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European Charter of Local Self-Government (Incorporation) (Scotland) Bill

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The European Charter of Local Self-Government (Incorporation) (Scotland) Bill, a Member's Bill introduced by Andy Wightman MSP, aims to incorporate the European Charter of Local Self-Government into Scots law. The Local Government and Communities Committee has been assigned as the lead committee on the Bill.



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Background

[The European Charter of Local Self-Government](#) ¹ was opened for signature on 15 October 1985, and is overseen by the Congress of Local and Regional Authorities within the Council of Europe (CoE). To date it has been signed by all 47 member states of the Council of Europe ², and it is expected that any new states to join the Council would sign the treaty.

The Charter commits signatories to a set of basic rules which seek to uphold the political, administrative and financial independence of local authorities through legislation and, where applicable, constitution. It also sets out that the charter applies to councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage ³. As a CoE instrument, the Charter does not have a binding effect or a monitoring mechanism.

Part I of the Charter outlines that public responsibilities should be carried out by the authorities closest to the citizens, and that management of particular aspects of public life be controlled at a local authority level. [The 11 Articles within Part I of the Charter](#) ³ set out the:

- Constitutional and legal foundation for local self-government.
- Concept of local self-government.
- Scope of local self-government.
- Protection of local authority boundaries.
- Appropriate administrative structures and resources for the tasks of local authorities.
- Conditions under which responsibilities at local level are exercised.
- Administrative supervision of local authorities' activities.
- Financial resources of local authorities.
- Local authorities' right to associate.
- Legal protection of local self-government.

Parts II and III of the Charter set out the responsibilities of each signatory, as well as the legal framework for ratification, territory, denunciation and notification ³. Article 12 of the Charter decrees that each signatory to the Charter undertakes to consider itself bound by at least 20 of the 30 paragraphs in Part 1 of the Charter, and states that at least ten of these should be taken from a specific set of paragraphs ³.

UK and Scottish ratification

Despite the Charter being opened for signature in 1985, there was some delay to the UK signing, with accounts suggesting that “local government was not seen by the then government as an issue for international standard-setting” ⁴. Following a change in

Government, [the UK signed the Charter in 1997](#)⁵, and the Charter came into force within the UK on 1 August 1998, with the UK considering itself bound, under Article 12, by all paragraphs of Part I of the Charter. Article 13 of the Charter requires the signatory state to set out the scope of the local bodies covered by the Charter. For Scotland, this is defined as "all councils constituted under Section 2 of the Local Government (Scotland) Act 1994"⁵.

In 2015, the UK All-Party Parliamentary Group on Reform, Decentralisation and Devolution commissioned an inquiry to look at how devolution across the whole of the United Kingdom could be better achieved⁶. The UK Local Government Association provided the secretariat to the inquiry.

The [final report](#)⁶ recommended "transposing the European Charter on Local Self-Government into primary legislation" (it did not specify whether this should be in UK-wide legislation or that of devolved nations). It also recommended that the UK Parliament should enshrine its commitment to devolution by building in greater safeguards against centralism. For example, through the requirement of a 'super majority' if Parliament is to pass any bill that enacts significant recentralisation. SPICe has found nothing to suggest that these recommendations have been implemented by the UK Government.

COSLA, in its submission to the Session 4 Local Government and Regeneration Committee's call for evidence on scrutiny of the Community Empowerment (Scotland) Bill, made similar arguments, and suggested that the Bill would be an opportune moment to specifically note the responsibilities of the Scottish Government in relation to the Charter, calling for the addition of a section stating:

" Ministers of the Scottish Government while exercising their functions must observe and promote the principles and provisions of the European Charter of Local Self-Government (1985) - ETS 122."

The Local Government and Regeneration Committee did not include any recommendations on the Charter in its Stage 1 report, however at Stage 3 of Bill proceedings Tavish Scott MSP lodged an amendment to this effect. Amendment 151⁷ was disagreed to by division (For 52, Against: 68)⁸.

Compliance

Whilst there are [research papers](#) which suggest some breaches by specific states in the Charter's terms and [discuss the legal framework around "compliance"](#), in the context of the Congress of the Council of Europe no formal action has been (or can be) taken to hold signatories to account.

UK Context

The Council of Europe, in its March 2014 report, [Local and Regional Democracy in the United Kingdom](#), commented on "austerity measures". Whilst it reported that the UK was "in general, in compliance with the obligations under the Charter", it found local authorities do "not have adequate financial resources" and this is likely to "get worse in years to come". The CoE recommended the devolution of powers to councils as "the ability of local

authorities to discharge their responsibilities sometimes appears to be highly restricted by central government".

Scottish Parliament

In response to the CoE's report, the Session 4 Local Government and Regeneration Committee undertook an inquiry into [Flexibility and Autonomy in Local Government](#) (June 2014)⁹. The Committee did not make any recommendations specific to the Charter, however it did receive evidence from the Scottish Government that, being at the time before the Scottish Independence Referendum, the intention was that:

“ With independence, Scotland will notify its succession to the European Charter of Local Self-Government and duly become a signatory. We will meet our obligations by pressing for the written constitution of an independent Scotland to guarantee the status and rights of elected local government.”

The [Commission on Local Governance](#), in *Free To Differ: The Future For Local Democracy* (2002), argued that within the UK there were at the time “some serious breaches of the provisions of the Charter, which need to be addressed by the government as a matter of urgency”.

European Charter of Local Self-Government (Incorporation) (Scotland) Bill

Draft proposal for a Bill and consultation

The draft proposal for a Members' Bill, the European Charter of Local Self-Government (Incorporation) (Scotland) Bill, was lodged by Andy Wightman MSP on 28 June 2018.

