

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

**SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL**

**Question 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? “**

The Council strongly welcomes the proposed incorporation of the Charter Articles into Scottish law. It is central to local democracy. The Council considers that all levels of government in Scotland, as in other countries should be seen as autonomous partners with each level of government having the ability to fulfil their own areas of responsibility without undue control by another. Scotland lacks a formal written constitution which protects the rights of local government. Formalising this will strengthen local democracy by ensuring a parity of esteem between the various levels of government and engender greater public participation at a local level by ensuring a greater recognition and respect of local government.

As a consequence, the legislation would lead to a welcome clarification of powers and responsibilities between levels of government and so reduce any public confusion.

As an aside, for the sake of enforceability, the Council has concerns that the Charter Articles as set out in Schedule 1 were not intended to have legal status but to be more declaratory principles in purpose. As a result, there are a number of subjective terms within the Articles for instance “appropriate” in Article 7 (relating to elected representatives’ expenses etc.) and “sufficiently diversified and buoyant nature” in Article 9(4). It is suggested that these are subjective matters which may be difficult for the courts to interpret without potentially being viewed as making law and becoming involved in “political” matters. Unlike the incorporation of the ECHR into UK law, there are no historical legal decisions made prior to incorporation that could be followed or considered in order to aid the courts in interpretation. It is suggested that, as stated by COSLA, in their response to the initial consultation that aspects of the language of the Charter Articles be reworded in such a way as to remove any ambiguities. This may be something that the Committee or Parliament may wish to consider as the Bill progresses.

**Question 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? “**

The Council supports a duty on the Scottish Ministers ~~of a duty~~ to proactively consider steps that they could take that would or might safeguard and reinforce local self-government and increase the autonomy of local authorities and that compliance with the duty is to be demonstrated by regular reports to the Scottish Parliament and

thereafter published. Such reports should also reflect feedback received from Local Government via COSLA. This would make the Scottish Ministers more open, transparent and accountable to Local Government and others.

**Question 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? “**

Given the restraints upon the Parliament in terms of the Scotland Act 1998, it is difficult to see any other way to enforce the Charter Articles. However, it must be considered whether what is effectively a statement from the court would have the effect envisaged by the promoter of the Bill. This strikes at the heart of the proposed legislation by limiting its effect and so puts into question whether the balance of public interest remain in favour of the Bill.

However, the Council believes that further clarity should be provided on what is meant by “primary legislation prevents the removal of the incompatibility”. Is it intended that this prohibition must be specific within the primary legislation or interpreted as being implied through any legislative provision regarding the terms of reference for the making of such subordinate legislation? The Council believes that this should be framed in a way that makes the removal of the incompatibility a powerful tool in supporting the Charter Articles and, almost, the default outcome.

**Question 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? “**

The Council hopes that recourse to courts will be a rarity rather than commonplace with all levels of government respecting the other. It envisages that the approach taken would be more consensual between the levels of government and so resolved without such extreme action. However, the Council, in order to deal with such rare occasions, suggests that there should be clarity in this provision on when a court would be unable to make a declaration of incompatibility in relation to subordinate legislation made prior to the Act which follows this Bill coming into force. It appears from the current wording that in such a situation, the alternative available to the court would be to quash that legislation. However, it is unclear as to whether that is the intention. It would also be appropriate to allow time to take corrective action, for example, by amending the legislation. However, whilst it may not be possible to state a definitive period to enact amending legislation, it is suggested that the Scottish Ministers should be required to take such action as quickly as possible taking account of the circumstances of each case and the significance of the incompatibility on local government and others

**Question 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.”**

The Bill if enacted does not, in itself, generate any immediate actions. However, its effect is likely to lead to challenges in relation to historical legislation and decisions, particularly in relation to local government financing and the governance arrangements on the exercise of their functions made prior to its passing where that legislation is perceived as being incompatible with the Charter Articles. This could potentially have an impact upon the Scottish Ministers and the courts as a result of parliamentary and court time required to deal with those challenges. It may be appropriate to consider a period of transition whereby existing legislation and decisions could be reviewed in partnership between local Authorities and the Scottish Ministers prior to the ability to challenge them being implemented. Once any historical elements are addressed, it is anticipated that the future scrutiny process would not require any additional resourcing.

The Council does not envisage any negative impact on equalities and human rights as a result of the proposed legislation. In fact, with the clarity of responsibilities between the levels of government, individuals will be able to clearly identify and enforce their rights against the appropriate level of government without the complication of having more than one level involved.