>

5.45 In addition, the Crime and Disorder Act established local youth offending teams and a central Youth Justice Board (YJB).

5.46 Youth offending teams are multi-agency partners, comprising of a probation officer, a social worker, a police officer, a member of the health authority and a person nominated by the chief education officer.<sup>201</sup> The teams were set up to achieve a

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<sup>200</sup> *ibid.*

<sup>201</sup> *ibid.*

more consistent approach to tackling young offending and to create a partnership of the essential players contributing to the prevention of youth crime. The key tasks of youth offending teams are:

- assessing the risks and needs of young offenders
- making recommendations regarding the type and content of sentences
- delivering community-based sentences and ensuring compliance
- undertaking preventative work to reduce the number of first time entrants<sup>202</sup>
- assisting police with out-of-court disposals and arranging for appropriate adults to be present during police questioning
- providing reports and information required by the courts in criminal proceedings against children and young people
- supervising children and young people released from custody (Taylor, 2016).<sup>203</sup>

5.47 In addition to youth offending teams, the Crime and Disorder Act 1998 created the YJB for England and Wales. The Board is a non-departmental public body of the Ministry of Justice, composed of ten to twelve appointed members with extensive and up to date experience of the youth justice system.<sup>204</sup> Principally, the Board oversees the youth justice system in both England and Wales, working to prevent youth offending and reoffending. In addition, the Board has a duty to ensure custody for children and young adults is safe and secure and actively seek to address the causes of their offending behaviour.<sup>205</sup> Within England and Wales the Board is responsible for:

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<sup>202</sup> National Audit Office. (2010). Ministry of Justice - The youth justice system in England and Wales: Reducing offending by young people. Available from: <https://www.nao.org.uk/wp-content/uploads/2010/12/1011663.pdf>

<sup>203</sup> Taylor, C. (2016). Review of the Youth Justice System in England and Wales. Ministry of Justice. Available from: <http://dera.ioe.ac.uk/29212/1/youth-justice-review-final-report.pdf>

<sup>204</sup> Crime and Disorder Act 1998. Part III Criminal Justice System: Youth Justice, paragraph 41. Available from: <http://www.legislation.gov.uk/ukpga/1998/37/contents>

<sup>205</sup> Welsh Government and the Youth Justice Board. (2014). Children and Young People First: Welsh Government/Youth Justice Board joint strategy to improve services for young people from Wales at risk of becoming involved in, or in, the youth justice system. Available from: <http://gov.wales/docs/dsjlg/publications/commsafety/140710-youth-justice-strategyv2-en.pdf>

- using information and evidence to form an expert view of how to get the best outcomes for children who offend and for victims of crime
- advising the Secretary of State for Justice and those working in youth justice services about how well the system is operating, and how improvements can be made
- identifying and sharing best practice
- promoting the voice of the child
- commissioning research and publishing information in connection with good practice.
- monitoring the youth justice system and the provision of youth justice services
- making grants, with the approval of the Secretary of State, for the purposes of the operation of the youth justice system and services
- providing information technology related assistance for the operation of the youth justice system and services.<sup>206</sup>

5.48 Thus, the Board is required to lead, monitor and oversee the youth justice system. The Board works closely with its partners, who include youth offending teams, community youth justice services and their partners and the youth secure state which is comprised of young offender institutions (YOIs), secure training centres (STCs) and secure children's homes (SCHs).

5.49 In July 2014 the Welsh Government in collaboration with the YJB produced a joint strategy to improve services for young people from Wales at risk of becoming involved in, or in, the youth justice system.<sup>207</sup> At the heart of the joint strategy is the United Nations Convention of the Rights of the Child (UNCRC), with the consequence the focus of youth justice in Wales does not reside purely with the

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<sup>206</sup> gov.uk. Youth Justice Board: About Us. Available from:

<https://www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales/about>

<sup>207</sup> Welsh Government and the Youth Justice Board. (2014). Children and Young People First: Welsh Government/Youth Justice Board joint strategy to improve services for young people from Wales at risk of becoming involved in, or in, the youth justice system. Available from: <http://gov.wales/docs/dsjlg/publications/commsafety/140710-youth-justice-strategyv2-en.pdf>

behaviour of the children and young people involved in the youth justice system, but also prioritises their rights and needs. The effective delivery of the strategy is guided by a series of principles

- Young people are children first, offenders second.
- Young people in the youth justice system have the same access to their rights and entitlements as any other young person.
- The voice of the young person is actively sought and listened to.
- Services focus on early intervention and holistic multi-agency support.
- Promotion of a culture where identifying and promoting effective practice is fundamental to improving outcomes for young people.
- Services are held to account for addressing the needs of young people.
- The youth justice sector is supported to develop the knowledge and skills to understand and address the needs of young people.
- The voices of victims are heard, and they are provided with the opportunity to share their views and take part in restorative approaches.

5.50 Of these principles, the first two – and in particular the second principle – are of key importance when considering voting rights of young adults. If the minimum voting age is to be reduced to sixteen years of age, together the second and first principle of the strategy pose a question over the differential treatment of young adults in the youth justice system, who are children before they are offenders, to other young adults who automatically become eligible to vote as soon as they turn sixteen years of age. However, it is important to note that principles differ from statutory guidance and, thus, where these principles are undermined there are no legal implications and, to date, there are no known cases in which the second principle – children and young people in the justice system hold the same rights and entitlements as any other child – has been directly upheld.<sup>208</sup>

### *Sentencing Young Offenders*

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<sup>208</sup> Personal Communication with the Welsh Government Crime and Justice Team. 9 March 2018.

5.51 Sentences for children and young people are not expected to be as severe as they are for adults. Although young people aged ten and over can rightly be held responsible for their actions, shorter sentences are justified for young juveniles, as they are not regarded as having a full and competent understanding of their actions unlike adult offenders. Children under the age of ten are under the age of criminal responsibility and, so, cannot be charged with a criminal offence, as they have not reached the threshold in which they can be justifiably held responsible for their actions.<sup>209</sup> Furthermore, there is an expectation custodial sentence will be particularly rare for children and young people under the age of fourteen.<sup>210</sup> There will be occasions when a child or young adult will increase in age between the date on which the offence was committed and the date of the finding of guilt. This increase in age – primarily turning 12, 15 or 18 – will result in the maximum sentence on the date of the finding of guilt being greater than the maximum sentence applicable when the offence was committed. In general, when any significant age is passed it will rarely be appropriate to impose a more severe sentence than permitted at the time the offence was committed. However, a sentence at or closer to the maximum may be appropriate, especially for young people who have turned 18 years of age.

#### *Youth Courts*

5.52 Children and young people should always where possible be tried in a youth court, which has been purposefully designed to meet their specific needs. A youth court is a special form of magistrates' court that has been adapted so that it is suitable for people aged between ten and seventeen. In a youth court there is either three magistrates or a district judge and there is no jury. A parent is required to accompany a child or young person who is under sixteen years of age and where a 16 or 17 year old has received a court order.<sup>211</sup> Youth courts are less formal than adult courts as, for example, members of the public cannot be present in the court, the child or young adult can have a parent seated alongside them, the court is expected to use simple language, all parties can sit at the same level and the child

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<sup>209</sup> nidirect. Youth Justice. Available from: <https://www.nidirect.gov.uk/articles/youth-justice>

<sup>210</sup> Sentencing Guideline Council. (2009). Overarching Principles – Sentencing Youth. Available from: <https://www.watersidepress.co.uk/acatalog/SGCOverarchingPrinciples-definitive.pdf>

<sup>211</sup> gov.uk. Criminal Courts: Youth Courts. Available from: <https://www.gov.uk/courts/youth-courts>

or young adult is called by their first name. Youth courts deal with the less serious youth cases such as theft and burglary, anti-social behaviour and drug offences, but they have greater sentencing power than the adult magistrates' court to allow for more youth cases to be heard in this adapted environment.<sup>212</sup> Youth courts can give a range of sentence including fines up to £1,000.00 or £250.00 where the offender is under 14 years of age, youth community orders, reparation orders, referral orders, absolute and conditional discharges, ancillary orders, a binding over the offender's parents and Detention and Training Orders.<sup>213</sup>

- 5.53 Although not a regular occurrence, serious cases involving a child or young adult are heard in the Crown Court. In the year ending March 2017, 4 per cent of the 25,700 children and young people sentenced were sentenced in the Crown Court.<sup>214</sup> When a young adult is trialled in the Crown Court, the normal trial process is modified to facilitate the effective participation of witnesses and defendants. Possible modifications include the removal of wigs and gowns, arranging a familiarisation visit to the court and the option for evidence to be given via a life link.<sup>215</sup> A child or young person should appear in the Crown Court for trial if:
- charged with homicide
  - charged with a firearm offence subject to a mandatory minimum sentence of three years and the offender is over 16 years of age at the time of the offence
  - notice has been given to the court is a serious or complex fraud or child case
  - the offence charge is a specified offence and if found guilty the child or young person would meet the criteria for a sentence under the dangerous offender provisions

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<sup>212</sup> Taylor, C. (2016). Review of the Youth Justice System in England and Wales. Ministry of Justice. Available from: <http://dera.ioe.ac.uk/29212/1/youth-justice-review-final-report.pdf>

<sup>213</sup> Magistrates Association. Youth Court. Available from: <https://www.magistrates-association.org.uk/about-magistrates/youth-court>

<sup>214</sup> Ministry of Justice and Youth Justice Board. (2018). Youth Justice Statistics 2016/17 England and Wales: Statistics Bulletin. Available from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/676072/youth\\_justice\\_statistics\\_2016-17.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf)

<sup>215</sup> Youth Justice Legal Centre. (2014). Modifications in Adult Courts. Available from: <http://yjlc.uk/modifications-in-adult-courts>

- a grave crime has been committed and there is a real prospect that a sentence in excess of two years detention will be imposed.

5.54 If a child or young person is found guilty before the Crown Court of an offence other than homicide, the court must remit the case to the youth court due to their expertise in the sentencing of children and young people, unless it would be undesirable to do so. Whether tried in a youth court or in the Crown Court the welfare principle at the heart of the youth justice system must always guide the sentencing.<sup>216</sup>

#### *Custodial Youth Sentences*

5.55 Custodial sentences should only be imposed upon children and young people as a “measure of last resort”. Courts are required to assess the seriousness of the offence and the risk of serious harm in the future to determine if an offence crosses the custody threshold. Only if the court is satisfied this threshold has been crossed can they, as a preliminary consideration, consult the equivalent adult guidelines to determine the appropriate sentence length. Although the expectation is a custodial sentence for a child or young person aged 14 years and younger is particularly rare, where a custodial sentence is imposed it should be for a shorter period of time than that which a young person aged 15-17 would receive for the same offence. The rough guidelines suggest that a 15-17 year old should receive a sentence that is in the region of half to two thirds of the adult sentence, with a greater reduction for those under 15 years of age.<sup>217</sup>

5.56 On 29<sup>th</sup> December 2017, the total number of Welsh young offenders in custody was thirty-three, all of whom were male. Broken down by age, there was one 13 year old in custody, four Welsh young offenders aged 15, seven aged 16 and twenty-one who were 17 years old. Twenty of the Welsh children and young adults in custody were detained through a DTO, five were being held on remand, seven had been sentenced for a grave crime under Section 91 and one was being held for another sentence. Five of the children and young adults in custody were from the Gwent

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<sup>216</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>217</sup> *ibid*

region, 13 were from North Wales and 15 were from South Wales. Of the thirty-three Welsh young offenders, 16 were detained in HMP and YOI Parc, whilst the rest were held in institutions across England.

#### Detention and training order (DTO)

- 5.57 There are two principle circumstances in which a court will sentence a child or young adult to a DTO. Firstly, when, it is the opinion that the offence/s is so serious that neither a fine alone nor a community sentence would be a justified response or, secondly, where there has been a failure by the offender to express his willingness to comply with a requirement that has been set by the court as part of a community order or to comply with a pre-sentence drug testing order. A DTO can only be imposed for a 4, 6, 8, 10, 12, 18 or 24 month period. However, the term imposed cannot exceed the maximum period of imprisonment permitted in a Crown Court.<sup>218</sup> If the sentence necessitates a reduction following a guilty plea and this reduction results in a sentence that falls between two of the possible proscribed periods, the court is required to impose the lesser of the two periods. In addition, when producing the sentence calculation the Prison service are required to take into account any time spent on remand in custody or on bail subject to a qualifying curfew condition.<sup>219</sup>
- 5.58 A child or young adult sentenced to a DTO is required to serve the period of detention (half of the DTO) in youth detention accommodation, whilst the second half of the order is served in the community under the supervision of the Youth Offending Team or the local probation board, as determined by the Secretary of State.<sup>220</sup> Whilst all young adults aged 15-17 can be sentenced to a DTO, it is a sentence reserved for only persistent offenders aged 12-14. Where a child or young adult is sentenced to six months or less the sentence incurs a rehabilitation period of eighteen months including supervision, whereas a sentence of more than six

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<sup>218</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

<sup>219</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>220</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

month carries a rehabilitation period of 24 months including supervision. A DTO sentence can be given in both the youth court and the Crown Court.<sup>221</sup>

#### Short-term detention

- 5.59 There are two principle circumstances where a short-term period of detention will be passed by the court. Firstly, where a young adult at least 18 years of age but under 21 years of age is convicted of an offence punishable by imprisonment in the case of an adult offender or, when required, a young juvenile fails to express their willingness to comply with a requirement proposed for inclusion in the supervision order, the court is required to pass a sentence of detention in a YOI. The maximum term of detention in a YOI that can be imposed upon a young adult must mirror the maximum term of imprisonment legislated for that offence. However, a sentence of imprisonment in a YOI cannot be passed for less than 21 days. The court has the power to pass consecutive sentences of detention in a YOI where: a young adult is convicted of more than one sentence for which they are liable to a period of detention in a YOI; or an offender whilst serving a sentence in a YOI is convicted of one or more additional offence for which he is liable to a period of detention (Banks and Elliot, 2015).<sup>222</sup>

