

# Report

Report to:	<b>South Lanarkshire Council</b>
Date of Meeting:	<b>23 September 2020</b>
Report by:	<b>Executive Director (Finance and Corporate Resources)</b>

Subject:	<b>European Charter of Local Self-Government (Incorporation) (Scotland) Bill</b>
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## 1. Purpose of Report

1.1. The purpose of the report is to: -

- ◆ To advise the Council of the Local Government and Communities Committee call for views on the provisions of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill as part of its stage 1 scrutiny of the Bill, and the Council's submitted response.

## 2. Recommendation(s)

2.1. The Council is asked to approve the following recommendation(s): -

- (1) that the content of the report and the Council's response to the call for views on the provisions of the European Charter of Local Self -Government (Incorporation) (Scotland) Bill by 17 September 2020 be noted; and
- (2) that it be noted that any further comments arising from elected members discussions may be submitted following the Council meeting.

## 3. Background

3.1. The United Kingdom is a signatory to the European Charter of Local Self-Government drawn up by the Council of Europe in 1985 and ratified by the UK in 1997. The Council of Europe is an international body unrelated to the European Union and so the treaty will be unaffected as a result of Brexit.

3.2. The purpose of the Treaty is to safeguard the right of local and regional authorities, such as the right to self-government, the right to elect their local bodies, to exercise their own powers, to have administrative structures and financial resources, and the right to take court action in the event of interference by other tiers of government.

3.3. At present, the Congress of Local and Regional Authorities has responsibility for assessing the situation of local and regional democracy in the 47 member states of the Council of Europe. Through its monitoring activities, the Congress ensures that the Charter is correctly applied and helps to maintain healthy local and regional self-government in Europe. Following its monitoring visits, the Congress draws up reports which are adopted by the Monitoring Committee. This committee also approves recommendations which, once adopted by the Congress, are forwarded to member states to be addressed.

- 3.4. In relation to the UK, there is no method of enforcement other than through that process. The Private Members Bill before the Scottish Parliament, promoted by Andy Wightman MSP, seeks, in so far as possible within the existing devolution settlement, to ensure that there are direct methods of enforcement in Scotland through the courts.
- 3.5. Mr Wightman considers that local government powers in Scotland have been eroded over a number of years by the Westminster Parliament and the Scottish Parliament through the passing of legislation and the provision of decision-making powers to the Scottish Ministers. This Bill is considered by him as a way of restoring the balance of powers

#### **4. The Bill's Effect**

##### **4.1. The Bill:-**

- places a duty on the Scottish Ministers to act compatibly with Articles 2 to 11 of the European Charter of Local Self-Government ("Charter Articles") which are listed in the Schedule to the Bill.
- places a duty on the 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 to quash subordinate legislation made by the Scottish Ministers in certain circumstances, and enables the Scottish Ministers to take remedial action, by regulations, in response to such court declarations.
- allows the courts to suspend the effect of a decision by the Scottish Ministers which the courts consider having breached a duty imposed by the Bill, or to remove or limit the retrospective effect of such a decision.
- 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.

4.2. Full details of the Articles in question are set out in Appendix 2 to this report.

#### **5. How the Bill enforces the duties set out previously**

5.1. The Bill seeks to incorporate the Charter into the law of Scotland and be enforceable against the levels of government that may interfere with the purposes or aspirations of the Charter Articles. The means for enforcing the Charter would be by raising an action for judicial review in the Outer House of the Court of Session. There is no restriction on who can take such action provided that they can show "standing" i.e. sufficient interest in the proceedings and can show that there is a real prospect of success.

5.2. It has been identified that, within Scotland, the levels of government that may interfere with the purposes or aspirations of the Charter Articles would be: -

- (a) the Scottish Parliament in relation to the making of legislation, and,
- (b) the Scottish Ministers in respect of secondary legislation and their administrative functions.

However, it is not within the competence of the Scottish Parliament to restrict the powers provided to it as part of the devolution settlement as contained within the Scotland Act 1998. As a result, the Bill is restricted to the actions of the Scottish Ministers.

- 5.3. The Bill sets out that the method of determining whether the Scottish Ministers have acted compatibly with the Charter Articles is via an action of judicial review. When determining complaints, the court is required to read and give effect to legislation in a way which is compatible with the Charter Articles. This applies to all legislation regardless of when made.
- 5.4. The powers of the court are restricted to making a Declaration of Incompatibility in relation to primary and subordinate legislation where the primary legislation from which it was made prevents removal of the incompatibility. However, this declaration does not affect the validity of the provision. The Scottish Ministers are given the power to make such provisions as they consider necessary or expedient following such a declaration.
- 5.5. If subordinate legislation is found to be incompatible with the Charter Articles and the primary legislation does not prevent the removal of the incompatibility, the court could declare that the secondary legislation was in breach of the Scottish Ministers' duty to act compatibly with the Charter Articles. In that case, the court could remove or limit the effect of the incompatibility or suspend the effect of the incompatibility for any period and on any conditions to allow the breach to be addressed by the Scottish Ministers.
- 5.6. The Court also has the power to remove etc. any incompatible secondary legislation made prior to the Act (once the Bill becomes law) where it is not possible for the court to make a declaration of incompatibility. It is unclear when this may arise as there does not appear to be any restriction on that power.
- 5.7. Finally, whilst not affecting any Public Bill from being considered by the Parliament, there must be a statement of compatibility with the Charter Articles.
- 5.8. Where the Scottish Ministers are exercising administrative functions (that do not relate to reserved matters) the court would have the same powers as outlined in paragraph 5.5 in relation to anything done by them and to decisions made by them.

