Written evidence submitted by Dr Susan Easton (VEP 0001)

Please find below my responses to the Draft Bill. I am responding as an individual with a particular research interest in this topic and relevant publications in this area¹.

Response to the three options in the draft Bill

1. Option A disqualifying prisoners sentenced to 4 years or more in prison from voting.

Of the three options in the Bill, this is the option most likely to satisfy the Strasbourg Court. Using 4 years as the threshold would separate offenders in terms of the seriousness of the crimes which they have committed. It would introduce an element of proportionality into the sanction and provide a rational distinction and one that will be clear to judges, prisoners and the general public. The numbers enfranchised would be substantial compared to the other options and would make a genuine difference. It is consistent with the practice in other European states which have already been seen as proportionate by the Court, (for example 3 years in Italy – see Scoppola v Italy App. No. 126/05 (22 May 2012). It would allow shorter term prisoners to retain an interest in the democratic process and a stake in the life of their communities of origin. Although I would favour extending enfranchisement to a much wider range of prisoners, I would consider option A the best of the three options in the Draft Bill.

2. Option B: disqualifying prisoners sentenced to 6 months or more in prison from voting.

Option B has less merit. Although it is clearly an improvement on the present position, it would bring relatively few prisoners into the electoral process and is less likely to satisfy the Strasbourg Court than the first option. Other European states which have permitted voting have substantially exceeded this figure. It is also a fairly arbitrary point and hard to justify 6 months rather than, say, one year.

3. Disqualifying all prisoners serving custodial sentences from voting – a restatement of the current ban.

This is the least desirable option. It would certainly not be compatible with Article 3 of Protocol I of the European Convention or comply with the Court’s ruling in Hirst and is difficult to defend from a legal standpoint. An argument in favour here is the political/populist one that public opinion is mostly hostile to change and clearly within democratic context the public’s view is important. But the Strasbourg Court has made clear in Hirst v UK (No.2) App No. 74025/01, (6 October 2005) that public opinion may

be one factor to consider but should not be the overriding factor when fundamental rights are infringed.

**Additional questions**

1. **What are the historical and philosophical justifications for denying prisoners the right to vote?**

   It is an appropriate and additional punishment.

   Prisoners do not deserve the right to vote as they have breached the social contract.

   It encourages civic responsibility.

   It preserves the purity of the ballot box.

   Each argument is problematic: it is difficult to justify losing the vote as an additional punishment and even if this were accepted, it would not comply with the accepted justifications of punishment (see Q.3 below).

   The argument based on desert is problematic as the individual has already been punished by the loss of liberty and no additional punishments should be imposed. The punishment for breaching the social contract is imprisonment so this should be sufficient. Moreover, fundamental human rights are universal and apply to all regardless of their moral status or desert.

   It is difficult to argue that civic responsibility is promoted through this denial as the prisoner is excluded from the democratic process and treated as a second class citizen and the gap between offenders and the law-abiding majority is reinforced.

   Including prisoners would not undermine the integrity of the electoral process if appropriate procedures are in place - see Q.8 below.

2. **Why is the right to vote considered to be a human right?**

   It is one of the most fundamental rights enshrined in all major international Human Rights Conventions, for example, Article 25 of the International Covenant on Civil and Political Rights, Article 21 of the UN Declaration of Human Rights and of course Article 3 of Protocol No. 1 to the European Convention on Human Rights. It allows and empowers individuals to participate in the democratic process, to influence governments and to protect other key rights. Loss of the right to vote is the key symbol of civic or social death and it is hard to justify the exclusion of specific groups in a modern democratic society.

3. **Is disqualifying prisoners from voting a suitable part of their punishment?**
No. Disqualifying prisoners from voting should not be part of their punishment, unless the prisoner has committed electoral offences which violate the democratic process e.g. postal voting fraud or misfeasance in a public office. Here the punishment is linked to the crime and could have a rational basis for a temporary ban. The Strasbourg Court has accepted this as a legitimate ground for a temporary ban in *MDU v Italy* App. No. 58400/00 (23 January 2003).

But otherwise it is difficult to justify an additional punishment as the prison sentence is the punishment. Disenfranchisement bears no relation to the type of crime or gravity of the crime. It is disproportionate and it can be seen as a degrading punishment reducing the offender to a state of civil death. It is also an arbitrary punishment as it depends on the timing of the elections. It is unlikely to deter offenders or the general public from committing crimes. It does not contribute to the rehabilitation of prisoners. On the contrary, it reinforces their social exclusion. Conversely, allowing prisoners to vote might encourage prisoners to reflect on their civic obligations and ultimately have positive implications in reducing re-offending and reinforcing their sense of having a stake in their community on release. Research by Uggen and Manza in the United States found differences between voters and non-voters in their rates of subsequent arrest, incarceration and self reported criminal behaviour. It is also not necessary for public protection. There is no risk to the public in granting the vote to prisoners regardless of sentence length.

4. What are the financial implications of maintaining the current ban in terms of claims by prisoners for compensation?

In *Greens and MT v UK* App Nos. 60041/08 and 60054/08 (23 November 2010) the Strasbourg Court made clear that a declaration of incompatibility constituted just satisfaction, and given that the UK was in the process of considering change, would not grant compensation at that time. The court noted that there were around 2,500 applications pending. It said that it would not award costs or examine applications registered prior to *Greens* raising similar complaints and that it would strike out these cases if compliance is achieved. However, it noted it could restore these applications if the UK does not change the law to comply with *Hirst*. A similar approach was taken by the domestic courts in *Tovey et al v Ministry of Justice* [2011] EWHC 271 (QB).

