

T: 0300 244 4000
E: scottish.ministers@gov.scot

James Dornan MSP
Convener
Local Government and Communities Committee
Scottish Parliament
Via email.

2 February 2021

Dear Convener

I am writing to provide the Scottish Government response to the Committee's Stage 1 Report on the European Charter of Local Self-Government (Incorporation)(Scotland) Bill.

The Scottish Government is grateful to the Committee for its scrutiny of this Bill at Stage 1. A response to the conclusions and recommendations from the report can be found in the attached Annex.

As you know the Government supports the Bill at Stage 1 and despite the financial constraints imposed on the Scottish Government (and in turn local government) by the block grant arrangements and systematic cuts to it by the UK Government we are fully committed to the incorporation of the Charter principles into domestic law in Scotland. I only see the need for a small number of technical amendments at Stage 2 and I hope that the collaborative approach to amendments that was achieved with the member in charge of the recent Period Poverty Bill can be replicated here. Such an approach will ensure that the Bill achieves its aims and objectives and benefits from the best parliamentary drafting advice available. My officials are working on these technical amendments with Mr Wightman and his team.

Working collaboratively with local government is, and will continue to remain a priority for the Scottish Government. The Member's Bill alongside the local governance review and the work associated with a new fiscal framework for local government are important vehicles to ensure our relationship remains based on mutual respect and a strong partnership approach.

We have seen throughout the COVID-19 pandemic, how the co-operation and collaboration between national and local government has been essential in keeping people safe and supported throughout Scotland. This could not have been achieved without working together

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in ways that practically demonstrate our ongoing support and commitment to the Charter principles.

I look forward to working with Mr Wightman and the Committee during Stage 2.



AILEEN CAMPBELL

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Government response to the Committee's Report

Conclusion or recommendation	Government response
<p>Committee Conclusion</p> <p>58. The Committee supports the general principles of the European Charter of Local Self-Government (Scotland) Bill. The Committee accepts that agreeing to the Bill would, to all intents amount to incorporating the Charter into Scots law, meaning that it could be directly relied upon as an authoritative legal source under certain circumstances (as laid out in the Bill).</p>	<p>The Government welcomes the Committee support for the general principles of the Bill.</p> <p>The Government also supports the general principles of the Bill.</p>
<p>Committee Conclusion</p> <p>59. The Committee supports incorporating the Charter into Scots law because:</p> <ul style="list-style-type: none"> • We accept -as successive UK and Scottish Governments have done- that the Charter lays out principles of good governance in relation to the local government sector which everyone should be able to support, and helps protect councils' status, resources and autonomy. We believe strongly in having a flourishing local government sector in Scotland and we believe that following the principles set out in the Charter is one way of helping achieve this. Enshrining the Charter in Scots law should bring it closer to citizens and communities; • We support the principle of increased devolution of decision-making to local government and believe incorporating the Charter into Scots law makes this more achievable; • While we do not agree with the Member in Charge that local government in Scotland has been "neglected" under devolution, we agree that there is room for a levelling-up in the relationship between Holyrood and the local 	<p>The Government notes the reasons for the Committee's support of the Bill.</p> <p>This Government is fully committed to subsidiarity and values the role of local government.</p> <p>The Government will continue to build on our strong platform of collaboration with local government, to cement our strong partnership and improve the lives of the people of Scotland.</p> <p>Developing and maintaining a close, constructive partnership between central and local government has always been a key priority of this Government. For example, we have agreed with COSLA to develop a multi-year fiscal framework and, although delayed due to the COVID-19 crisis, we are ready to reinvigorate and restart the second phase of the Local Governance Review which was jointly launched with COSLA to ensure Scotland's diverse communities and different places have greater control and influence over decisions that affect them most.</p>

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<p>government sector. Incorporating the Charter into Scots law is not a magic wand and some expectations expressed in evidence about what the Bill may achieve could be seen as unrealistic. But we agree that passing the Bill creates the opportunity and space for local and central government to recommit together to an effective, respectful and inclusive working partnership;</p> <ul style="list-style-type: none"> • We agree that the Bill would rectify an anomaly: it would mean that Scotland would no longer be one of the last remaining jurisdictions in the continent of Europe not to have given the Charter direct legal standing in domestic law. 	
<p>Committee Conclusion</p> <p>60. In considering whether to agree to the general principles, the Parliament should note two matters. First, agreeing to the Bill would not "enshrine" the Charter in the sense of giving it a distinct constitutional status. It would be part of the text of an Act of the Scottish Parliament, capable of being amended in the light of experience, in the same way as the text of any other ASP could be amended. There are also some limitations and mitigations set out in the Bill as to what a court can do when it finds that the Charter has been breached.</p>	<p>The Government notes the matters raised by the Committee.</p>
<p>Committee Conclusion</p> <p>61. Secondly, there is some uncertainty as what the legal impact of incorporating the Charter into domestic law would be, including how frequently it would give rise to litigation, how likely the courts would be to agree that there has been a breach, and what the wider consequences of the finding of a breach could be. Most stakeholders agree with the Member in Charge that litigation would generally be avoided, and this includes local government stakeholders. They think the Bill would not be disruptive but would act more as a spur for local and central government to cooperate effectively, to make better laws and policies, and to</p>	<p>The Government agrees with the Committee that the Bill will inevitably give rise to some uncertainty regarding the legal impact and the potential for litigation in future.</p> <p>We welcome the view of stakeholders that the Bill will not be disruptive but will become an important element in continuing and improving effective partnership working between central and local government.</p> <p>However, the Government would hope that going to court is still seen as the last option in dealing with disputes, an option only</p>