#### Long-term detention

- 5.60 In certain specified circumstances a community order or a DTO is not considered to be a justified response to the seriousness of the crime. Section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 determines the offences classified as serious crimes for offenders under eighteen years of age. To be sentenced under Section 91 a child or young adult must have been found guilty of a grave offence in a Crown Court; the Court may use section 91 to pass a sentence longer than the maximum two years that is permitted under a DTO. However, following a guilty plea and the associated reduction guaranteed with this plea, a two year detention order

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<sup>221</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>222</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

may be considered appropriate opposed to a sentence of detention under section 91.<sup>223</sup>

#### Extended detention or detention for life

- 5.61 If a child or young person is convicted of a specified offence and the Crown Court concludes that there is a significant risk of serious harm to members of the public from the young person committing further specified offences, then the court may pass an extended sentence of detention or a detention for life sentence. A sentence of extended detention can only be imposed where the appropriate custodial term is four years or more. The extended period of detention that can be imposed on a child or young adult is limited to five years in the case of a specified violent offence and eight years for a specified sexual offence, as with adult offenders. Similarly, the terms of the extended sentence must not exceed the maximum term of imprisonment for an adult offender convicted of the same offence. A sentence of detention for life is a last resort, only to be used where an extended sentence is unable to provide the level of public protection deemed necessary. When passing a sentence of detention for life, the court must set a minimum term to be served in custody before the child or young adult can be considered for parole.<sup>224</sup> However, where law does not determine a life sentence, the court must order early release provisions to apply to the offender as soon as they have served the custodial part of their sentence, as specified in the order (Banks and Elliot, 2015).<sup>225</sup>

#### Detention at Her Majesty's Pleasure (for offences of murder)

- 5.62 As for adult offenders, the mandatory sentence for children and young adults convicted of murder is life. When detained by Her Majesty's Pleasure for a murder offence, the child or young person will remain subject to the sentence for the rest of their life. As an offence with unique statutory provision, when a child or young person is convicted of murder careful consideration must be given to the extent of

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<sup>223</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>224</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>225</sup> Banks, R. and Elliot, J. (2015). Halsbury's Laws of England: Sentencing (Volume 92(2015)).

any reduction following a guilty plea and to the minimum term specified as is must sufficiently reflect the seriousness of the offence.<sup>226</sup> Schedule 21 of the Criminal Justice Act 2003 states that the starting point for determining the minimum sentence where the offender is a juvenile is 12 years, opposed to 15 years for those who are over the age of 18 years.<sup>227</sup>

### *Persistent Offenders*

- 5.63 When a child or young offender is considered to be a persistent offender, the imposition of only certain sentences becomes appropriate:
- A youth rehabilitation order (YRO) with intensive supervision and surveillance when the child or young adult is under 15 years of age
  - A YRO with fostering when the child or young adult is under 15 years of age; and
  - A DTO when the child or young adult is aged 12-15.
- 5.64 The term persistent offender is not defined in statute, but it is generally expected that the child or young person would have had previous contact with the authorities as a result of criminal behaviour on a number of occasions or when a child or young person is being sentenced in a single appearance for a series of separate, but comparable, offences committed in a short space of time.<sup>228</sup>

### *Types of Establishment for Young Offenders*

- 5.65 Custodial sentences for children and young people are a last resort. In December 2017 the youth custody population in England and Wales under the age of eighteen was 876, which rises to 959 when eighteen year olds are included. Of the 876 children and young adults detained in custody:

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<sup>226</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>227</sup> Criminal Justice Act. (2003). Schedule 21: Determination of Minimum Term in Relation to Mandatory Life Sentence. Available from: [http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga\\_20030044\\_en.pdf](http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf)

<sup>228</sup> Sentencing Council. (2016). Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guidelines. Available from: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

- 31 were female and 845 were male
- 100 were housed in secure children's homes, 171 in secure training centres and 605 in young offenders institutions
- 866 had been detained through a DTO, 222 were on remand, 241 were detained under Section 91 and 48 were detained under other unspecified legal provisions
- 43 were aged 10-14, 113 were fifteen years of age, 239 were sixteen years of age and 481 were seventeen years of age.<sup>229</sup>

5.66 The punishment for children and young adults requiring a period of time in a secure environment is the loss of liberty. Therefore, time incarcerated should not provide an occasion for further punishment/s to be laboured on a child or young adult. Rather, a secure environment presents the opportunity to address the underlying needs of each child or young person in a therapeutic environment with high staff ratios. The youth secure state tailors provision to a young person's mental, physical, social and educational development.<sup>230</sup>

5.67 The Children (Secure Accommodation) Regulations 1991 defined children's secure accommodation as accommodation provided for the purpose of restricting the liberty of children.<sup>231</sup> Under the current arrangement, the National Offender Management Service has been commissioned by the YJB to provide secure accommodation for children and young people. There are three types of accommodation for young offenders: secure children's homes, secure training centres and young offender institutions. In general, male offenders aged 15 and above and female offenders who are aged 17 serve the custodial part of their sentence in young offenders institutes, while male offenders aged 12-14 and female offenders who are under 17

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<sup>229</sup> Ministry of Justice and Youth Justice Board for England and Wales. (2018). Youth Custody Data: December 2017. Available from:

<https://www.gov.uk/government/statistics/youth-custody-data>

<sup>230</sup> Howard League. (2012). Future Insecure: Secure children's homes in England and Wales. Available from: <https://howardleague.org/wp-content/uploads/2016/05/Future-Insecure.pdf>

<sup>231</sup> The Children (Secure Accommodation) Regulations 1991. Available from: <http://www.legislation.gov.uk/ukSI/1991/1505/regulation/2/made>

serve the custodial period in their sentence in a secure children's home or a secure training centre.<sup>232</sup>

### Secure Children's Homes (SCHs)

5.68 The Care Standards Act 2000 defined an establishment to be a children's home where the provision of care and accommodation are wholly or mainly for children.<sup>233</sup> SCHs are registered as children's homes but are also approved by the Secretary of State for the purpose of restricting the liberty of children and young people; they are not defined in legislation as a penal institution for young offenders.<sup>234</sup> Across England and Wales there are fifteen individually managed SCHs, each housing a range of services within a secure environment to support the individual needs of the children in their care. SCHs detain youth offenders in a locked environment and, thus, restrict a young person's liberty. They provide care and accommodation for boys and girls aged between ten and eighteen who have been detained or sentenced by the criminal courts and those who have been remanded to secure local authority accommodation. In addition, they accommodate and care for children and young people who have been placed in a SCH on welfare grounds by local authorities or the courts. They offer full residential care, educational facilities and/or training and healthcare provision. SCHs work with multi agency partners to deliver individualised packages of holistic care and typically young people housed within them receive 25-30 hours of schooling a week. A very high level of intensive help, tailored to meet individual needs, is offered to each young person, with low children to staff ratios. Within each home, children and young people are held in small units where close relationships with staff can be formed and a high level of intervention is active to support children and young adults in making positive changes that, in turn, can contribute to a decrease in the likelihood of re-offending.<sup>235</sup> Although SCHs have the highest cost per place per year of the youth offender establishments, a report published by the Howard League states of the three types of accommodation

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<sup>232</sup> Ministry of Justice, National Offender Management Service. (2012). Care and Management of Young People. PSI 08/2012.

<sup>233</sup> Care Standards Act 2000. Chapter 14: Part One: Introductory. Section One. Available from: [http://www.legislation.gov.uk/ukpga/2000/14/pdfs/ukpga\\_20000014\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/14/pdfs/ukpga_20000014_en.pdf)

<sup>234</sup> Ofsted. (2011). Introduction to Children's Homes: A Children's Social Care Guide to Registration. Available from: [http://dera.ioe.ac.uk/12282/2/Introduction\\_to\\_children's\\_homesper cent5B1per cent5D.pdf](http://dera.ioe.ac.uk/12282/2/Introduction_to_children's_homesper cent5B1per cent5D.pdf)

<sup>235</sup> Secure Children's Homes. (2018). Secure Children's Homes. Available from: <http://www.securechildrenshomes.org.uk/>

housing young offenders, secure children's home most effectively ensures the safety of the young juveniles.<sup>236</sup>

5.69 On the 31<sup>st</sup> March 2017 there were fifteen SCHs in England and Wales, accommodating 203 children and young people, of which 59per cent were males and 41per cent females. SCHs in England provide accommodation and care to 184 children and young adults. 43per cent of the children accommodated on the 31<sup>st</sup> March were placed in SCHs by the local authorities on welfare grounds. Due to the closure of two SCHs, there has been an 18per cent decrease in the number of approved places since 2010 and in 2017 the occupancy rate of approved places was 80per cent. Furthermore, there has been a 39per cent decrease since 2010 in the number of places contracted to the YJB. On the 1<sup>st</sup> June 2017 there were 117 approved places contracted to the YJB in SCHs across England and Wales, with 93 of these places being filled. Of the children housed in SCHs in 2017, 61per cent were aged 15 or 16 and 28per cent were aged fourteen or younger. There were no children under the age of twelve accommodated in SCHs in 2017. Of the children accommodated in England and Wales on the 31<sup>st</sup> March 2017, 55per cent had been accommodated for less than three months and 7per cent had placements lasting a year or more.<sup>237</sup>

#### Hillside Secure Children's Home

5.70 Of the 33 Welsh children and young people in custody, four are housed in SCHs: one in Vinney Green Secure Unit in South Gloucestershire, north east of Bristol city, and three in Hillside Secure Centre in Neath, South Wales. Hillside is a national purpose-built secure children's home, which opened in 1996. It can accommodate up to twenty-two children and young people of either gender ranging from 12 to 17 years of age. Of the twenty-two spaces at Hillside, six are reserved for children and young people who are accommodated by the YJB. Hillside provides spaces for young people for whom a period of restricted liberty has been deemed necessary by the courts, on account of one of the following decisions:

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<sup>236</sup> Howard League. (2012). Future Insecure: Secure children's homes in England and Wales. Available from: <https://howardleague.org/wp-content/uploads/2016/05/Future-Insecure.pdf>

<sup>237</sup> Department for Education. (2017). Statistical First Release – Children accommodated in secure children's homes at 31<sup>st</sup> March 2017: England and Wales. Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/616481/SFR23-2017\\_Text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/616481/SFR23-2017_Text.pdf)

- remand to youth detention accommodation as specified in the powers set down within the Legal Aid, Sentencing and Punishment of Offenders Act 2012
- a DTO as specified under Section 100 of the Powers of the Criminal Courts Act (Sentencing) 2000
- a recall for breach of Licence conditions whilst serving the community part of a DTO under Sections 104 or 105 of the Powers of the Criminal Courts (Sentencing) Act 2000
- Sentence, through the Crown Court, for grave and serious crimes under Section 90 or 91 of the Powers of the Criminal Courts Act (Sentencing) 2000
- overnight transfer arrangements under the relevant sections of the Police and Criminal Evidence Act (PACE) 1984.<sup>238</sup>

5.71 In addition to contracted places for the YJB, there are also space reserved on welfare grounds for Local Authority Children's Service, as well as a number of places to accommodate children or young people who are vulnerable under Section 25 of the Children Act 1989 and Section 119 of the Social Services Well-Being Act (Wales) 2016. In certain circumstances the YJB allows the Local Authority Children's Services to spot purchase a vacant bed at Hillside, to enable the Local Authority to accommodate a young person on welfare grounds under Section 25 of the Children Act (1989). Hillside can also accommodate emergency requests for placements (i.e. up to 72 hour period) on authorisation by the Local Authority's Director of Social Services. A local authority wishing to place a young person below the age of 13 years is required to seek permission from the Welsh Government Minister or the Secretary of State at the Department of Education prior to the placement. Every referral receives careful consideration to ensure the services at Hillside have the capacity to meet the needs of the child or young person in question. All admissions are thoroughly planned, providing the opportunity for the manager of Hillside to receive the relevant information prior to the admission of a young person. Where possible, additional sources of information are sought

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<sup>238</sup> Hillside Secure Children's Home. (2017). Statement of Purpose 2017. Available from: <http://www.hillsidesecurechildrenshome.co.uk/media/7734/statement-of-purpose.pdf>

including, where relevant, additional views regarding the needs and behaviour of the child or young adult from previous placements.<sup>239</sup>

5.72 The children and young people admitted to Hillside are vulnerable young persons, who often have complex needs underlying their presenting behaviours. Each person has at least one nominated residential worker who acts as a keyworker and is responsible for individualised care management. The implementation of each child's or young person's unique care plan is overseen by a unit leader and, in turn, monitored by the case management team. It is the unit leader who holds the responsibility for delivering and achieving the best outcomes of each care plan. Each child or young person has an appointed case manager, who has responsibility for the young person's care plan for the entirety of their stay. The care plan is designed to ensure steps are continually being made to address the difficulties that led to the courts' decision to place a child or young person in a condition of security and, thus, seeks to promote the best outcomes for each and every child or young person. Hillside's service delivery, of which the care plan is a key part, is undertaken by well-trained and experienced staff members, who are all qualified in their respective fields of expertise. Every week the in-house multidisciplinary team review each person's care plan. In addition, comprehensive assessments and individual programs of intervention are monitored and evaluated regularly for each child or young person and the outcomes reported through the monthly case reviewing process.<sup>240</sup>

5.73 Hillside is split into three living units, which each have televisions, radios, videos, PlayStation, CD players, crafts, board games, books, magazines, art equipment and an external recreational garden area. Each young person has his or her own room with en suite facilities. Hillside's additional facilities comprise of:

- a gymnasium, fitness room, all weather outdoor pitch
- a craft design and technology room, an art room and a compute room
- a horticultural garden

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<sup>239</sup> *ibid.*

<sup>240</sup> *ibid.*

- a cinema and karaoke/music room
- vocational workshop facilities including building, plumbing, electrical, home economics, health and beauty and painting and decorating.<sup>241</sup>