The [consultation](#) which accompanied the draft proposal was launched alongside the draft proposal, and ran until 21 September 2018. It sought to gather views on the incorporation into Scots law of the European Charter of Local Self-Government.

The summary of consultation responses ¹⁰ sets out that the majority of respondents supported the introduction of the bill.

The consultation summary sets out that the key themes which emerged through the responses were:

“

- 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.”

Support for the Bill

The proposal for the Bill was lodged on 4 December 2018, and following this 26 members expressed their support. The party breakdown was as follows:

- Eleven Scottish Labour.
- Five Scottish Conservative and Unionist Party.
- Five Scottish Liberal Democrats.

- Five Scottish Green Party.

Introduction

This summary aims to briefly outline each section of the Bill. It does not aim to replicate the detail set out in the Policy Memorandum ¹¹ .

The European Charter of Local Self-Government (Incorporation) (Scotland) Bill was introduced in the Scottish Parliament on 5 May 2020 ¹² . The Local Government and Communities Committee was assigned as the lead committee in scrutinising the Bill.

In summary, as set out in the Financial Memorandum ¹³ , the Bill aims to strengthen the status and standing of local government by incorporating the Charter into Scots law. This includes by making it possible to challenge in the Scottish courts any executive action by Scottish Ministers within devolved competence, or any legislation that is within the legislative competence of the Scottish Parliament and is believed to be incompatible with the Charter Articles.

The Bill ¹⁴ :

- Places a duty on the Scottish Ministers to act compatibly with the Charter Articles.
- 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 Court of Session and UK Supreme Court to declare legislative provisions to be incompatible with the Charter Articles, and enables the Scottish Ministers to take remedial action, by regulations, in response to such declarations.
- Allows the courts to suspend the effect of a decision that the Scottish Ministers breached a duty imposed on them by the Bill, or remove or limit the retrospective effect of such a decision. This also applies where the court finds that subordinate legislation is incompatible and it is not possible to make a declaration of incompatibility.
- 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.

Sections 1-3 - Definitions and Scottish Ministerial duties

Section 1 defines “the Charter Articles” to mean [Articles 2-11](#) ³ of the European Charter of Local Self-Government. These are the substantive Articles of the Charter that are incorporated by the Bill (and reproduced in the schedule). The remaining Articles, not incorporated by the Bill, set out the procedures for member states to sign and ratify the

Charter. Section 1(3) of the Bill gives the Scottish Ministers a mechanism to reflect amending or additional protocols to the Charter that have been signed by the UK.

Section 2 lays a duty upon Scottish Ministers to act compatibly with the Charter Articles, and Section 3 lays a duty upon Scottish Ministers to promote local self-government, including laying a report before the Parliament every five years setting out:

- The steps they have taken, or plan to take, by the date the report is published to safeguard and reinforce local self-government and increase the autonomy of local authorities.
- Their plans until the date on which the next report is to be published to safeguard and reinforce local self-government and increase the autonomy of local authorities.

Sections 4-5 - court interpretation of legislation and actions

Section 4 sets out that legislation within the legislative competence of the Scottish Parliament must be read and given effect in a way which is compatible with the Charter Articles.

Section 5 sets that if a court is satisfied that the provision is incompatible with the Charter Articles, it may go on to make a declaration of that incompatibility. This applies specifically if a provision of primary legislation prevents removal of the incompatibility.

Section 6-7 - remedial action and limitation of retrospective effect of decisions

Section 6 gives Scottish Ministers by regulations the power to take remedial action where courts have ruled that there is an incompatibility with the Charter Articles.

Section 7 gives courts the power to remove or limit the effect of any decision, or to suspend the effect of the decision for any period and on any conditions to allow the breach or incompatibility to be addressed. This applies specifically to a decision that the Scottish Ministers have breached a duty imposed by the Bill, or a decision that pre-commencement subordinate legislation is incompatible with the Charter, and in cases where primary legislation does not prevent removal of the incompatibility.

Section 8 - MSP responsibilities

Section 8 requires that any member of the Scottish Parliament introducing a Public Bill in the Parliament must, on or before introduction, make a statement about the extent to which, in that member's view, the Bill is compatible with the Charter Articles.

Sections 9-11- Miscellaneous provisions

Section 9 makes further provision about what regulations may do, and about the Parliamentary scrutiny they are subject to.

Section 10 sets out the that provisions under sections 1-9 of the Act come into force at the end of the period of 6 months beginning with the day of Royal Assent, and Section 11 sets out the short title of the Act.

Financial Memorandum

The Financial Memorandum ¹³ of the Bill sets out the anticipated costs of implementing the legislation. This explains that:

“ There are relatively few specific costs placed on any party as a direct result of the Bill’s enactment. The only direct costs are to the Scottish Government. The Bill places a duty on Scottish Ministers to act compatibly with the Charter, and to promote local self-government in Scotland. This involves a requirement to keep under consideration whether there are any steps which they could take which would or might safeguard and reinforce local self-government and increase the autonomy of local authorities. There is also a requirement that the Scottish Government produce and publish a report at least once every five years. ”

The total costs outlined in the Bill, to the Scottish Administration, are expected to be-

- £42,075 in initial costs for "Familiarisation of officials in each Scottish Government Directorate/Agency with the provisions of the European Charter of Local Self-Government", and
- £8,400 (at least once every 5 years) for the Scottish Government to produce and publish a report on the promotion of local self-government.

In its response to the Local Government and Communities Committee's call for views on the Bill, the Scottish Government made the following comments on the potential financial implications of the Bill:

“ 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 3 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.”

Scottish Government, 2020¹⁵

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