So it is likely that if a blanket ban is retained, the courts will make orders for compensation. There is a backlog of 2,500 to 3000 cases in Strasbourg. In *Firth and 2,353 Others v UK* App Nos. 47784/09(26 March 2013) the hearing of these applications was adjourned by the Court until the end of September 2013. Estimates have been made of substantial costs. The number of prisoners disenfranchised at the last election was clearly well in excess of 3000 and if further applications are made the consequences called be substantial. In addition, the Strasbourg Court could initiate infringement proceedings against the UK which could then result in further financial penalties.

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Obviously this raises issues regarding whether or not the UK should remain a party to the Convention as well as constitutional issues over Parliamentary sovereignty which are being debated in the country and not yet resolved. However, insofar as the UK currently is a party to the Convention then it may incur financial sanctions. But more importantly failure to comply undermines its legitimacy, particularly when the UK government is (rightly) criticising other states for abusing human rights and violating the rule of law.

5. **Is sentence length a legally robust basis on which to retain an entitlement to vote?**

It is difficult to find an appropriate and coherent threshold to exclude some prisoners from re-enfranchisement but from a legal standpoint, sentence length is a possible criterion. Sentence length does provide a rudimentary measure with which to distinguish offenders and offending when considering entitlement to vote. The courts will take account of the harm caused and the culpability of the offender in determining the seriousness of the offending and any mitigating and aggravating factors. Sentence length is used as a basis for prisoner enfranchisement in several states including Italy (see Scoppola). The four-year proposal would include those given longer sentences for those offences which most concern the public.

6. **What would be the likely legal consequences, both domestically and internationally, of:**

   a) **keeping the law as it is?**

This will no doubt lead to further legal challenges within the domestic courts and the European Court of Human Rights. The Committee of Ministers of the Council of Europe is scrutinising carefully the response and is unlikely to entertain any further delays beyond this autumn. In effect this will be seen as a refusal to comply with international human rights law and standards. It is accepted practice that the UK will and does comply with its international obligations. Keeping the law as it is with an indiscriminate blanket ban would breach the obligations and lead to infringement proceedings.

   b) **passing legislation giving some prisoners the right to vote, but in a way that maintains a form of blanket restriction?**

The question here is the number of prisoners who would benefit. If 6 months were used very few prisoners would benefit and this may not pass a Convention challenge. A restriction based on 4 years is less likely to fail.

   c) **seeking to comply by enfranchising the minimum number of prisoners possible consistent with our international legal obligations?**

This would be sufficient to ‘head off’ legal challenges domestically and internationally. The 4 year option is most likely to achieve this. The discussion of the draft bill and the
parliamentary process of scrutinising and discussing proposed legislation will also be important in showing that the UK has considered the matter in some detail.

7. **Would giving prisoners the right to vote have any significant administrative impact on the prison system or the Electoral Commission?**

No. There are existing procedures in place for remand prisoners and these seem to work satisfactorily and given the frequency of elections would not incur onerous burdens. The current procedures used are set out in Prison Service Order 4650 *Prisoners’ Voting Rights*. The Electoral Commission reviewed the proposals in the earlier Consultation Paper in 2009 and was satisfied that the proposed procedures were manageable and that the integrity of the electoral process would be preserved\(^3\). I would recommend postal votes to increase the level of control. Procedures need to be clear for all concerned. Postal voting is more tightly controlled now and if properly monitored allows a reduced risk of fraud. It is relatively easy to administer and there is an established system in place already for remand prisoners.

8. **Is there any evidence to suggest that allowing prisoners to vote would have significant impact on particular constituencies?**

No. If prisoners use their normal place residence outside the prison by making a declaration of local connection, there is no danger of bloc voting and the impact of their votes will be diffused across the UK.

The concern that prisoner enfranchisement will undermine the purity of the ballot box has been raised. The fear is that prisoners may elect candidates who represent their interests rather than the community as a whole, but this would not be an issue in the model proposed for the UK of allowing voting in the community of origin where they would normally reside. Allowing prisoners to register using the prison address would be undesirable. The example often given is the Isle of Wight where there is currently a relatively large number of prisoners within a small constituency and where there may be a narrow margin between candidates. If prisoners are registered in the communities with which they have a local connection then it makes sense for them to express their view on who should represent them as they may be living there when released.

9. **What lessons can be drawn from the experience of other countries regarding prisoner voting?**

The available evidence suggests that it is not problematic. In other states it is accepted by the public and seems to work satisfactory. The overall trend worldwide is towards re-enfranchisement. The issue has been considered by the Canadian Supreme Court, the High Court of Australia, the South African Constitutional Court and numerous other jurisdictions and these courts have failed to find a rational foundation for a blanket ban. The Republic of Ireland also changed the law in response to *Hirst* with no apparent ill

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effects and the change was in force for 2007 election. A clear cut procedure is essential. In the United States there have been problems of under-registration of eligible voters because of the complexity surrounding entitlement and registration procedures. It is also better to avoid a discretionary system or the involvement of the judiciary as it will add to the burden on the courts.

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