5.74 Hillside actively promotes wellbeing, good health and high quality education. The education of the children and young people detained in Hillside spans across the centre and is provided thorough social learning on the living units, leisure and recreational activities, extra curricula education, through homework and through the structured weekly 28-hour education programme.<sup>242</sup> Hillside aims to support children and young people as they seek to achieve a fulfilling and enjoyable life in a safe and positive way. Hillside invests in children and young people so they have a voice, empowers them to be active participants during their time in the home and enables them to use the skills gained to enhance their opportunities on their return to their community.<sup>243</sup>

#### Secure Training Centres (STCs)

5.75 Secure training centres hold children and young people aged 12 years and 18 years and in December 2017 a total of 171 children and young offenders were housed in STCs.<sup>244</sup> There are three STC across England and Wales: Rainsbrook STC in Willoughby near Rugby, Oakhill STC near Milton Keynes and Medway STC in Rochester. STCs have the capacity to accommodate both female and male juveniles. Additionally, Rainsbrook hosts a purpose built mother and baby unit providing accommodation for detained mother and their babies, as well as for females in the final stages of pregnancy. In April 2015 Hassockfield STC in Consett near Newcastle, which had an accommodation capacity of 58, was closed due to increasingly fewer young people serving custodial sentences. Together the three STCs hold approximately 15 per cent of the youth custody population.<sup>245</sup> Each STC

<sup>241</sup> Secure Children's Homes. (2018). Leisure. Available from: <http://www.hillsidesecurechildrenshome.co.uk/2273>

<sup>242</sup> Secure Children's Homes. (2018). Education. Available from: <http://www.hillsidesecurechildrenshome.co.uk/2267>

<sup>243</sup> Hillside Secure Children's Home. (2017). Statement of Purpose 2017. Available from: <http://www.hillsidesecurechildrenshome.co.uk/media/7734/statement-of-purpose.pdf>

<sup>244</sup> Ministry of Justice and Youth Justice Board for England and Wales. (2018). Youth Custody Data: December 2017. Available from: <https://www.gov.uk/government/statistics/youth-custody-data>

<sup>245</sup> Ministry of Justice and Youth Justice Board. (2018). Youth Justice Statistics 2016/17 England and Wales: Statistics Bulletin. Available from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/676072/youth\\_justice\\_statistics\\_2016-17.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf)

is designed to accommodate between 50-80 children and young adults, with a staff to child ratio of 3:8.<sup>246</sup> STCs are split into units, with each unit accommodating between five to eight young adults. Young juveniles accommodated in STCs will have been sentenced to a period of detention for a range of different offences, ranging from minor crimes to the most serious of offenses.

5.76 The Criminal Justice and Public Order Act 1994 proposed the concept of STCs and the original Statement of Purpose proscribed:

- 1) The aims of a centre to be:
  - a) to accommodate trainees in a safe environment within secure conditions; and
  - b) to help trainees prepare for their return to the outside community.
- 2) The aim mentioned in paragraph (1) (b) above shall be achieved, in particular, by:
  - a) providing a positive regime offering high standards of education and training;
  - b) establishing a program designed to tackle the offending behaviour of each trainee and to assist in his development;
  - c) fostering links between the trainee and the outside community; and
  - d) co-operating with the services responsible for the trainee's supervision after release.<sup>247</sup>

5.77 Education is at the heart of STCs, with the children and young people accommodated in the centres receiving a mandatory 25 hours of education and/or training a week. Alongside the primary educational purpose, STCs focus heavily on rehabilitation and care.

5.78 In recent years STCs have been the focus of negative publicity, following the broadcast of the BBC Panorama programme in 2016 which exposed the mistreatment of young people in Medway STC. Traditionally private operators have run STCs, with G4S being the prime operator. Following the concerns over the

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<sup>246</sup> Parliamentary Office of Science and Technology. (2016). Postnote: Education in Youth Custody. Number 524. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/POST-PN-0524#fullreport>

<sup>247</sup> Secure Training Centres, England and Wales: The Secure Training Rules 1998. Available from: <http://www.legislation.gov.uk/uksi/1998/472/introduction/made>

provision of care for the children and young adults housed in STCs, the management of the centres is moving back into the public sector. Since July 2016 the NOMS has been given the responsibility for managing Medway STC. OFSTED is responsible for the inspection of STCs and in the most recent rounds of inspection in 2017, the overall effectiveness of Rainsbrook was graded “requires improvement”,<sup>248</sup> whilst Oakhill and Medway were deemed “inadequate” in terms of their overall effectiveness.<sup>249,250</sup> However, the OFSTED reports for each STC do suggest improvements are slowly being made, driven by the appointment of new directors and new management teams. All three centres are enhancing the independent advocacy service provided by Barnardo’s for the young people they accommodate, elevating monitoring systems, reviewing safeguarding arrangements and seeking funding to extend CCTV coverage.

#### Young Offender Institutions (YOIs)

Youth Offending Institutes	Location	NOMS Region
Ashfield (contracted establishment)	Gloucestershire	N/A
Cookham Wood	Kent	Kent and Sussex
Feltham	Greater London	Greater London

<sup>248</sup> OFSTED. (2017). Inspection of Secure Training Centres: Inspection of Rainsbrook. Available from: <https://reports.ofsted.gov.uk/sites/default/files/documents/secure-training-centre-reports/rainsbrook/Rainsbrookper cent20STCper cent20Ofstedper cent20reportper cent20Juneper cent202017per cent20per cent28PDFper cent29.pdf>

<sup>249</sup> OFSTED. (2017). Inspection of Secure Training Centres: Inspection of Oakhill. Available from: <https://reports.ofsted.gov.uk/sites/default/files/documents/secure-training-centre-reports/oakhill/Oakhillper cent20STCper cent20Octoberper cent202017per cent20report.pdf>

<sup>250</sup> OFSTED. (2017). Inspection of Secure Training Centres: Inspection of Medway. Available from: <https://reports.ofsted.gov.uk/sites/default/files/documents/secure-training-centre-reports/medway/Medwayper cent20STCper cent20Ofstedper cent20reportper cent20Marchper cent202017.pdf>

<b>Hindely</b>	Greater Manchester	North West
<b>Parc (contracted establishment)</b>	Wales	N/A
<b>Warren Hill</b>	Suffolk	East of England
<b>Werrington</b>	Staffordshire	West Midlands
<b>Wetherby</b>	West Yorkshire	Yorkshire and Humberside

5.79 Young offender institutions are part of the main prison system, operating with many of the same rules and policies as prisons for adult male offenders and female adult offenders. YOIs were introduced under the Criminal Justice Act 1988 to accommodate young adults aged 15-21. YOIs tend to be larger than the other two types of secure accommodation for young offenders. There are currently eight YOIs accommodating young males in England and Wales (see table 4) and three dedicated female young person units in England (see table 5).

**Table 4: Young offender institutes holding young males in England and Wales.<sup>251</sup>**

<sup>251</sup> Justice. (2017). Young People (Juvenile Offenders). Available from: <https://www.justice.gov.uk/offenders/types-of-offender/juveniles>

Establishment	Location	NOMS Region
Downview (Josephine Butler Unit)	Surrey	Greater London
Eastwood Park (Mary Carpenter Unit)	Gloucestershire	South West
New Hall (Rivendell Unit)	West Yorkshire	Yorkshire and Humberside

**Table 5: Young offender institutes holding young females in England.<sup>252</sup>**

- 5.80 Between 2005 and 2015 the number of children and adults held in YOIs fell dramatically. In December 2017 there were 605 young offenders accommodated in YOIs across England and Wales.<sup>253</sup> YOIs have witnessed a 74 per cent decrease in their population over the last ten years, which is by far the greatest decrease in population across the three sectors providing custodial accommodation for children and young people. Of the 33 Welsh young offenders in custody on the 29<sup>th</sup> December 2017, 24 of these were accommodated in YOIs.
- 5.81 The Care and Management of Young People PSI, currently 28/2009, sets forth the guidelines and mandatory instructions to Governors of YOIs. These guidelines and instructions ensure the service in the institutions operates in accordance to statutory requirements. YOIs are designed to provide a safe and secure environment for young people, with a child to staff ratio of 1:10.<sup>254</sup> Young people accommodated in YOIs are allocated a personal officer who is their first point of contact for any concerns. Local authorities from outside contractors commission education within YOIs and there is also the option for young people to engage in vocational training. Since August 2015 the mandatory educational hours for young people in YOIs is 30 hours per week. Where a sufficient level of trust and development has been demonstrated, young people have the opportunity to apply for temporary release which can be granted to undertake activities in the community linked to education, training and employment. As a child or young person approaches the end of their custodial sentence, they may be granted temporary release to assist with resettlement.

<sup>252</sup> *ibid.*

<sup>253</sup> Ministry of Justice and Youth Justice Board for England and Wales. (2018). Youth Custody Data: December 2017. Available from: <https://www.gov.uk/government/statistics/youth-custody-data>

<sup>254</sup> Parliamentary Office of Science and Technology. (2016). Postnote: Education in Youth Custody. Number 524. Available from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/POST-PN-0524#fullreport>

5.82 The Juvenile Staff Awareness Programme offers training to all staff in the Prison Service working in direct and regular contact with young people. This is a seven-day training programme designed to provide staff with a comprehensive understanding of the specific issues that are faced by young people detained in custody. The programme includes modules on safeguarding, mental health, and substance misuse and behaviour management.<sup>255</sup> Mirroring the experience of secure training centres, YOIs have been historically been subject to a large degree of criticism, which is particularly acute today. There are grave concerns regarding the level of violence in YOIs and, thus, over the safety of the young people accommodated in these institutions. In July 2017, following an increase in violence, the prison watchdog stated not one youth jail in England or Wales was safe. Peter Clarke, HM Chief Inspector of Prisons, stated 'the current state of affairs is dangerous, counterproductive and will inevitably end in tragedy unless urgent corrective action is taken' (Travis, 2017).<sup>256</sup>

Her Majesty's Prison and Young Offenders Institute Parc

5.83 HMP and YOI Parc is a category B prison situated in Bridgend, South Wales. Opened in 1997, Parc was one of the first prisons to be built under the Government's Private Finance Initiative. G4S Care and Justice Service played a leading role in the development of Parc prison and hold a 25-year operating contract to manage the prison on behalf of HM Prison Service. The prison can accommodate 1,803 convicted male adult prisoners and remand/convicted young offenders,<sup>257</sup> with the Young Persons Unit having the capacity to accommodate 62 young males aged 15-17 years. The Young Person Unit houses young males (under 18 years of age) on remand as well as those who have been convicted,

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<sup>255</sup> Justice. (2017). Young people (juvenile offenders). Available from: <https://www.justice.gov.uk/offenders/types-of-offender/juveniles>

<sup>256</sup> Travis, A. (2017). Prisons Inspector Warn of 'Staggering' Decline in Safety of Youth Jails. The Guardian. Available from: <https://www.theguardian.com/society/2017/jul/18/youth-jails-staggering-decline-standards-england-wales-peter-clarke-prisons-inspector-report>

<sup>257</sup> Ministry of Justice, National Offender Management Service, HM Prison Service, and Her Majesty's Prison and Probation Service. (2017). Population Bulletin: Monthly December 2017. Available from: <https://www.gov.uk/government/statistics/prison-population-figures-2017>

whilst the rest of the prison is reserved for convicted male adults and young adults (aged 18-20 years).

- 5.84 The Young Persons' Unit was opened in response to the YJB's desire to have an institution in Wales with the capacity to house Welsh young offenders closer to their homes and families. The unit opened in 2002 as a 28-room facility for young people held on remand aged between 15 years and 18 years. In 2004 the unit was expanded to house 36 young people, accommodating both remand and sentenced young adults. In 2007 the unit expanded further to accommodate 64 young males. The facility was originally for courts in south and mid wales, but in 2013 the catchment area was extended from Wales to encompass the southwest of England, including Somerset, Devon and Cornwall. In April 2014 the court catchment area increased once again to include Bristol, Swindon and Wiltshire. Today the Young Persons' Unit, which is known as the John Charles unit, has two residential units – GI housing up to 36 young male and the EI unit accommodating up to 28 young males.<sup>258</sup> In October 2017 Parc Prison held 43 young males and as of December 29<sup>th</sup> 2017 there were 13 Welsh young offenders accommodated in the Young Persons' Unit.
- 5.85 Parc's Young Persons' Unit adopts a holistic approach to effective rehabilitation and resettlement of young people. The work of the John Charles Unit seeks to support the YJB's core objectives of preventing reoffending and promoting resettlement opportunities for the young males in its care. The Welsh Government's extended entitlement agenda – the core elements of which are learning, inclusion, citizenship and safety<sup>259</sup> – is reflected in all of Parc's policy and procedures that support the rights of the children and young people resident. The young males accommodated in the unit are encouraged to maintain family and community links. Education for all young males aged 15-17 years is strongly promoted and a varied curriculum is offered in the Young Persons Learning and Skills Centre. On a monthly basis young males will have the opportunity to discuss individual learning plans with senior

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<sup>258</sup> HM Chief Inspector of Prisons. (2017). Report on an Unannounced Inspection of Juvenile Unit of HMYOI Parc: 5-16 December. Available from: <https://www.justiceinspectorates.gov.uk/hmiprisonswp-content/uploads/sites/4/2017/04/Parc-Web-2017-1.pdf>

<sup>259</sup> Department for Training and Education. (2012). Extending Entitlements: Support for 11 to 25 year olds in Wales. Direction and Guidance. Available from: <https://www.npted.org/section/youth-service/Downloads/Extendingper cent20Entitlementper cent20directionsper cent20andper cent20guidance.pdf>

teachers, to ensure adequate progress is being made. All young people housed at Parc receive care, protection and the necessary individual assistance – social, psychological, medical, educational and physical – in order to develop and promote their personal and social development.<sup>260</sup>

- 5.86 Historically, and in contrast to the condition of YOIs across England and Wales, HM Chief Inspector of Prisons has produced a series of very positive reports following inspections of Parc's Young Persons' Unit. Inspections carried out by HM Chief Inspector of Prisons judge an establishments performance against the model of a healthy prison, which takes into consideration safety, respect, purposeful activity and resettlement – the four elements which, when successfully met to a high standard, comprise to ensure a healthy prison system. Despite the YOI at Parc having a positive record, the inspection carried out in December 2016 noted deterioration, stating the unit had become less safe with an increased level of disrespect. Following a further unannounced inspection in October 2017, HM Chief Inspector of Prisons concluded the deterioration had been stymied and there was evidence significant improvements had been made. Although levels of violence were still relatively high, advances had been made regarding safety with increasingly rigorous safeguarding and child protection procedures. The young offenders at Parc evidenced progress in education and many were given the opportunity to develop useful and transferrable skills. Resettlement provision remained sufficient and the report concluded the staffs are well trained, committed and confident.<sup>261</sup> The quality of care in the Young Persons' Unit at Parc suggests the young people accommodated here would be well informed of their rights, whilst the proficient education service offered to the detained young males suggests there is the capacity to ensure they could be well informed voters if they were enfranchised.

