

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION)
(SCOTLAND) BILL

SUBMISSION FROM COSLA

The following paragraphs present the COSLA draft response to the Scottish Parliament Local Government and Communities Committee's call for views on the five questions below. The response draws on the detailed response¹ made by COSLA to the initial consultation on the proposal for a Bill to incorporate the European Charter of Local Self-Government into law in Scotland.

This submission is made subject to ongoing detailed examination of the Bill which will add to our understanding of the issues and has the potential for suggested submissions for amendments to the Bill at relevant stages of passage of the Bill through Parliament.

1. The main aim of the Bill is to make the European Charter of Local Self-Government directly enforceable in Scots law and to require the Scottish Government to act in a way that agrees with the Charter [section 1 and 2]. Do you agree with this?

Yes.

COSLA believes that incorporating the Charter of Local Self Government into law in Scotland can fundamentally strengthen Scotland's overall system of democracy and create the foundations for an enduring and progressive partnership between national government, local government and communities.

We believe that incorporating the Charter into Scots Law is not just a symbolic step or a matter of democratic principle; we believe that it is key to building on local and national government's joint commitment to improve outcomes and renew democratic participation across Scotland.

Local democracy in Scotland and the UK is highly unusual because its basic powers and rights are not set out in law in the way that is commonplace internationally. Instead, it is the Scottish Parliament and Ministers that have sole power to set the shape, size, powers and functions of local decision making.

The key reasons that COSLA believes that the European Charter of Local Self-Government should be incorporated into law in Scotland are listed below:

- Doing so would strengthen local and national government's ability to work jointly to improve outcomes in communities across Scotland.
- It would strengthen Scotland's democracy by ensuring that communities enjoy the same local democratic rights that are already commonplace across Europe and beyond.
- It would deliver the unfinished business of the Scottish Parliament by ensuring that for the first time this partnership between national and local government is built into Scotland's system of democratic governance, and reflected in its day to day culture and practice.
- It would ensure that Scotland fully complies with international treaty obligations, and addresses outstanding issues that have previously been identified in this regard.

¹ <https://tinyurl.com/yyjgvtb5>

Each of these points were explored fully in our response to the initial consultation carried out prior to the introduction of this Bill.

The United Kingdom ratified the Charter on 24 April 1998 and it came into force on 1 August 1998. In drafting and bringing forward the Charter, the Council of Europe intended to impose enforceable obligations on ratifying states, not simply a general aspiration or source of guidance; several articles reference this objective explicitly. In particular, Article 2 sets out that “the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.”

As we know Scotland and the UK has no written Constitution and although there is plenty of legislation governing specific local government services and systems, the overall *principle* of local self-government is not recognised anywhere in legislation. In view of this COSLA consider that incorporation into Scots Law is a practical and workable option. Having said that we understand that legislation can, of course, always be overturned, but incorporating the Charter would undoubtedly be a very powerful step, and one which any government would not seek to amend without careful consideration and consultation.

2. Section 3 of the Bill puts a general duty on the Scottish Government to support local government. The Scottish Government must also report to the Scottish Parliament about what it has done to support local government at least once every 5 years. Do you support section 3?

Yes.

COSLA believes it is likely that there would need to be active support for a new way of working to ensure that the policy and legislative landscape upholds the Charter. In this regard a general duty on the Scottish Government to support Local Government could ensure that national and local government work together to scrutinise the compatibility of policy and practice with the law.

COSLA's view is that clarifying the competencies of national and local government in the ways set out in the Charter, would require both spheres of government to commit to a new level of consensus and partnership working on shared issues, with an associated impact on the outcomes that national and local government can deliver together. We consider it very important to stress our expectation that a key success measure of incorporation would be that there is not routine recourse to the potential for legal challenge it would ultimately create; much like legislation on equalities, public smoking and seat belts, the law would provide a legal back stop, and in doing so deliver its most significant impact in creating and embedding a partnership approach to policy making, political culture and working practices.

