

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION)
(SCOTLAND) BILL
SUBMISSION FROM THE SOCIETY OF LOCAL AUTHORITY LAWYERS AND
ADMINISTRATORS (SOLAR)

The Scottish Parliament Local Government and Communities Committee has called for views on the following five questions relating to the European Charter of Local Self-Government (Incorporation)(Scotland) Bill. SOLAR previously expressed its support for incorporation, both when responding to the Consultation on the Local Governance Review and when responding to a consultation by the MSP seeking to introduce the Bill.

- 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.

We appreciate that with any Bill it is important to determine the rationale and necessity for the Bill. In this case, the rationale and necessity test has already been satisfied through signature of the European Charter. For a country which is increasingly moving to a rights-based approach, whether in terms of children's rights or human rights, it is anomalous to be a signatory to a Charter without there being any means to bring rights into effect. While there is an argument of 'why the urgency, this has waited 22years', equally, 22 years is quite long enough to wait before complying with Charter obligations. There is now an opportunity for the Scottish Parliament to lead the way in complying with Charter obligations, and this should be grasped.

More importantly, SOLAR believes that incorporating the Charter of Local Self Government into law in Scotland will be a milestone in terms of changing the culture of relations between national government, local government and communities. It will help dispel a mindset which can view national government, local government and communities in terms of tiers, rather than spheres of influence. In this regard, incorporation can only 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 fully support COSLA'S submissions which we have had the opportunity of seeing. In particular, 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. In the same way that it is important for the Scottish Parliament to have its status and powers embedded and protected from arbitrary abolition, the same holds true for local government.

In common with COSLA, the key reasons we believe 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.

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 we consider that incorporation into Scots Law is a practical and workable option.

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.

Like COSLA, we believe 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.

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. 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 culture change and 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.

Court challenge is the nuclear option- an effective deterrent which everyone would strive to avoid. The very act of creating this possibility is a powerful imperative for all concerned to work productively together. Nevertheless, it is essential there is a remedy. Unless there is a remedy, it will be impossible to change the culture of those who continue to ignore or pay lip-service to the Charter.

We consider it appropriate that the courts would play a role in determining potential breaches of the Charter and we consider that this route is 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’.

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 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 hold the Executive to account and require Executive action to remedy any breaches and to strike down any incompatible legislation. This is a fundamental principle of administrative law.

However, the extremely complex nature of public policy landscapes with interconnections and dependencies that might not always be immediately apparent, points to the need for flexibility both in the scope and temporal aspects of any court ruling. Corrective action following any ruling will include 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)**

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.

It may be argued that incorporation should not be a priority during the COVID outbreak. We take the opposite view. Effective partnership working comes into its own during an emergency. If ever there was an example of the need for national government, local government and communities to work together this is it. Where tensions have arisen, they have generally been from attempts to impose a top-down solution which ignores or is unaware of local capacity and arrangements. If COVID teaches us anything it is the need for effective relations and partnership working. This Bill is a building block of that.

It may also be argued that the Bill should wait to be part of the proposals emerging out of the Local Governance Review. The danger is that this is seen as kicking the ball into the long grass. Instead this Bill could be an early win towards a Scotland which is willing to embrace and promote fundamental rights.

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

There may be some minor costs associated with introducing the Charter, although arguably decision makers should already be having regard to the Charter. However, any costs need to be considered in the context of the wider efficiencies that are achievable by improving outcomes in this way.

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

We do not anticipate that the proposed Bill would have any negative impact on any groups with protected characteristics under the Equality Act 2010. Nevertheless, it sits well within a rights-based approach to human rights and rights of the child.