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<sup>260</sup> HMPYOI Parc. (2014). Young Persons Unit. Available from: [https://www.hmpparc.co.uk/about\\_rar\\_ypu.htm](https://www.hmpparc.co.uk/about_rar_ypu.htm)

<sup>261</sup> HM Chief Inspector of Prisons. (2017). Report on an Unannounced Inspection of Juvenile Unit of HMYOI Parc: 5-16 December. Available from: <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2017/04/Parc-Web-2017-1.pdf>

## **6. Section Four: Delving Further into the Challenges**

- 6.1 Both politically and practically enfranchising prisoners is a large task. Politically prisoner disenfranchisement has proved largely unpopular with the general public and across the political spectrum. When faced with public and political opposition seeing through a mandate can be more difficult. What is more, the success of a publicly and politically contentious proposal necessitates the need for a clear, tight and coherent policy, which can be justified and is responsive to any concerns or worries from political parties, interested organisation and charities, practitioners and the general public.
- 6.2 Practically there are a number of challenges that will be faced in developing policy that provides Welsh prisoners, whose due release date falls within the term of the office being elected, with mechanisms and processes for both registering to vote and then exercising that vote. What is more, these mechanisms and processes are going to require coordinated work across various organisations and services – including, but not limited to, the Electoral Commission, the Prison Service, Electoral Registration Officers and the YJB – and across both England and Wales. This section, in turn, explores three of the primary challenges: determining a prisoner’s due release date, addressing the case for different principles for youth juveniles and the issues of prisoners being regarded as “ordinarily resident” for service provision purposes. This section does not seek to provide the answers to these questions, but rather aims to present the challenges in-depth and the potential practical issues and political arguments that may arise in addressing them.

### **Challenge One: Determining Release Date**

- 6.3 In order to enfranchise Welsh prisoners whose due release date falls within the terms of council being elected, it will be necessary to know a prisoners release date. Electoral Registration Officers (EROs) will need to know when a prisoner is due to be released, to accept both their application to enrol and their application for a postal or proxy vote. What is more, it is essential that this information is up to date. Drawing on the information presented in the previous section around custodial sentences and the sentence calculations carried out by the Prison Service, this chapter delves further by mapping out the process of calculating a release date and

the factors that affect a prisoner's release date. In the following discussion, the challenges that will be faced in developing policy will be detailed and a potential policy approach, drawing from the Australian model, will be mapped out.

#### *The release date*

- 6.4 Overwhelmingly, it is the sentence that has been passed by the court that will determine a prisoner's release date. However, it is important to note that due to the introduction of new or amended legislation, different active release schemes that are currently operative and, so the interaction between the date the offence was committed or the date the sentence imposed and the types of sentence passed will determine the initial release date. Here, the most recent legislation and amendments are drawn upon, which mark a difference between offences committed and/or sentenced prior to February 2015.
- 6.5 A sentence can never commence prior to the date of imposition and, unless the courts state otherwise, a sentence will normally run from the day it is imposed. Prisoners serving a standard determinate sentence of less than 12 months are released automatically at the halfway point of their sentence (referred to in the sentence calculation as the conditional release date). Following release these prisoner are on licence until their sentence ends, whilst also being subject to post sentence supervision for 12 months after the halfway point of their sentence. The release, licence and supervision dates are the same for sentences that are more than 12 months but less than two years. Those who are serving a sentence of two years or more are also automatically released at the halfway point and remain on licence until the end of their sentence, but they are not required to have a period of post sentence supervision. All prisoners serving an extended determinate sentence will be eligible for discretionary release by the Parole Board at the point where two thirds of the custodial sentence has been served (referred to in the sentence calculation at the parole eligibility date). A prisoner who is granted parole remains on licence until the end of their sentence. Where a prisoner has been denied parole,

they will automatically be released at the end of their custodial sentence (referred to in the sentence calculation as the custody end date).<sup>262</sup>

- 6.6 Although a release date cannot be calculated for indeterminate sentences, the Secretary of State automatically applies for parole on behalf of prisoners serving an indeterminate or life sentence. If a prisoner is serving a minimum term of four years or more they will automatically be contacted three years before their tariff runs out. A prisoner serving an indeterminate sentence for less than four years will be automatically contacted six months before their tariff runs out.<sup>263</sup> Once a case has been referred, the Parole Board will then consider a prisoner's case within six months and, if they conclude the prisoner in question should be released, then the prisoner will be released on their parole eligibility date or, where that date has already passed, the earliest date possible.<sup>264</sup>

#### *Time Spent on Remand*

- 6.7 Sentence calculation must take into consideration the time spent on remand to custody, remand on tagged bail and police detention time (the latter is only applicable to sentences imposed prior to the 3<sup>rd</sup> December 2012 for offences committed prior to the 4<sup>th</sup> April 2005). A "relevant period" of time spent on remand, in detention or on bail automatically contributes to the custodial sentence period and, thus, can bring the conditional release date forward. A relevant period can only be credited once to the overall sentence length. Remand on tagged bail counts as time served towards the sentence at a rate of half of the number of days actually spent on tagged bail while subject to the relevant requirements. The number of days spent on tagged bail to count as a relevant period will be directed by the court and stated on the sentence warrant. The Prison Service must, then, credit this time when calculating the sentence dates. Where the number of remand/tagged bail days exceeds the custodial part of the sentence, only the remand/tagged bail days that will clear the custodial part of the sentence can be applied. This will result in

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<sup>262</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

<sup>263</sup> gov.uk. Getting Parole. Part Three: Life and indeterminate sentences. Available from: <https://www.gov.uk/getting-parole/life-and-indeterminate-sentences>

<sup>264</sup> Offenders Families Helpline. (2015). Parole. Available from: <http://www.offendersfamilieshelpline.org/index.php/parole/>

immediate release of the prisoner, but the remaining balance of remand/tagged bail days does not reduce the licence period of the sentence. However, if a prisoner is recalled on licence the balance of uncredited remand/tagged bail time may, depending upon the type of recall and when the offence was committed, be offset against the period of return or recall.<sup>265</sup>

6.8 A prisoner is not entitled to be released until the last day of the custodial part of the sentence. Yet, for practical reasons the prisoner may be discharged at any time of the day, usually in the morning to allow time for travelling. If a prisoner's release date is due to fall on a weekend or Bank Holiday, the release date must be brought forward to the immediate preceding weekday. The exception is prisoners serving a five-day sentence or less, who can be released on the Saturday. Following release from custody and in line with the Offender Rehabilitation Act 2014, all prisoners serving a standard determinate sentence where the offence was committed on or after the 1<sup>st</sup> February 2015 will be subject to supervision for at least 12 months following their release. This supervision period consists of a licence period, active between the conditional release date and the sentence licence expiry date, and a period of post sentence supervision which is active between the sentence licence expiry date and the top up supervision end date. Prisoners that are excluded from post sentence supervision are:

- those sentenced to one day
- those serving an extended sentence
- those sentenced for on offence committed prior to 1<sup>st</sup> February 2015
- those who are under the age of 18 years at the half way point of the sentence as adjusted by remand/tagged bail and unlawfully at large time
- those serving terms in default (including terms in default of a confiscation order)
- those serving civil terms of imprisonment.

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<sup>265</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

6.9 For sentences that do entail a period of post sentence supervision and where the offender breaches this period, the court can deal with the breach by ordering the person to be committed to prison for a period that does not exceed fourteen days.<sup>266</sup>

#### *Multiple sentences*

6.10 Where a prisoner has been convicted of a number of sentences passed on the same occasion the court will have stated if the sentences are to run concurrently or consecutively. If the multiple sentences are to run concurrently, the longest of the sentences imposed determines the conditional release date. When concurrent sentences are passed on different occasions then the multiple sentences run parallel. Each sentence, thus, is calculated separately and each has its own release date. The offender will not be released until the last conditional release date and they will then remain on licence to the latest sentence licence expiry date, with post sentence supervision concluding at the latest top up suspension end date. Providing a prisoner has not been released before another sentence is imposed, any remand/tagged bail relevant to any of the sentences will reduce the effective (latest) release date.

6.11 Alternatively, when passing multiple sentences the court can order for the sentences to be served consecutively. Here, in terms of carrying out the sentence calculation, the individual sentences are aggregated. Release, then, is conditional at the halfway point of the aggregate, with the licence expiring at the end of the aggregate. Post sentence supervision applies to: aggregate sentences totalling 12 months or more but less than two years where at least one of the offences has been committed on or after the 1<sup>st</sup> February 2015; and to aggregates of less than 12 months where all the offences have been committed on or after 1<sup>st</sup> February 2015. Therefore, sentences and offence that fall within these terms will require a top up supervision end date to be calculated, as well as a conditional release date and a sentence licence end date. From 2008 the courts have not had the power to impose a consecutive sentence where a prisoner has been released from the initial custodial part of an earlier sentence, even if they have been subsequently recalled

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<sup>266</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determinante-sentenced-prisoners.pdf>

for a breach of licence and are back in custody in respect of the first sentence when the second sentence is imposed. In this case, the two sentences – the licence revoke and the new sentence – run in parallel, with the prisoner not being released until required in respect of each sentence.<sup>267</sup>

### *Appealed cases*

- 6.12 Cases on appeal from the magistrates' or youth courts will be heard afresh in the Crown Court and will result in a completely new hearing. Where the Crown Court dismisses the appeal or re-imposes the same sentence, there is no effect on the sentence calculation and no action needs to be taken, unless pending appeal the prisoner was bailed in which case the period spent on bail must be credited to the original release date. When the Crown Court imposes a sentence of a different length to the original sentence, a new release date will need to be calculated that deducts the term already served from the date of the original sentence unless the court has ordered otherwise. Where a Court of Appeal changes a sentence, a new sentence calculation will be made commencing from the date of the original sentence, unless the courts have stated differently. Any time spent on bail pending an appeal cannot be counted towards the sentence.

### *Additional days*

- 6.13 Although release dates tend to fall prior to the custodial end date, there is the potential for additional days to be added to the custodial period. If a prisoner is found guilty of a breach of Prison Rule 51 or a YOI Rule 55, the prisoner or young offender serving a determinate sentence (but not a young offender serving a DTO) may be ordered to serve additional days. The varying dates calculated in the sentence calculation effected by additional days awarded are dependent upon the sentence length and when the sentence was imposed/offence committed, but in general the conditional release date or automatic release date will always be pushed back as a result of additional days. The imposition of additional days cannot extend the release date beyond the custody end date. Prisoners serving a default sentence or civil sentenced on or after the 4<sup>th</sup> April 2005 cannot be subject to the imposition of additional days. There is the potential for awarded additional days to

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<sup>267</sup> *ibid.*

be remitted or quashed. In such cases, the sentence dates affected by additional days awarded will be brought forward in accordance with the number of days remitted. A prisoner on remand who is awarded provisional additional day/s and who, subsequently, receives a custodial sentence, will have their release date deferred in accordance with the number of additional days awarded as long as the remand time applies to the sentence.<sup>268</sup>

- 6.14 On the other hand, the prison Governor may recommend, following meritorious conduct, a prisoner is to be rewarded by special remission. The case for early release must be put of the Regional Custodial Manager, who can approve the recommendation and the number of early release days to be awarded. The sentence calculation must, then, be recalculated to determine the new release date.<sup>269</sup> There is, however, no statutory provision for “time off for good behaviour.”