International experience suggests where these rights are set out then many of the debates that have taken place in Scotland about how power is used do not take place; national and local government simply get on with the job of using good democratic governance to focus on improving outcomes across the country together. A requirement for a five yearly report to on the steps the Scottish Government have taken, or plan to take to safeguard and reinforce local self-government and increase the autonomy of local authorities would be of significant importance in that regard.

3. Section 4 of the Bill says all legislation must be interpreted in line with the Charter whenever possible. Section 5 allows a court to make a “declaration of incompatibility”. This is a statement that a provision in a piece of legislation is not in line with the Charter. Where this declaration has been made, section 6 gives the Scottish Government power to take action to fix this provision so that it is line with the Charter (section 6). Do you agree with these sections?

Yes.

COSLA consider it very unlikely that there would be regular legal challenge regarding a potential breach of the Charter. The very act of creating this possibility is instead a powerful imperative for all concerned to work productively together.

We consider it appropriate that the courts would play a role in determining any complaints regarding potential breaches of the Charter and would be required as any meaningful implementation of the Charter and we consider that this route may be sufficient rather than through a dedicated commissioner. Article 11 makes reference to:

'legal protection of local self-government' and a 'judicial remedy in order to secure a free exercise of their [local authority] powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation'.

Currently, the fact that no constitutional or legislative 'right to local self-government' exists mean that this is not possible, and it is this that the prospect of incorporation would address.

COSLA support for the Bill derives from the opportunity that it provides to strengthen and deepen partnership working in pursuit of outcomes, energise participation, and maximise all of the benefits for efficiency, effectiveness and impact associated with designing and delivering services in ways that fit local communities and circumstances. Our motivation then is not to create the circumstances for legal challenge, although we recognise the possibility for this is an important component of giving the Charter 'bite' in ways that have not previously been possible.

Therefore, should action be found to be 'incompatible' with the Charter then this action should be capable of being overturned. Simply declaring the action unlawful would not have the effect of upholding the Charter's principles in practice, We welcome the opportunity to have an emphasis on all partners working together to determine suitable improvements or alternatives which then come into line with the intention of the Charter.

4. **Section 7 allows a court to limit the consequences of a ruling that the Scottish Government has not complied with a duty set out elsewhere in the Bill. For instance, the court could provide that the effects of the ruling don't reach back in time. It can also give the Scottish Government some time to take corrective action to address the ruling. Do you agree with section 7?**

Yes.

In terms of judicial remedies the courts should have the power to require executive action to remedy any breaches identified and to strike down any incompatible legislation.

The extremely complex nature of public policy landscapes with interconnections and dependencies that might not always be immediately apparent points to the need for a needs for flexibility both in the scope and temporal aspects of any court ruling. COSLA understands that corrective action following any ruling will include a consideration of, for example, the time needed to take that action and will need to be proportionate to each individual case.

As mentioned above we see view the emphasis is on all partners working together to determine suitable improvements or alternatives.

5. **Do you have thoughts on anything else about the Bill, for example:**
- **how quickly it should become law after it's passed (section 10 says this should happen almost immediately)**

COSLA would agree that given that 22 years have elapsed since the UK signed the Charter ratification in Scotland through passing this Bill is overdue and we would not wish to see any further delay in adopting this international norm.

- **what financial impact it will have if it becomes law**

COSLA believe that there may be some costs associated with introducing or testing the application of the Charter in the aberrant circumstance that a breach is felt to have occurred. However, these need to be considered in context of the wider efficiencies that are achievable by improving outcomes in this way. We would anticipate that any such costs are likely to be incurred during the early period following incorporation.

Going forward, it is anticipated that once any historic elements are addressed then the policy making and scrutiny process would not require additional resourcing.

If a Commissioner was created to consider complaints under the Bill there would be moderate costs associated with setting up that post.

Where the courts did find that an Act of the Scottish Parliament or action of Scottish Ministers constituted a breach of the Charter, there would very likely be costs associated with remedying the breach.

- **if it will have any positive or negative impact on equality or human rights.**

COSLA do not anticipate that the proposed Bill would have any negative impact on any groups with protected characteristics under the Equality Act 2010.