

EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (SCOTLAND) BILL

WRITTEN SUBMISSION FROM THE SCOTTISH GOVERNMENT

Introduction

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Local Government and Communities Committee of the European Charter for Local Self-Government (Scotland) Bill (“the Bill”), which was introduced by Andy Wightman MSP on 5 May 2020.

Background

2. The European Charter of Local Self-Government is a treaty of the Council of Europe and was adopted in 1985. It commits signatories to apply basic rules guaranteeing the political, administrative and financial independence of local authorities; and provides that the principle of local self-government will be recognised in domestic legislation and where practicable in the constitution. The UK ratified the Charter in 1998 and so the Scottish Government is bound to comply with it.

3. On 29 June 2018, Mr Wightman launched a consultation on a draft proposal for a Member’s Bill to incorporate the Charter into Scots law, which closed on 21 September. He lodged a final proposal on 4 December 2018 for such a Bill which was in the same terms as his consultation proposal, although he did not publish a draft Bill. He gained the support of 26 other MSPs¹, across all opposition political parties, so under the Parliament’s Standing Orders he obtained the right to introduce the Bill, which he did so on 5 May 2020.

4. Mr Wightman’s Policy Memorandum describes the objective of his Bill as :

“...[to] strengthen the status and standing of local government by incorporating the European Charter of Local Self-Government (“the Charter”) into Scots law.”

5. A fuller explanation of the Bill can be found [here](#) but it can be summarised as follows:

- places a duty on Scottish Ministers to act compatibly with the Charter Articles;
- places a duty on Scottish Ministers to promote local self-government;
- requires the courts to read and give effect to legislation, where possible, in a way that is compatible with the Charter Articles;
- enables the courts to declare legislative provisions to be incompatible with the Charter Articles, and enables Scottish Ministers to take remedial action, by regulations, in response to such declarations;
- allows the courts to suspend the effect of a decision that Scottish Ministers breached a duty imposed on them by the Bill, or remove or limit the retrospective effect of such a decision; and

¹ A full list of the MSPs who supported the draft Bill is available [here](#)

- requires each person introducing a Public Bill in the Parliament to make a statement about the extent to which, in their view, the Bill is compatible with the Charter Articles.

Consultation

6. Mr Wightman received 44 responses to his consultation, including from COSLA, the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and seven local authorities. We have not conducted a full analysis of the responses but at the time there was broad support for the proposal.

7. Mr Wightman has summarised the key themes that emerged from the responses as follows:

- Strong support for the incorporation of the Charter into Scots law. There was majority support for incorporation in the manner set out in the consultation document but several alternative methods were also suggested.
- Just over half of respondents supported complaints being made to a commissioner in the first instance with recourse to the courts on appeal.
- In terms of the judicial remedy available where an executive action is found to be in breach of the Charter, there was overwhelming support for the court having the power to overturn the action (although the supporters were split about whether the court should also have the power to punish the public authority).
- In terms of the judicial remedy available where legislation is found to be in breach of the Charter, there was clear support in favour of the courts having the power to strike down the legislation over the suggestion the court could declare the legislation incompatible but be unable to strike it down

8. The Scottish Government did not formally respond to Mr Wightman's consultation.

9. Given the initial consultation was carried out over two years ago the Committee may want to consider if the views of stakeholders has changed and therefore may wish to consult with Local Government and judiciary stakeholders – including but not limited to – COPFS, COSLA, SOLAR and SLADE.

Financial Impact

10. The Financial memorandum accompanying the Bill, sets out some limited direct financial costs for the Scottish Government. However, there are some concerns around the robustness of this assessment of costs and we consider that if it were to be enacted there is potential for greater resource implications generated by responding to legal challenges or taking other actions that might arise from incorporation of the Charter. For instance, at least once every five years, a report must be published on the steps Scottish Ministers have taken to safeguard and reinforce local self-government and increase the autonomy of local authorities. There

will also be a need for staff and other resources to be allocated to undertake guidance or awareness-raising activity. As the Bill provides a basis on which action can be taken in the courts this should be noted and could potentially be costly. Therefore there is need for further analysis to be undertaken to ensure that all the financial implications are taken into account. This might be something the committee would wish to consider.

Scottish Government's Position

11. It has been two years since the consultation on the draft Bill and since then much has changed. 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 (LGR) which we jointly launched with COSLA to ensure Scotland's diverse communities and different places have greater control and influence over decisions that affect them most. This demonstrates the Government is fully committed to subsidiarity and values the role of local government.

12. It is particularly important to note that the Scottish Government has invited all public service partners, not only Local Authorities, to propose alternative governance arrangements in different areas of Scotland, to reflect the particular characteristics of those areas and their communities (via the National Islands Plan, the Additional Powers Regulations and the LGR). The Bill must allow space for, and preferably support, these different arrangements to flourish even where it may result in variations in the extent of local government powers. Mr Wightman is aware of the review and Ministers' associated commitment to subsidiarity and local democracy. Our commitment to the joint LGR is unwavering and whilst some progress has been made the results of what more can be achieved is still in development.

13. There are a number of questions around the legal process, impact and consequences of the Bill which need to be carefully considered. COSLA themselves noted in their response to Mr Wightman's consultation that some provisions of the Charter are heavily qualified and much of the language is imprecise, meaning that they may need to be redrafted and made more prescriptive to give them greater effect and that more evidence and detailed analysis of how the provisions can be practical enforced is needed. The Government share that view and the Committee may wish to explore this further as they consider the responses to their consultation and of course when they progress to evidence sessions with key stakeholders. In particular the committee may wish to explore what proposals COSLA intend to put forward to achieve the desired effect and ensure that the Bill is workable in practice.

Conclusion

14. The European Charter of Local Self-Government (Scotland) Bill is a significant constitutional change which if incorporated brings the opportunity to ensure that a culture of partnership and participation is enshrined in Scots Law. There can be no doubt this Government is committed to subsidiarity and the role of local government in that regard. However, this Bill must not only give the principles of that partnership and participation it must also give the detail and prescription of how it can practically operate. We believe that more clarification on key aspects of the Bill is needed as well

as more evidence and detailed analysis of how the provisions can be practically enforced, which will be challenging to conclude at this point in the parliamentary session.

Scottish Government
25 September 2020