*Re-calculation following a transfer*

- 6.15 The Crime (Sentences) Act 1997 sets forth provisions for prisoners to be transferred, on a restricted or unrestricted basis, between the United Kingdom jurisdictions and the Islands (Jersey, Guernsey and the Isle of Man) for the primary purpose of facilitating family contact. Prisoners, under the act, can be transferred to another jurisdiction either to complete their sentence or for a limited time to receive accumulated visits. Prisoners may also be transferred for judicial purposes. If transferred on an unrestricted basis, the receiving jurisdiction gains authority over the continued administration of the sentence. Therefore, prisoners transferred to England and Wales on an unrestricted basis must have their release dates recalculated as if sentenced by a court in England and Wales, with credit for time in custody only being awarded if permitted in the jurisdiction in which the prisoner was sentenced. When a prisoner is transferred to England and Wales on a restricted basis – whether that be for a limited or an unlimited period – the release dates determined by the sending jurisdiction continue to apply. If additional days have been awarded or remitted in the new jurisdiction, the Cross Border Transfer Section

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<sup>268</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

<sup>269</sup> *ibid.*

in NOMS must be consulted before the release dates of restricted transferees are adjusted.<sup>270</sup>

### *Rectifying mistakes in calculations*

- 6.16 If a mistake has been found in the sentence calculation which changes the prisoners release dates, immediate action must be taken to rectify the mistake. The prisoner is required to be notified of revised date and provided with a reason as to why their release date has been altered. In addition, the IT record needs to be amended and the calculation sheet annotated to detail the reason for the altered dates. If the recalculation means that the prisoner should have already been released, the release must take effect as soon as it can be arranged with the proper discharge and supervision arrangements in place. When a prisoner has, for several months, been provided with an understanding that they were to be release, consideration must be given to whether the sentence imposed should be served up to the correct release date or whether the Royal Prerogative of Mercy should cancel out the period in question.<sup>271</sup>

### *Discussion*

- 6.17 Having mapped how a prisoner's initial release date is calculated and, then, the factors that can alter the initial calculation, it is evident there are a number of challenges posed by knowing a prisoners release date and, thus, determining their eligibility. However, taking a step back and prior to even thinking about an offenders due release date, policy will first need to address the proposal set out by UK Government to add clarity in the sentencing process. The Hirst judgment indicated how during sentencing, the criminal courts in England and Wales do not make any reference to disenfranchisement, with the consequence 'most courts and citizens were totally unaware that loss of voting rights accompanied by the imposition of a sentence of imprisonment.'<sup>272</sup> To address the lack of clarity regarding the loss of voting rights following a defendant being committed to a period of imprisonment, UK

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<sup>270</sup> National Offender Management Service. (2015). Sentence Calculation – Determinate Sentenced Prisoners. Available from: <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-03-2015-sentence-calculation-determiante-sentenced-prisoners.pdf>

<sup>271</sup> *ibid.*

<sup>272</sup> Case of Hirst v. The United Kingdom (No. 2). (2005). Judgement. The Court's Assessment, paragraph 44. Available from: <http://www.bailii.org/eu/cases/ECHR/2005/681.html>

Government has stated the court process will ‘make it clear to criminals when they are sentenced that while they are in prison they will lose the right to vote’.<sup>273</sup>

However, in light of commitment by the Welsh Government to enfranchise prisoners for local government elections, this may not necessarily be the case for Welsh defendants sentenced to a period of imprisonment. What is more, at the time of sentencing the court is unlikely to know whether or not the prisoner in question will be eligible to vote. The policy, then, will need to consider this and potentially courts across England and Wales, when sentencing a Welsh prisoners, will have to make clear as part of the sentencing process the terms – if their release date falls within the term of office being elected – by which a prisoner will be eligible to vote.

- 6.18 As part of the sentencing process the courts produce a sentence warrant. The sentence warrant is the order committing the defendant in question to a determined period of imprisonment (specified in days, months or years), as decided by the judge. Although the sentencing warrant is integral to producing the sentence calculation, it does not specify release dates and therefore does not contain the information required to determine whether or not a prisoner is eligible to vote. Rather, the information needed is found in the sentence calculation produced by the Prison Service and, thus, it is this information that will need to be available to the relevant persons/organisations under the policy that is introduced.
- 6.19 The date of the sentence calculation that will be of particular concern will be the conditional release date. This date, however, is conditional because it can potentially be affected by a number of factors. Although the time spent on parole and the effect of receiving multiple sentences will be accounted for in the initial date the is produced (within five working days of reception), the date can change following: a successful appeal of a case; the imposition of additional day which, in turn, can be then quashed or remitted; where early release days have been awarded; recalculation following transfer; and rectifying mistakes in calculation. Thus, the challenge for policy development resides not simply with knowing a prisoner proposed release date but also ensuring the date is the most recent date

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<sup>273</sup> Lidington. D. (2017). Sentencing. Statement to the House of Commons, November 2017, volume 630. Available from: <https://hansard.parliament.uk/commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing>

calculated and is not subject to any further changes from, for example, additional days received following a breach of prison rules.

6.20 Drawing on the Australian model, there is the potential that policy could provide for correspondence between the Prison Service and EROs. Correspondence could be set off on a monthly basis and detail the conditional release date of any prisoners who have been received in the previous month and any changes to release dates for other prisoners, then using this data the ERO would be able to register prisoners who were eligible and deny the application of those who were in eligible or, where necessary, remove them from the electoral register. Otherwise, when a prisoner is sent a copy of their release date notification slip, this could also be sent to the Welsh Electoral Commission and kept on file to be viewed, when needed, by those assessing electoral registration application. However, unlike in Australia, the process is complicated not only by the potential for the conditional date of release to change but also the impact this change could have in relation to the requirement of being released during the term of office being elected. In Australia federal election it is the sentence length that determines eligibility and this rarely alters unless there has been a change in sentence following an appeal. Therefore, whilst in Australia the data contained in the monthly correspondence only needs to detail the prisoners who, in the proceeding month, have been sentenced to a period of imprisonment of three years or more, in the Welsh context the policy developed would have to ensure all release dates were available for prisoners serving a determinate sentence, as at some point these prisoners will be eligible and, what is more, that this information is up to date. In addition, whilst there would need to be regular correspondence between the appropriate persons/organisations, when developing policy it would also be necessary to consider the need for additional correspondence around the time of the election to ensure that the data held by those determining if a prison is eligible to vote is up to date.

6.21 However, certain sentences do not carry a conditional release date but rather a parole eligibility date. Extended determinate sentences and special custodial sentences do not have a conditional release date as persons serving these sentences will only be released prior to their custody end date at the order of the parole board. Thus it will be necessary for correspondence between the Prison

Service and the ERO to provide the data regarding custodial end dates for persons serving extended determinate sentences and special custodial sentences. As, however, there is a likelihood these persons could be released by the Parole Board well in advance of their custodial end date – those serving extended determinate sentenced become eligible for parole at the two-third point of their sentence and those serving a special custodial sentence at the halfway point – there is the potential a case could be made for also monitoring the parole eligibility date and the decision of the parole board in these cases. Potentially, there could be an argument advanced that where a Parole Board has ordered the release of a prisoner serving an extended determinate sentence or a special custodial sentence, then this release date (which will be the parole eligibility date) overrides the custodial end date when determining if the prisoner in question is eligible for release. However, this would then pose a question over monitoring the parole release date of prisoners serving indeterminate sentences, particularly where the Parole Board has determined a prisoner serving an indeterminate sentence is suitable to move to an open prison where they will automatically gain more freedom and, thus, rights.

- 6.22 Alternatively there may be the potential for policy to developed, for all prisoners serving a sentence with an end date, around a prisoner’s custodial end date rather than their (conditional) release date for administrative and policy simplicity. However, such policy provision would not correspond to the proposal that has been set forth and, what is more, may not be realistic considering the large number of prisoners who are released prior to their custodial end date. Furthermore, considering determinate sentences are by far the most common types of custodial sentence and these sentences carry a conditional release date, then to develop policy around custodial end dates for all prisoners would potentially compromise the commitment of the Welsh Government to enfranchise Welsh prisoners whose due release date falls within the terms of office being elected.
- 6.23 Having understood the working of the custodial justice system and the process of sentence calculation, in order to develop policy around due release date it will be necessary to develop a system of correspondence between the Prison Service and the electoral services. In developing policy around release dates that corresponds to the current proposal the policy will potential need to have three strands: the first

strand relating to prisoners serving determinate sentences and correspondence regarding their conditional release date, considering the potential for this date to alter the need for this information to be up to date is particularly acute in this place; the second strand relating to persons serving extended determinate sentence and special custodial sentence and correspondence regarding their custodial end date and, if deemed necessary, their parole eligibility date which would require correspondence with the Parole Board as it is their decision which would determine whether the prisoner in question would be released at this date; and thirdly a strand around prisoners serving indeterminate sentences, which legally and politically determines the disenfranchisement of prisoners serving indeterminate sentences (regardless of these sentences also having a parole eligibility date). This policy developed would need to set up correspondence that geographically encompassed prisons in Wales and England and, additionally, it would be necessary to include a caveat whereby the right cannot be applied retrospectively due to the potential for a prisoner's conditional release date to alter. In addition, policy will need to account for special correspondence in the lead up to an election to ensure the data is up to date and, also, for the registering of prisoners who are attainers. Thus, there will not only have to be policy in place for prisoners who are already eligible to vote, but also for those prisoners who are due to be eligible to vote.

**Challenge Two: Different Principles of Youth Justice – “children first, offenders second”**

- 6.24 Alongside the proposal to enfranchise Welsh prisoners who meet a determined criterion, as part of their electoral reform the Welsh Government has proposed to enfranchise sixteen and seventeen year olds. The interaction between these two proposals poses the question should the same principles and, so policy, regarding the enfranchisement of adult offenders be applied to youth offenders or should different principles be developed specifically for young juveniles? This question is particularly pertinent considering there is a separate, unique youth justice system that has been designed especially to meet the needs of youth offenders and, more specifically, the joint strategy produced by the Welsh Government and the YJB to improve services for young people from Wales as risk of becoming involved in, or in, the youth justice system. The youth justice system, although modelled on the

adult justice system, diverges from the adult system in several ways as it recognises, and provides tailored provision, for the special circumstances of youth offenders – including, for example, the adaptation of youth courts from the traditional criminal court set up, less severe sentences that are individualistic-focused opposed to offence-focused and distinct penal institutions designed explicitly for children and young adults.

- 6.25 In addition to having to consider the distinct characteristics of the youth justice system, it is also necessary to delve deeper into the principle of Welsh Government and YJB's joint strategy. Introduced in 2012 to address youth justice in Wales, this strategy is guided by a series of principles, of which the first two are key to working through the challenge of young juvenile voting rights: the first principle is contained in the statement 'young people are children first, offenders second'; and the second principle in the statement 'young people in the youth justice system have the same access to their rights and entitlements as any other young person.' Taken together these two principles pose a question over the differential treatment of young adults in the youth justice system, who are children before they are offenders, to other young adults who automatically become eligible to vote as soon as they turn sixteen years of age.
- 6.26 This section seeks to delve deeper into the question posed by the interaction between the proposal to enfranchise Welsh prisoners and the proposal to reduce the minimum voting age to sixteen. First, a brief history of the youth justice system is provided before moving on to discuss the youth justice system of today. Primarily, this detail illustrates how the principles of youth justice have altered overtime. Today, youth justice is no longer guided by control and punishment but, rather, rehabilitation and care. The remainder of the chapter is focussed on the principle underpinning the Welsh strategy to youth justice and, in particular, the interaction of these principles with the view, as promoted by the United Nations, that children are full, active citizens.

#### *The History of the Youth Justice System*

- 6.27 Over time there have been varying representations of children and young adults involved with the justice system. The framing of youth juveniles is integral to how

they are politically and socially engaged with and influences the core principles of the youth justice of the day. Historically, criminal young juveniles have been identified as distinctly different from other innocent children. This constructed distinction created an environment in which a harsh and punitive response to young juveniles was both justified and, what is more, framed as necessary.<sup>274</sup>

Furthermore, it underpinned a youth justice system characterised by control, management and measurement. However, with a growing awareness of the right of children and with each successive government wanting to make an impact, the framing of children and young adults involved in the justice system has altered overtime. Today, the principles of welfare, rehabilitation and care are the foundation to the youth justice system and in the last few years we have witnessed the development of models advancing novel conceptions of youth justice.<sup>275</sup>

#### *The Welsh Youth Justice System Today*

- 6.28 Although in principle the Welsh Government does not constitutionally have responsibility of crime and justice, the practical discharge of key responsibilities integral to today's youth justice system are overwhelmingly dependent on devolved services – most notably in health, social services and education. The Welsh Government has, however, in partnership with the YJB produced a strategy for youth justice in the Wales. This strategy is grounded in the “children first, offenders second” principle, which is distinctive to Wales. In viewing children and young adults caught up with the youth justice system as children first, offending is reduced to one element in a much broader and more complex identity. What is more, it emphasises the limited maturity, capabilities, abilities and power of children and young adults involved in the youth justice system. Thus, young juveniles are no longer viewed as characteristically different from other children and their vulnerability, innocence (although not to override the degree of culpability that is moot and variable across the ten to seventeen age range) and need for both support and protection from and

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<sup>274</sup> Case, S. (2016). Negative Youth Justice: Creating the youth crime 'problem'. Centre for Youth and Criminal Justice. Available from: <http://www.cycj.org.uk/negative-youth-justice-creating-the-youth-crime-problem/>

<sup>275</sup> Drakeford, M. (2009). “Children first, offenders second”: Youth Justice in Devolved Wales. Centre for Crime and Justice Studies. Available from: <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627250903385156.pdf>

by adults should be accounted for in the justice system.<sup>276</sup> To a degree responsibility has been diverted from children and becomes placed upon the flaws in the systems, on which these children depend. Therefore, underpinned by the child first offender second principle, the Welsh Government have strongly recognised and advocated social justice as a precondition of youth justice.

6.29 If children in the youth justice system are children before they are offenders, this begs the question whether these young adults are entitled to the same rights as all other children. In 2002 The Welsh Government produced a document, Extending Entitlement: Support for 11 to 25 year olds in Wales, which provided both direction and guidance on the entitlements of young adults in Wales.<sup>277</sup> This document determines every young person to have a basic entitlement to...

- education, training and work experience that is tailored to their needs
- basic skills which open doors to a full life and promote social inclusion
- a wide and varied range of opportunities to participate in volunteering and active citizenship
- high quality, responsive, and accessible services and facilities
- independent, specialist careers advice and guidance and student support and counselling services
- personal support and advice – where and when needed and in appropriate formats – with clear ground rules on confidentiality
- advice on health, housing benefits and other issues provided in accessible and welcoming settings
- recreational and social opportunities in a safe and accessible environment

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<sup>276</sup> Case, S. (2016). Positive Youth Justice: Solving the youth crime 'problem' with children first solutions. Centre for Youth and Criminal Justice. Available from: <http://www.cycj.org.uk/positive-youth-justice-solving-the-youth-crime-problem-with-children-first-solutions/>

<sup>277</sup> Welsh Assembly Government. (2002). Extending Entitlement: Support for 11 and 25 year olds in Wales – Direction and Guidance July 2002. Available from: <https://www.npted.org/section/youth-service/Downloads/Extendingpercent20Entitlementperpercent20directionsperpercent20andperpercent20guidance.pdf>

- sporting, artistic, musical and outdoor experiences to develop talents, broaden horizons and promote rounded perspectives including both national and international contexts
- the right to be consulted, to participate in decision-making, and to be heard, on all matters which concern them or have an impact on their lives.

