

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

**SUBMISSION FROM CHRIS HIMSWORTH**

Views have been invited on the following five questions:

- 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?**

“Incorporation” by the scheduling (by s 1) of the Articles of the Charter seems (in line with the Human Rights Act 1998) a good route to ensuring their direct enforceability. So too is the imposition of duties to comply, by acting compatibly, on the Scottish Ministers.

I would, though, ask three questions:

- a. Might not the scope of the Bill be appropriately extended to make other public bodies subject to the obligation? I do understand that the paramount Charter concern is the curtailment of “central government” authorities and that the Scottish Ministers are, therefore, most involved but why should such other public bodies (which might even include UK ministers, especially if they were to use new (UK Internal Market) funding powers in addition to City Deal powers?) not also be required to act compatibly?
- b. Is it appropriate to confine the duty imposed on the Scottish Ministers to “functions” defined as “within devolved competence” by s 54 of the Scotland Act 1998? Why should not ANY of the Scottish Ministers’ functions be included, eg those conferred by Orders under s 63 of the Act? Para 67 of the Policy Memorandum simply acknowledges that those other powers are excluded by the current formula. But why? Are not ministers, in the exercise of all their functions, required to adhere to the general law of Scotland, unless, of course, constrained by other relevant legislation? The other powers, I think I would acknowledge, are unlikely to be very significant (for Charter purposes) in practice. (As in para a above, I may be stretching legislative competence issues here a little. Advice could be taken.)
- c. As a technical matter, I think there may be a drafting flaw in relation to s 2(2) in relation to “act”? It defines (twice) a noun, whereas in subs (1) “act” is used as a verb. So “failing” (twice) rather than “a failure” might cure it. Although I do worry a little about the idea of Ministers being obliged to “fail to act” compatibly with the Charter!

- 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?**

This general duty seems entirely appropriate. Two narrow questions:

- a. The principal terminology in the section is not “local government” but, as in the Charter, “local self-government”. Does that term, which is unfamiliar in existing Scottish local government statutes, require definition in the Bill? The same might be asked of “autonomy”. Local authorities are also mentioned in the section but should they not (as democratically elected bodies) be included in the (new) definition of “local self-government”?
- b. Is the reversion to the terminology of “local government” in subsection (4) deliberate? Does that risk confusion?
- c. Might the obligations in subs (4), be improved by the insert of “the Convention of Scottish Local Authorities and other” after “consult”?

**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?**

I think that the general approach here (via the interpretative duty, incompatibility and remedial action) seems appropriate. Questions:

- a. For reasons explained in relation to Question 1(b) above, is it appropriate to confine incompatibility to provisions (including those in subordinate legislation) within the competence of the Parliament?
- b. Could one have a “*declarator* of incompatibility”? Paras 83 and 83 of the Policy Memorandum appear to fluctuate between “*declarator*” and “*declaration*”?
- c. In the light of sections 5(3),(4), does one not need something more explicit in the Bill about what a court may order in the case of provisions of subordinate legislation NOT caught by s 5(4)(b)? And also other acts, decisions etc held to be incompatible with the Charter Articles? Does it not have to be made clearer that these can be struck down (as invalid/unlawful) or subject to other sanction, if, as I assume, that is the intention? Para 77 of the Policy Memorandum explains why certain orders may be inappropriate in relation to Acts of the Scottish Parliament but does that not imply that powers to strike down etc *are* appropriate in other cases? This also affects s 7. Paras 83 and 84 (and para 87) of the Policy Memorandum appear to assume those additional court powers (by assuming illegality/invalidity and their general effects in judicial review) but should they not be reinforced in the new Act? It might help to overcome doubts expressed about the justiciability of the Charter Articles.
- d. Does “Supreme Court” in s 5(5) require definition or further spelling out? I think it might.

**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?**

- a. I agree with the point of section 7. Based on my comments under Question 3 above, however, I repeat my concern that, in addition to dealing with the "consequences of a ruling", one might need to specify what rulings (in section 7, "decisions") are available to a court.
- b. Does it need to be clear in section 7 to which "courts" it applies? Presumably one of the reasons why s 7 (1)(b)(ii) might apply is that the court is not the Court of Session or the Supreme Court?
- c. After "a duty" might one insert "or may be about to breach a duty"? Or such words.

**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)**
- **what financial impact it will have if it becomes law**
- **if it will have any positive or negative impact on equality or human rights.**

Beyond reiterating my (very strong) welcome for the Bill, I believe I have no further thoughts.