## **6. The call for views/evidence**

- 6.1. The call for views asked for comments on the following:-
  1. Does the Council agree with the main aim of the Bill which 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?
  2. Does the Council support a general duty being placed on the Scottish Government to support local government, and that the Scottish Government should report to the Scottish Parliament at least once every 5 years about what it has done to support local government?
  3. Does the Council agree with sections 4,5 and 6 of the Bill which provide that all legislation must be interpreted in line with the Charter whenever possible; that the Court be given a power to declare that a provision in legislation is not compatible with the Charter and following on from this that Scottish Government will have the power to take action to bring the legislative provision into line with the Charter?
  4. Does the Council agree with Section 7 of the Bill which allows a Court to limit any ruling that the Scottish Government has not complied with a duty set out in the Bill, for example by allowing the Government time to take corrective action or by not making the impact of the ruling retrospective ?

5. Does the Council have any comments on when the Bill, if passed, should come into force; on the financial impact, if any of the Bill, if passed; and on whether it will have any positive or negative impact on equality or human rights?
- 6.2. Officers from Finance and Corporate Resources submitted a response to the call by the deadline of 17 September 2020. Given that the deadline fell before Council could consider the terms of the response attached at Appendix 1 of the Report, officers contacted the Local Government and Communities Committee and received permission to submit any further comments on the Call for Views arising from the Council meeting.
- 6.3. The main points raised in the consultation response are as follows:-
- The proposed incorporation of the Charter Articles into Scots law is welcomed as it will strengthen local democracy by ensuring greater recognition and respect for local government. It was flagged that some of the wording lacks clarity which may lead to some difficulties in interpretation but that this could be resolved as the Bill makes it progress through Parliament.
  - The Council supports a duty being placed on the Scottish Government to support local government and to report regularly to Parliament on compliance with the duty. It is suggested that any reports should take account of feedback from local government.
  - It is appropriate to interpret legislation in line with the Charter however a court declaration of incompatibility may not have the effect intended by the Bill unless the Court in making the declaration also issued a direction to Scottish Government to take action to amend the legislation. The Bill should be framed in such a way to make the removal of the incompatibility the default outcome.
  - The Council hopes that recourse to the courts to resolve any perceived incompatibility will be limited and that any incompatibilities can be resolved without court action. Nonetheless there should be clarity provided in the Bill on the powers of the Court to make declarations, issue directions or suspend or quash legislative provisions which it finds to be incompatible. It may not be possible in every case to set a definitive time period in which amending legislation should be enacted to resolve incompatibilities, as it would depend upon the complexity of the legislation. Timescales should take account of the circumstances and the significance of the incompatibility on local government and others.
  - It would be appropriate to bring the Bill, if passed into force in phases. To implement it immediately for all current Bills or Acts which have not yet been fully implemented, and a later implementation date for all legislation already in force. A transition period will allow any significant incompatibilities in historic or existing legislation to be identified and potentially resolved through amending legislation without tying up court and parliamentary time and financial resources to deal with challenges.
  - There may be financial costs in introducing the Charter into Scots law, once the historical elements are addressed, future scrutiny processes would not require additional resourcing.
  - The Council does not anticipate that the Bill, if enacted, would have any negative impact on equalities and human rights.

## **7. Employee Implications**

7.1. None

## **8. Financial Implications**

8.1. None

## **9. Climate Change, Sustainability and Environmental Implications**

9.1. There are no implications in terms of climate change, sustainability or the environment in terms of the information contained in this report.

## **10. Equality Impact Assessment and Consultation Arrangements**

10.1. No equality impact assessment is required in terms of the recommendations contained within this report

10.2. Consultation has been undertaken with the Political Group Leaders in terms of the contents of this report.

**Paul Manning**

**Executive Director (Finance and Corporate Resources)**

28 August 2020

### **Link (s) to Council Values /Ambitions/Objectives**

◆ Accountable, Effective, Efficient and Transparent

### **Previous References**

None

### **List of Background Papers**

### **Contact for Further Information**

If you would like to inspect the background papers or want further information, please contact: -

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### Response

Dear Sir/Madam

#### **European Charter of Local Self-Government (Incorporation)(Scotland)Bill Call for Evidence/views**

I refer to the recent call for evidence/views by the Local Government and Communities Committee in respect of the above Bill and provide a response on behalf of South Lanarkshire Council to the matters raised and questions contained within the call.

**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.



## **Appendix 2**

### **THE CHARTER ARTICLES**

#### *Article 2 – Constitutional and legal foundation for local self-government*

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

#### *Article 3 – Concept of local self-government*

1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.
2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.

#### *Article 4 – Scope of local self-government*

1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.
2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.
3. Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.
4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.
5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.
6. Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.

#### *Article 5 – Protection of local authority boundaries*

Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.

*Article 6 – Appropriate administrative structures and resources for the tasks of local authorities*

1. Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.
2. The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.

*Article 7 – Conditions under which responsibilities at local level are exercised*

1. The conditions of office of local elected representatives shall provide for free exercise of their functions.
2. They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.
3. Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.

*Article 8 – Administrative supervision of local authorities' activities*

1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.
2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.
3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.

*Article 9 – Financial resources of local authorities*

1. Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.
2. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.
3. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.

4. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.
5. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.
6. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.
7. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.
8. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.

*Article 10 – Local authorities' right to associate*

1. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.
2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.
3. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.

*Article 11 – Legal protection of local self-government*

Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.