...in an environment where there is:

- a positive focus on achievement overall and what young people have to contribute
- a focus on building young people's capacity to become independent, make choices, and participate in the democratic process
- celebration of young people's successes.

6.30 These entitlements guarantee every young person is given the opportunity to participate as an active citizen and the right to be consulted on, to participate in and to be heard on all matters that concern them or have an impact on their lives – an entitlement that reverberates with the right to vote.

#### *Children and Young Adults as Active Citizens*

6.31 In 1989 the United Nations General Assembly signed the United Nations Convention on the Right of the Child (UNCRC),<sup>278</sup> which was then ratified in 1991 by the UK government. The Convention sets out 54 articles on the Right of the Child, including:

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3)
- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

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<sup>278</sup> United Nations. (1989). Convention on the Rights of the Child. Available from: <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12)

- A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State (Article 20)
- Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (Article 37)
- States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (Article 40).<sup>279</sup>

6.32 The articles which have been detailed here illustrate both the rights of children involved in the youth justice system and the need for this system to be characterised by care and respect for human rights and right for children to both develop and express their own opinions. However, at the core of the convention is the recognition that children under eighteen years of age are children and, as children, their unique rights are worthy of special protection.<sup>280</sup> The UNCRC promotes children as full citizens in their *own* right – a citizenship though that is simultaneously recognised as qualitatively different from the citizenship possessed by adults. Children and young people are viewed by the UNCRC as independent bearers of rights, invested with agency and decision making capacities (Stasiulis, 2002).<sup>281</sup> It promotes the view children or young persons are not, and so should no

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<sup>279</sup> United Nations. (1989). Convention on the Rights of the Child. Available from:

<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

<sup>280</sup> Lister, R. (2007). Why Citizenship: Where, how and why children. *Theoretical Inquiries in Law*, 8(2), 693-718.

<sup>281</sup> Stasiulis, D. (2002). The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement. *Citizenship Studies*, 6(4), 507-538.

longer be regarded, as “pre-citizens” or “potential adults” or “becomings”<sup>282</sup> but as important social citizens with fundamental – if unique – rights.

- 6.33 The youth justice system in England and Wales has traditionally operated under a fragmented view of youth citizenship, with different types of youth citizenship active in youth justice law, policy and practice. The status of children as citizens is integral to the youth justice system, as it reflects the particular constructions of childhood through which laws and policies for children and young people are implemented. As a consequence of framing young people as offenders, the youth justice system has constructed these young people as fully functioning citizens invested with agency. This construction has overestimated the capabilities of children and young people and illustrates a disregard for the child’s right to respect for their evolving capacities and competencies. In contrast if children and young people are regarded as citizens in the making they, then, have a position which recognises the limitations and exclusions placed on that evolving citizenship by criminal laws which, in turn, raises questions regarding the legitimacy of criminally punishing children and young people engaging in offending behaviour. It has been suggested by Professor Arthur, head of the University of Northumbria’s School of Law, that a “different-centred” youth citizenship should be advanced, which recognises young people as citizens, acknowledging their rights and obligation, whilst respecting their differences which, in turn, provides for their vulnerability and dependency. In term of children and young adults involved in the justice system, a “different centred” youth citizenship acknowledges these young persons are not threatening outsider but rather children to be supported in their socialisation, rehabilitation and inclusion in society.<sup>283</sup>

#### *Discussion*

- 6.34 Clearly there is a strong case to be made that young adults involved in the justice system to maintain the same rights as their counterparts active in society. What is more, this case becomes particular pertinent considering rehabilitation is the main aim of the youth justice system and voting has the potential to contribute to

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<sup>282</sup> James, A. (2011). To Be (Come) or Not to Be (Come): Understanding Children's Citizenship. The Annals of The American Academy of Political and Social Science, 633(1), 167-179.

<sup>283</sup> R, Arthur. (2015). Recognising Children’s Citizenship in the Youth Justice System. Journal of Social Welfare and Family Law, 37(1), 21-37. Available from: [http://nrl.northumbria.ac.uk/21644/1/Arthur\\_R\\_childrenper cent27s\\_citizenship\\_Final\\_amended.pdf](http://nrl.northumbria.ac.uk/21644/1/Arthur_R_childrenper cent27s_citizenship_Final_amended.pdf)

rehabilitation, along with the well-established precedent for the differential treatment of and special provisions provided for young juveniles involved in the justice system. The issue that potentially arises is that the argument by which youth offenders should be considered as children first and offenders second and the conception of a different-centred youth justice, resides in children being qualitatively different from adults. Children are regarded as not fully developed or empowered with the same cognitive, social and economic resources or the same degree of maturity as adults, so they should not be treated as such. Thus, if an argument was to be made that the restrictions regarding what class of prisoners should and should not be enfranchised could be more lax for young juveniles, as they are children before offenders and so should have the same rights as other children of their age, does this in turn act as an argument against the enfranchisement of **all** sixteen and seventeen year olds? Or, alternatively, if a sixteen or seventeen year old is regarded as responsible enough to vote (and to legally get married, to engage in full time employment and to pay taxes and national insurance), are they not also responsible enough to face the repercussions of their own actions with the same severity as adults? In addition, as the sentencing for youth offenders is not as severe as it is for adults, were the same terms of eligibility were to be applied across the justice system there would only be a handful of young juveniles aged sixteen and seventeen, who had committed the most serious of crimes, that would remain disenfranchised. Thus, politically the argument could be advanced that the special protection afforded to children and young adults and to their rights, has already been accounted for in the youth justice system and, so, the terms of eligibility can justifiably be applied across the justice system as young juveniles necessarily serve less severe sentences than adult offenders.

- 6.35 Alternatively, considering Wales seems to be advancing a novel model of youth justice, there is the potential voting could be part of a series of provisions that actively help to promote positive behaviour, outcomes, services and opportunities for children in the youth justice system – a series of provisions which would regard children and young adults involved in the justice system as children first by removing the responsibility from these children and going some way to redress the systems that have failed them. Enfranchising young juveniles aged 16 and 17 and

approaching those aged 14 and 15 as attainers has the potential to increase participation in pro-social school and community activities, as well as increased participation and engagement with education which, in turn, can contribute positively to the rehabilitation and inclusion of young juveniles.

- 6.36 As policy is developed it will be necessary to consider these two cases: the case for different principles guiding voting right for young juveniles and the case for the terms of eligibility to be consistent across the justice system. Both cases have merits and in the development of policy it will be necessary to consult with the varying organisations holding a role in the youth justice system. Potentially, rather than creating “special” terms of eligibility for youth offenders, it will be more pertinent for special provisions in policy to be advanced that ensure young detained juveniles also benefit from the provisions that are to be introduced regarding political education and engagement programmes. Thus, detained young juveniles would have the same opportunities to become informed and responsible voters as their counterparts.

### **Challenge Three: Prisoners as “ordinarily resident”**

- 6.37 As can be learnt from the experience in the Republic of Ireland, key to enfranchising prisoners is creating mechanisms and process within policy that allows for eligible prisoners to register to vote. The vision set forth by the Welsh Government proposes for eligible prisoners to register on the basis of a connected address in Wales. The eligible connected address would usually be the prisoner’s home address, their last known address or some other address in Wales within which they had a connection prior to imprisonment. Enfranchising prisoners on the basis on a local connection provides a mechanism by which Welsh prisoners accommodated outside of Wales can still register to vote, which is essential considering there are no penal establishments in Wales that have the capacity to house female prisoners or high risk offenders and due to the placement policy in operation. It is important to note the proposal indicates the prison address cannot be an address of local connection and, thus, prisoners in Welsh prisons will not be eligible to register to vote in the local authority area in which the prison is located on the basis of the address of the prison itself. Therefore, a prisoner say from outside Wales with a

home address in England would not be eligible to register to vote in Welsh local government elections, unless they were able to evidence an address of local connection in Wales (which is not the address of the prison). However, there is a challenge to this restriction residing with the right prisoners hold with regards to drawing on the local service of the area in which the prison is located. In certain circumstances, prisoners either legally or in practical are regarded as “ordinarily resident” in the area in which the prison is located for the purpose of service provision. Thus, if prisoners are regarded as ordinarily resident in certain circumstance should they not also be regarded as ordinarily resident for electoral purposes, especially considering voting is the primary mean by which to register view regarding the services and provisions in their local area?

- 6.38 This chapter, in turn, maps out the different service areas – health, social services and education – that have a duty to provide provision for prisoner. Mirroring the other chapters in this section, the challenges that could potentially arise as policy is developed. Key is this discussion is the lack of consistency across how legislation with regards to whether prisoners are regarded as resident in the area the prison is located in and the potential impact of the new administrative changes proposed by Westminster is response to the Hirst judgment.

#### *Healthcare*

- 6.39 It is widely acknowledged and accepted that prisoners are entitled to the same range and quality of health services as the general public. The Welsh Government holds overall responsibility for the development of prison healthcare in *public* sector prisons. This responsibility was transferred from the Home Office to the Welsh Government in April 2003, with this responsibility subsequently being devolved to the relevant Local Health Boards (LHBs), who each receive a small annual allocation to provide clinical governance support to prisons. Today, the relevant Boards are
- Aneurin Bevan Health Board – HM Prisons Usk & Prescoed, Monmouthshire.
  - Cardiff & Vale University Health Board – HM Prison Cardiff
  - Abertawe Bro Morgannwg University Health Board – HM Prison Swansea

- Betsi Cadwaladr University Health Board – HM Prison Berwyn.

- 6.40 In effect, the LHBs became the responsible commissioner for the prisoners in their locality, with the exception being prisoners who are transferred from prisons to hospitals under the Mental Health Act. In the latter case, the commissioning responsibility remains with the prisoner's area of resident prior to their detention. In contrast, the commissioning of responsibility for HM Prison and YOI Parc – the only private prison in Wales – rest with NOMS and is delivered through their contract with G4S, who are the main operator of the prison. The responsibility for meeting secondary and tertiary care health needs of prisoners, regardless of whether the prison establishment is held in the public or private sector, falls to the NHS.<sup>284</sup>
- 6.41 As is the case for all citizens in Wales, NHS Wales holds ultimate accountability for the planning and delivery of health services for prisoners. However, the responsibility and accountability of prisoner healthcare in England and Wales can only be exercised in collaboration with NOMS and the Prison Service. The partnership between Wales NHS, NOMS and the Prison Service, provided for under the NHS (Wales) Act 2006, was set up with the principle aim of providing prisoner with access to the same quality and range of health care services as received by the Welsh general public.<sup>285</sup> At the local level, Prison Health Partnership Boards (PHPBs), which are jointly chaired by the Chief Executives of the LHBs and the Governors of the prison or their nominated deputies, hold the responsibility for the daily governance of the prison health service. The PHPBs have the duty of maintaining a joint register of risk, both shared and to their respective organisations, which together they develop and then manage collaboratively. In addition, the PHBs are required to ensure the Prison Health Needs Assessments are routinely reviewed and updated, whilst holding responsibility for the development and implementation of Prison Health Delivery Plans. To ensure both the successful development and implementation of the health service in prisons, the active engagement of the local Directors of Public Health and Public Health Wales NHS Trust in the PHPBs is crucial. HMP Parc is the only private prison in Wales and

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<sup>284</sup> NHS Wales. Responsibilities for Prisoner Healthcare. Available from: <http://www.wales.nhs.uk/governance-emanual/responsibilities-for-prisoner-healthcare>

<sup>285</sup> National Health Service (Wales) Act 2006. Part 13 Miscellaneous: Joint working with the prison services, paragraph 188. Available from: [http://www.legislation.gov.uk/ukpga/2006/42/pdfs/ukpga\\_20060042\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/42/pdfs/ukpga_20060042_en.pdf)

although this alters the nature of the partnership between Abertawe Bro Morgannwg University Health Board and Parc, as the Health Board does not responsibility for commissioning primary health care in prison, in all other respects and duties there is an expectation of robust partnership working.<sup>286</sup>

### *Social Services*

6.42 Historically, there has been minimal provision of social care and social work in prisons across England and Wales. With an obvious and growing need, the lack of social care provision has been recently addressed under the 2014 Care Act in England and the 2014 Social Service and Wellbeing (Wales) Act respectively. In the application of the Welsh Act, either an adult or child detained in prison or in youth detention accommodation are regarded as being *ordinarily resident* in the area in which their place of detention is located (although there limited exceptions), regardless of where they have lived prior to their imprisonment.<sup>287</sup> Local authorities, thus, have responsibility for both assessing and meeting the care and support needs of adult prisoners and youth offenders detained in establishments within the authority's catchment area. This includes the provision of care for people who have moved from their usual place of residence to live within another local authority, as required by their conditions of bail. Mimicking general circumstances, persons detained in approved premises or living in bail accommodation may, subject to financial assessment, be required to contribute to the cost of their care. Therefore, local authorities have the discretion to charge prisoners for the care and support they arrange or provide. In certain circumstances, and where requested, the Act puts responsibility on the local authority to receive and accommodate children and young persons in detention or remand and, what is more, as part of the sentence warrant a judge can order the local authority where a young juvenile is detained to meet additional determined requirements. However, where a local authority has not been charged with providing accommodation for a convicted child or young person or where a child or young person has been detained under section 38 of the Police

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<sup>286</sup> NHS Wales. Partnership Working with the Prison Service. Available from: <http://www.wales.nhs.uk/governance-emanual/partnetship-working-with-the-prison-serv-1>