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<p>avoid conflict. There was also a view that the open-ended and hedged nature of much of the language in the Charter would likely mitigate against a narrow judicial interpretation of what particular provisions "must" mean.</p>	<p>considered once all attempts had been made to resolve the issue through open engagement and dialogue. Litigation is an expensive and time consuming process and when this course of action is taken it should only be done when it represents the most effective use of public funds.</p>
<p>Committee Conclusion</p> <p>62. The Committee is reassured by these views. The legal reach of the Charter is nonetheless somewhat uncertain. It is not clear how the courts would handle cases, or issues of legislative interpretation under section 4 of the Act, that relate to matters which the Charter appears to address, but which hitherto have been seen as belonging more to the policy than the legal sphere. Examples might include legislation reorganising local services following what the local government sector perceives as a lack of proper consultation, or funding being ring-fenced or allocated in a particular way, or council revenue-raising being restrained in a particular way.</p> <p>63. Therefore, if the Parliament agrees to the Bill, it should do so, in the awareness of a possibility of future cases testing the legal meaning of particular paragraphs in the Charter. There might be some uncertainty, and the possibility of cases with significant consequences, until domestic jurisprudence on the Charter becomes more settled.</p>	<p>The Government notes the issue of legal uncertainty raised by the Committee.</p>
<p>Breadth of the Section 2 duty</p> <p>68. The Committee understands the logic of extending the requirement to adhere to the Charter Articles to public bodies in Scotland other than the Scottish Government. However, if the Parliament were to agree to the Bill, we consider that it would be better to first see how the duty beds in, and only consider broadening the Bill in this way in the light of experience.</p>	<p>The Government notes the views of the Committee and believes that that the breadth of the section 2 duty as it stands in the Bill is reasonable.</p>

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<p>Duty to promote local self-government and to report to Parliament</p> <p>72. The Committee welcomes section 3, which imposes a duty on the Scottish Government to actively consider how to strengthen local government and how to devolve more autonomy to it. We also welcome the requirement imposed in section 3 for the Scottish Government to report every five years on how it has increased the autonomy of local government.</p>	<p>The Government notes the views of the Committee on section 3 of the Bill.</p>
<p>Costs arising from the Bill</p> <p>76. The Committee accepts that costs arising directly from implementation of the Bill would be low. As discussed earlier, the potential for the Bill's enactment giving rise to legal actions that the Scottish Government would be expected to defend cannot be ruled out, although local government stakeholders have given repeated assurances that this is something they would wish to avoid. The prospect of a legal ruling under the Act requiring significant Scottish Government expenditure in order to rectify it cannot be wholly ruled out either. If so, the court would have a discretionary power under section 7 to limit some of the consequences of a far-reaching ruling.</p>	<p>As the Committee note the Bill has the potential to give rise to legal actions that could lead to significant expenditure. The Government welcomes the discretionary power under section 7 of the Bill for the Court to remove or limit the retrospective effect of decisions.</p>
<p>Preparing for enactment</p> <p>80. If the bill were agreed to, it currently provides that most substantive provisions would come into force after six months. Given that the charter is a well established document, this appears to the committee to be reasonable. However, it would be prudent, during this period, for there to be awareness-raising about the charter and the consequences of the new act within central and local government.</p>	<p>The Government notes the recommendation and will take action following enactment to raise awareness of the Bill across central government.</p>
<p>Delegated powers in the Bill</p> <p>85. The Committee welcomes the undertaking of the Member in Charge to</p>	

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<p>reflect on the wording of the delegated power provision in section 6(1), and whether it requires to be tightened by amendment. As the power is to be exercised by the Scottish Ministers, we expect that he will consult with the Scottish Government about how best to amend the provision, should the Bill pass Stage 1.</p>	<p>The Government is willing to discuss any amendment to the provision with the Member in Charge.</p>
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