<sup>287</sup> Social Service and Wellbeing (Wales) Act 2014. Part 11: Miscellaneous and General. Section 185: Adults in youth detention accommodation, prison or bail accommodation etc. and Section 186: Children in youth detention accommodation, prison or bail accommodation etc. Available from: [http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw\\_20140004\\_en.pdf](http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw_20140004_en.pdf)

and Criminal Evidence Act 1984, any reasonable expenses of accommodating the child in question are recoverable from the local authority where they has previously been resident prior to their detention.<sup>288</sup>

6.43 The provision for the social care and needs of prisoners requires local authorities to work collaboratively. National pathways are set out to ensure a consistent approach of care and support across local authorities for those accommodated in the secure estate. It is via these pathways that local authorities work with their partners to implement their individual local care and support arrangements. Although under the 2014 Social Service and Wellbeing (Wales) Act local authorities are required to meet a defined minimum expectation of service delivery, how social care is provided is not proscribed. Thus, the commissioning and partnership arrangements set up under the responsibilities of the local authorities to deliver the required social care, vary in range and nature for each establishment. Within each prison there will be a nominated local lead for Adult Social Care, who holds responsibility for liaising with the local authorities, their providers and provider staff. It is the duty of the Prison Service to ensure information provided by the local authority regarding care and support is readily available to prisoners. Prisons, thus, are required to work with local authorities and healthcare providers to ensure this information is up to date and available.<sup>289</sup>

### *Education*

6.44 In recent years, there have been a number on concerns regarding the level of education and training in prison. A report by the European Commission published in 2013 indicated fifteen countries, including those of the United Kingdom, stated less than a quarter of all prisoners participate in some form of education or training.<sup>290</sup> A report by the Ministry of Justice, published in May 2016, indicated whilst 101,600 adult prisoners participated in prison learning in the 2015/15 academic year, three

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<sup>288</sup> Social Service and Wellbeing (Wales) Act 2014. Part 6: Looked After and Accommodate Children. Section 77: Accommodation for children in police protection or detention or on remand etc. Available from: [http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw\\_20140004\\_en.pdf](http://www.legislation.gov.uk/anaw/2014/4/pdfs/anaw_20140004_en.pdf)

<sup>289</sup> National Offenders Management Service. (2016). Adult Social Care. Available from: [https://www.insidetime.org/download/rules\\_&\\_policies/psi\\_\(prison\\_service\\_instructions\)/2016/PSI-2016-003\\_adult-social-care.pdf](https://www.insidetime.org/download/rules_&_policies/psi_(prison_service_instructions)/2016/PSI-2016-003_adult-social-care.pdf)

<sup>290</sup> Hawley, J., and Murphy, I. and Souto-Otero, M. (2013). Prison Education and Training in Europe: Current State-of-Play and Challenges – A Summary Report Authored for the European Commission. Brussels: GHK.

fifths of prisoners leave prison without an identified employment, education or training outcome. In England and Wales, education services in the justice system are formally facilitated through local education authorities active in their local authority and by prison instructors directly employed by HM Prison Service or the private contractors running the prison. Since 1993, prison education has been contracted out to various external providers including colleges of Further Education, Local Authorities and private companies.<sup>291</sup>

6.45 Whilst governors of Youth Custody Establishments are responsible and accountable for the children and young adult in their care, they cannot be held responsible for services that are contracted out and remotely managed. Rather, responsibility is shared across stakeholders with the consequence no single organisation holds ultimate responsibility. Contracted providers employ the teachers working in YOIs and STCs, whilst the local authority employs the teachers working in SCHs.<sup>292</sup> At Hillside SCH in Neath Port Talbot, the Assistant Manager for Education oversees the education of all the children and young people resident and maintains effective working links with the Education Authority and Careers.<sup>293</sup> HMP and YOI Parc is a privately run establishment and G4S employ qualified teacher to work in the education department and to deliver the core learning programmes on offer. In addition, the education department provides and supports distance-learning packages. Parc Prison has a strong partnership with Careers Wales, who provide a full time-time Career Advisor for the 18+ estate and an additional advisor for the Young Persons Unit.<sup>294</sup>

### *Discussion*

6.46 From the detail presented above it is clear that in the majority of service areas it is the Welsh Government or the local authority that are responsible for providing healthcare, social service and education (although this is less tangible) to prisoners. What is also clear is that, whether defined legally or not, in terms of service

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<sup>291</sup> Czerniawski, C. (2016). A Race to the Bottom – Prison Education and the English and Welsh Policy Context. *Journal of Education Policy*, 31(2), 198-212.

<sup>292</sup> Parliamentary Office of Science and Technology. (2016). Postnote: Education in Youth Custody. Number 524. Available from: <http://researchbriefings.files.parliament.uk/documents/POST-PN-0524/POST-PN-0524.pdf>

<sup>293</sup> Hillside Secure Children's Home. Education. Available from: [https://www.hmpparc.co.uk/about\\_rar\\_e.htm](https://www.hmpparc.co.uk/about_rar_e.htm)

<sup>294</sup> HMP and YPI Parc. (2014). Education. Available from: [https://www.hmpparc.co.uk/about\\_rar\\_e.htm](https://www.hmpparc.co.uk/about_rar_e.htm)

provision prisoners are practically regarded as ordinarily resident in the area where their place of detainment is located. If prisoners are ordinarily resident for the purpose of service provision, then there is a question to be asked whether these prisoners should also be regarded as ordinarily resident for electoral purposes. What is more, this question becomes particularly pertinent considering the Welsh Government hold powers over health, social services and education. Thus, voting in both Welsh local government and Assembly elections would potentially be the primary mechanism for prisoners to raise their concerns and express their opinions of the delivery and quality of these services. What is more, enrolling on the basis of the prison address itself would guarantee all eligible prisoners would retain the capacity to register to vote. Yet, to create provision whereby all prisoners accommodate in Welsh prisons retained their voting rights, there would need to be substantial evidence that prisoners who are not from Wales would want to vote in local Welsh government elections. This evidence would be necessary to counter the well founded argument that prisoners serving short-term sentences and those who are approaching release, would be more likely to be interested in politics in their home area rather than in the area where their place of detainment is located.

6.47 The Welsh Government has proposed to place restrictions on the capacity to register at the prison address, to prevent prisoners having an undue influence in local elections. In certain areas in Wales – most prominently the Coity Ward on Bridgend Council, where HMP and YOI Parc is located, which has 1,625<sup>295</sup> electors whilst Parc Prison can accommodate 1,803<sup>296</sup> offenders at any one time; and HMP Berwyn in the Holt ward on Wrexham Council, whilst in December 2017 Berwyn prison held 890<sup>297</sup> offenders when it is fully operational it will have a capacity of 2,100 which will almost match the 2,533<sup>298</sup> electors resident in the Holt ward – the prison population would be far larger than the local population and, therefore, have

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<sup>295</sup> The Electoral Commission. (2017). Wales - Local elections 2017 - Electoral data. Available from: <https://www.electoralcommission.org.uk/our-work/our-research/electoral-data/electoral-data-files-and-reports>

<sup>296</sup> Ministry of Justice, National Offender Management Service, HM Prison Service, and Her Majesty's Prison and Probation Service. (2017). Population Bulletin: Monthly December 2017. Available from: <https://www.gov.uk/government/statistics/prison-population-figures-2017>

<sup>297</sup> *ibid.*

<sup>298</sup> The Electoral Commission. (2017). Wales - Local elections 2017 - Electoral data. Available from: <https://www.electoralcommission.org.uk/our-work/our-research/electoral-data/electoral-data-files-and-reports>

the potential to determine the result of the election despite potentially never being a resident in the area prior to imprisonment or not having any intention to reside in the area following release. However, considering the low uptake of prisoner voting in Ireland and Australia it can be questioned whether this fear has any substantial grounds.

6.48 Although there is a case to be made for prisoners to have the capacity to register to vote on the basis of the prison address itself, more research is needed to uncover the number of prisoner who are not Welsh accommodated in Welsh prisoners. If it was decided, on the basis non-Welsh prisoner are regarded as ordinarily resident in the area in which the prison is located, they should also be enfranchised, to mitigate the potential for the prison population to have an undue influence on election result, policy would need to create a system of registration whereby registering at the address of the prison was a last option, only available to prisoners who are unable to register via a declaration of local connection. Furthermore, the current policy in place providing the provisions by which the handful of prisoners who are eligible to vote can register suggests a hierarchy, with the option to register on a basis of local connection or at the prison address being alternatives available to those prisoners who cannot establish an appropriate home address.

6.49 In addition, when developing policy it will be necessary to be aware of the inconsistencies currently existing in legislation. The Representation of the People Act 1983 determines persons detained cannot for any electoral registration purposes be treated as resident in the penal institution in which they are incarcerated – as the Welsh proposal currently stands it will uphold this restriction. However, Section 7A of the Representation of the People Act 2000 permits prisoners to register at the address of the establishment in which they are detained, where the period of detention is sufficient to be regarded as resident for the purpose of electoral registration (in excess of six months):

- 2) A person to whom this section applies shall (subject to subsection (5) below) be regarded for the purposes of section 4 above as resident at the place at which he is detained if the length of the period which he is likely to spend at

that place is sufficient for him to be regarded as being resident there for the purposes of electoral registration.<sup>299</sup>

6.50 Under the Representation of the Peoples Act 2000 eligible prisoners are able to register at either an address of local connection or the address at which they are detained, which does suggest the prison address itself does not qualify as an address of local connection. Thus, in terms of previous legislation, an address of “local connection” does not have a precedent of including the address where a prisoner is detained. What is more, the administrative changes that have been proposed by the UK Government to allow prisoners on temporary release to vote do not intend to permit registration on the basis of the prison address and, thus, it can be assumed this restriction would be consistent with the most recent policy proposals from the UK Government.

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<sup>299</sup> Representation of the Peoples Act 2000. Section 7A: Residence: persons remanded in custody etc. Available from: <http://www.legislation.gov.uk/ukpga/2000/2/section/5>

## **7. Conclusions**

- 7.1 The aim of this report was not to produce defined proposals or recommendations but, rather, to carry out extensive desk based research to provide the background information and understanding required to develop policy, which fulfils the proposal of enfranchising prisoners for ordinary elections whose due release date fall within the term of the office being elected. Specifically, this required: a broad exploration of the history of prisoner voting in the UK including the main arguments that have been advanced both against and in favour of prisoner voting, the current capacity for prisoners detained in the UK to vote and the administrative changes that have been introduced by Westminster to address the ECHR's ruling, as contained in the Hirst judgment. In addition, it was necessary to look to Europe and beyond to develop an understanding of the practical processes and mechanisms that have been introduced following the political decision to enfranchise prisoners. As the development of policy implement the proposal to enfranchise prisoners will necessitate an understand on the criminal justice system and the youth justice system, the paper presented a detailed examination of each, drawing specifically on the types of custodial sentences at the hands of the courts, the calculation of release dates and the process by which prisoners are released and the different establishments of the youth justice system.
- 7.2 Generally, the project brief has been met through presenting in-depth and dense detail. This is largely because both electoral matters and crime and justice are novel policy areas for the Welsh Government and, so, unfamiliar areas where is cannot be assumed there is the foundational knowledge. Thus, whilst the political principles of the proposal are developed and clear, the practical understanding needed to animate the proposal is lacking and, hence, the need for a detailed and broad reading. The detail informing the report has largely been taken from government reports and document, varying legislation, Prison Service Instructions and Prison Service Orders, reports produced by various electoral commissions, government bills and strategies, and relevant court judgements. In addition a range of reputable websites have been drawn on, in particular government websites relating to crime

and justice and websites of charities and organisations concerned with the justice system and the welfare of prisoners, information from the latter was primarily used to engage with the different and varying arguments that have been advanced in the debates on prisoner voting.

7.3 Finally, the report addressed the principle issues – from both the political and practical perspective – of fulfilling the terms of the proposal. In exploring these challenges specific detail is provided that addresses the issue and provides the context to, then, politically and practically consider the terms of the debate. In this discussion, I have sought to draw on the detail of the report to present the different political arguments that can be developed around the specific issue and begun to (lightly) sketch out how policy could begin to address these issues, drawing most prominently from the Australian model. The aim, here, is not to provide recommendations or advise of the policy route, but to map out the varying arguments and the caveats that will need to be addressed in the developing the associated policy. Although, at this stage, defined proposals and recommendations cannot be produced, drawing from the research it is possible to develop a series of conclusions to inform the associated policy in its continuing development:

## **Conclusions**

- The contemporary history of prisoner voting in the UK has been characterised by controversy and uncertainty. Although in 2005 the ECHR's ruled the UK's automatic ban on all convicted detained prisoners was a breach of human rights, over a decade later all sentenced prisoners serving a period of imprisonment remain disenfranchised. The handful of prisoners who are currently eligible to vote, can register at either their home address where they would normally be resident if they were not detained or, where this is not an available option, via, a declaration of local connection or using the address of the prison establishment in which they are detained. Eligible prisoners can exercise their voting rights by either post or proxy. However, following increasing pressure to address the ECHR's ruling, Westminster have proposed administrative changes due to come into force for the 2019

elections, which will result in the enfranchisement of prisoners who have been granted temporary release (enfranchising an approximately a few dozen prisoners at any one time). Thus, the policy that is to be developed will need to give consideration to the procedures that are both already in place and which are coming into place, in particular, the permitted addresses a prisoner is currently eligible to register against.

- Argument for and against prisoner voting tend to coalesce around what one believes a penal institution to be: a place of punishment for criminals who have removed themselves from society through their own actions or, alternatively, a place of rehabilitation that should promote the inclusion, social responsibility and human dignity of the persons it accommodates. The arguments in favour of prisoner voting tend to be more advanced than the arguments supporting continued prisoner disenfranchisement. Furthermore, prisoner voting rights are promoted by a number of key charities and organisation engaged in issues surrounding criminal justice. Whilst traditionally the evidence has suggested the general public are vehemently against prisoner voting, the recent responses to the Welsh Government consultation report suggest this view may be altering or, at the very least, diminishing in strength.
- In the majority of European states today, detained prisoners retain their voting rights with only limited constraints. Although there are notable exceptions, there are few states in which all detained prisoners retain their voting rights. The approaches for advancing restrictions on prisoner enfranchisement are based on either sentence length or on the basis of the offence committed or on a mixture of the two approaches. Although based on sentence length, the Welsh Government's proposal is novel in that seeks to enfranchise prisoners in relation to a prisoner's release date, opposed to the sentence handed down by the courts. Despite the legitimacy and appropriateness of an offence-based approach, the Welsh Government electoral reform consultation overwhelming illustrated support for an approach based on sentence-length.

- The experience of prisoner enfranchisement in the Republic of Ireland indicates the need for tight and coherent mechanisms in place to ensure eligible prisoners have the capacity to both register to vote and, then, to exercise their vote. In addition, the Irish case illustrates the high level of cooperation needed from the Prison Service. The Irish prison service are responsible for informing prisoners of their voting rights, assisting them with the completion of their application forms (both the form to register and the postal registration form), overseeing the voting process and returning all forms and sealed ballot papers to the relevant persons. Despite the efforts of the Irish prison service and even with prisoners commending the ease of voting whilst detained, very few Irish prisoner exercise their voting rights (6.2 per cent of prisoners voted in the last general election compared with a nation turnout of 65.2 per cent).
- In Australia all prisoners serving a sentence of less than three years are required to vote in federal elections. Prisoners are eligible to register at a number of addresses but a hierarchical system of applicability is in place and, thus, a prisoner can only register at their address of detainment where none of the previous options are applicable. Legislation provides for monthly correspondence between the Director General of Prisons and the AEC, which ensures the relevant persons hold the information needed to processes an application to the Australian electoral role and determine if the applicant in question is eligible to vote. The status of prisoner voting varies between states/territories across Australia, with the consequence whilst a prisoner is eligible to vote in a federal election they may not be able to vote in a state or local election. Both the AEC and VEC have commented on the confusion that arise with prisoners having different voting rights for different elections and, thus, both have stressed the importance of education and awareness programmes. Considering the poor literacy rate among prisoners, the VEC have indicated a preference for educational and awareness programmes to be delivered face-to-face and for a need to invest in mobile voting. Mirroring the experience in the Republic of Ireland, the number of

Australian prisoners who exercise their voting rights is relatively low, with a quarter of eligible prisoners enrolled on average.

- There are five common types of custodial sentences in the UK. Determinate sentence, extended determinate sentence and special custodial sentence carry a determined period of imprisonment as decided by the courts. In contrast indeterminate sentences and sentence of imprisonment for life do not have a determined length of detainment, but the judge is required to set a minimum tariff period that must be served before release of the prisoner in question can be considered. When a custodial sentence is passed in court, the courts produces a sentence warrant detailing the terms of detainment, including the sentence length or the minimum tariff period. Along with a series of other information, the Prison Service uses sentence warrants to produce a sentence calculation within five days of a prisoner's reception. Alongside a number of other dates, the sentence calculation determines, where applicable, a prisoner's release date. The point at which a prisoner will be released is largely determined by the type of sentence they are serving and then, where required, by the decision of the Parole Board. Where a sentence does not carry a conditional release date or does not have a custodial end date, the case must be considered by the Parole Board – at defined points for different sentences – and it is the decision of the Parole Board that will determine their release.
- The youth justice system, established in 1998, provides and manages a distinct justice system to sentence, accommodate and meet the distinct needs and requirement of youth offenders. Custodial sentence for young juveniles are a last resort, with rehabilitation and welfare being at the heart of the system. The youth justice system is distinct from the adult justice system in a number of ways: when passing sentence the focus is on the individual rather than being offence-focussed as it is in the adult justice system; the types of sentences applicable to young juveniles are less severe and the length of sentence tends to be shorter; young juveniles are predominantly tried in a youth court that have been adapted to meet the specific needs of young offenders; and detained young juveniles are accommodated in

purposely designed accommodation (either a SCH, STC or a YOI) which are overwhelmingly focussed on education and/or training and rehabilitation.

## **Challenges**

### *Challenge One: Determining release date*

- Although the sentence warrant formally details the length of sentence, it is the sentence calculation completed by the Prison Service that determines a prisoner's release date. A determinate sentence carries a conditional release date (the automatic date at which the prisoner should be released) and a custodial end date. The release date is conditional as it can be affected by a number of factors, most prominently by an order of addition days.
- Prisoners serving either an extended determinate sentence or a special custodial sentence do not have a conditional release date, but they do carry a parole eligibility date (either at the half-way point to two-thirds point of their sentence) and a custodial end date. Prisoners serving these sentences will have to apply to the Parole Board, in the run up to their parole eligibility to date, who will determine if the prisoner in question is eligible for release. Where the case is unsuccessful, the prisoner will not be released until their custody end date.
- An indeterminate sentence and sentence to life imprisonment do not carry a custody end date and, thus, the Welsh Government has proposed these prisoners should remain disenfranchised.
- In developing policy around release dates that corresponds to the current proposal, there will need to be three primary strands: a strand that legislates for correspondence between the relevant authorities around the conditional release date of prisoners serving a determinate sentence, which will need a mechanism ensuring that this information is up to date; a strand in relation to sentences that do not have a conditional release date but which do carry a custodial end date and, so, provides for correspondence of this date between the relevant authorities; and thirdly, a strand which disenfranchises those

prisoners who are serving a sentence that does not carry a custodial end date.

- It will also need to be considered if it is necessary to set up correspondence with the Parole Board to enfranchise prisoner serving extended determinate sentences or a special custodial sentence whose case has been successful and, thus, who are due to be released at the parole eligible date opposed to at the custody end date.
- In addition, policy will need to account for special correspondence in the lead up to an election to ensure the data is up to date and, also, for the registering of prisoners who are attainers.

*Challenge Two: Different principles of youth justice*

- Considering the different principles and workings of the youth justice system and the proposal to enfranchise sixteen and seventeen year olds, there is a question relating to whether the same principles and, so policy, regarding the enfranchisement of adult offenders can be uniformly applied to youth offenders or, rather, should different principles be developed that meet the specific needs and requirement for young juveniles? What is more, this question becomes particular pertinent considering the principles – ‘young people are children first, offenders second’ and ‘young people in the youth justice system have the same access to their rights and entitlements as any other young person’ – underpinning the Welsh Government and YJB’s joint strategy on youth justice.
- In 2002 the Welsh Government produced a report detailing the entitlements for all 11 to 25 year olds, which guarantee every young person is given the opportunity to participate as an active citizen and the right to be consulted on, to participate in and to be heard on all matters that concern them or have an impact on their lives – an entitlement that reverberates with the right to vote. The UNCRC promotes children as full citizens in their own right, whilst acknowledging children rights require special protection. Thus, it has been suggested that a “different-centred” youth citizenship needs to be advanced,

in order to recognise the special circumstance of children and young adults without diluting their citizenship.

- However, by arguing different terms of eligibility should be applied to young juveniles on the basis they are qualitatively different from adults – children are not fully developed or empowered with the same cognitive, social and economic resources or the same degree of maturity as adults, so they should not be treated as such – there is a risk in advancing an argument against the enfranchisement of *all* sixteen and seventeen year olds.
- Thus, the political question to be asked is whether this risk is overridden by the need to protect the rights of the child and the primary focus on the rehabilitation and inclusion of youth juveniles, who are children before they are offenders, or is the special protection afforded to children and young adults and their rights already accounted for in the specific tailoring of the youth justice system and, specifically, through the provision that necessitate less severe sentences for juveniles.
- Regardless of whether or not different principles are applied to young juveniles, it is essential policy contains provisions that guarantee any education and engagement programmes, designed to ensure the sixteen and seventeen years olds of today and of the future are informed voters, are also available in young juvenile penal establishments.

*Challenge Three: Prisoners as “ordinarily resident”*

- The Welsh Government has proposed eligible prisoners will be able to register to vote on the basis of a connected Welsh address, which would usually be their home address, their last known address or some other address to which they had a connection prior to imprisonment. The provision of a connect address has been deemed essential considering all Welsh female prisoners are accommodated in prisons in England.
- The proposal, however, has stated eligible prisoners will not be able to register on the basis of the prison address in which they are detained. If prisoners were able to register at their place of detainment, there is concern

that in certain locations the prison population could have an undue influence on the election.

- Yet, for the purpose of service provision, prisoners are at least practically and, in some cases, legally regarded as ordinarily resident in the locality of their detention. Thus, there is the potential to argue prisoners should also be considered ordinarily resident for electoral registration purposes. The case becomes increasingly stronger considering the current legislation permits the handful of eligible prisoners to register on the basis of the prison address.
- The challenges surrounding the address prisoners should be registered to use needs further consideration, from both a political and policy perspective. Particularly, consideration needs to be given to hierarchical address options for registration, whereby a prisoner is eligible to register using the address of their place of detainment only where none of the other options apply.

## Appendix One

### Criminal Justice Act 2003 Determinate Sentences and the Release Dates to which they are Subject<sup>300</sup>

Type of Sentence	Date Sentence Imposed	Date Offence Committed	Release Dates	Comments
SDS Less than 12 months	Any date of sentence	On or after 01/02/2015	CRD SLED TUSED	Automatic Release at ½ way point. On licence to end of sentence. Post sentence supervision expires 12 months after ½ way point.
SDS Less than 12 months	Any Date of Sentence	Prior to 01/02/2015	ARD SED	Automatic Release at ½ way point. Release is unconditional
SDS 12 months but less than 2 years	Any date of sentence	On or after 01/02/2015	CRD SLED TUSED	Automatic Release at ½ way point. On licence to end of sentence. Post sentence supervision expires 12 months after ½ way point.
SDS 12 months but less than 2 years	Any date of sentence	Prior to 01/02/2015 and on or after 04/04/05	CRD SLED	Automatic Release at ½ way point. On licence to end of sentence.
SDS 2 years or more	Any date of sentence	On or after 04/04/05	CRD SLED	Automatic Release at ½ way point On licence to end of sentence.
SDS 12 months but less than 4 years	Sentenced Prior to 03/12/2012	Prior to 04/04/05	CRD LED SED	Automatic Release at ½ way point. On licence to ¾ point. End of sentence
SDS 4 years or more Offence NOT in Schedule 15	Sentenced Prior to 03/12/2012	Prior to 04/04/05	CRD SLED	Automatic Release at ½ way point. On licence to end of sentence.
SDS 4 years or more Offence in Schedule 15	Sentenced Prior to 03/12/2012	Prior to 04/04/05	PED NPD LED SED	Eligible for discretionary release by the Parole Board at ½ way point. Automatic Release at ¾ point. On licence to ¾ point End of sentence

<sup>300</sup> National Offender Management Service. (2015). *Sentence Calculation – Determinate Sentenced Prisoners*

Type of Sentence	Date Sentence Imposed	Date Offence Committed	Release Dates	Comments
SOPC Section 236A	Sentenced on or after 13/04/2015	Any Date of Offence	PED  CRD  SLED	Eligible for discretionary release by the Parole Board at ½ way point of the custodial term.  Automatic Release at the end of the custodial term.  On licence to the end of the aggregate of the custodial term + one year.
Extended Determinate Sentence Section 226A or 226B Where custodial period is both less than 10 years AND is NOT for a Schedule 15B offence	Convicted On or After 03/12/2012 but sentenced before 13/04/2015	Any Date of Offence	CRD  SLED	Automatic Release at ⅓ point of custodial period.  On licence to end of sentence.
All Extended Determinate Sentence Section 226A or 226B imposed on or after 13/04/2015 and where imposed before 13/04/2015 those EDS where custodial period is 10 years or more OR is for a Schedule 15B offence	Convicted and Sentenced On or After 03/12/2012 and ALL EDSs imposed on or after 13/04/2015	Any Date of Offence	PED  CRD  SLED	Eligible for discretionary release by the Parole Board at ⅓ point of custodial period.  Automatic Release at end of custodial period.  On licence to end of sentence.
Extended Sentence Section 227 or 228	Sentenced On or After 14/07/08 Convicted before 03/12/12	On or After 04/04/05	CRD  SLED	Automatic Release at ½ way point of custodial period.  On licence to end of sentence.
Extended Sentence Section 227 or 228	Sentenced Prior to 14/07/08	On or After 04/04/05	PED  CRD  SLED	Eligible for discretionary release by the Parole Board at ½ way point of custodial period.  Automatic Release at end of custodial period.  On licence to end of sentence.
Extended Sentence Section 85 Where custodial period is less than 12 months	Convicted prior to 03/12/12	Prior to 04/04/05	CRD  LED  SED	Automatic Release at ½ way point of custodial period.  On licence to end of custodial period + extension period.  End of sentence
Extended Sentence Section 85 Where custodial period is 12 months but less than 4 years	Convicted prior to 03/12/12	Prior to 04/04/05	CRD  LED  SED	Automatic Release at ½ way point of custodial period.  On licence to ¾ point of custodial period + extension period.  End of sentence

Type of Sentence	Date Sentence Imposed	Date Offence Committed	Release Dates	Comments
Extended Sentence Section 85 Where custodial period is 4 years or more.	Convicted prior to 03/12/12	Prior to 04/04/05	PED  NPD  LED  SED	Eligible for discretionary release by the Parole Board at ½ way point of custodial period.  Automatic Release at ⅔ point of custodial period.  On licence to ¾ point of custodial period + extension period.  End of sentence
Extended Licence Section 86 or 44 12months but less than 4 years	Convicted prior to 03/12/12	Prior to 30/09/98	CRD  LED/SED	Automatic Release at ½ way point of sentence.  On licence to end of sentence.
Extended Licence Section 86 or 44 4 years or more	Convicted prior to 03/12/12	Prior to 30/09/98	PED  NPD  LED/SED	Eligible for discretionary release by the Parole Board at ½ way point of sentence.  Automatic Release at ⅔ point of sentence.  On licence t

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