

Proposed policy statement for Part 2 of the Localism Act 2011

Consultation questionnaire for responses

How to Reply

Responses to this consultation must be received by 5pm on 22 April 2012.

You can respond by email to part2policy@communities.gsi.gov.uk or write to:

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Date of response: 20-04-2011

Are you replying on behalf of an organisation or company?: Yes

COSLA, the **Convention of Scottish Local Authorities**, is the representative voice of Scottish local government and also acts as the employers' association on behalf of all 32 Scottish Councils. With approximately 70% of legislation coming directly from the EU, our European work aims to ensure that the interests and rights of Scottish local government are safeguarded and advanced by EU policy and legislation. Key to our work is the ability to effectively forecast development and to actively influence policy and legislative stages at the earliest possible moment. In this or previous stages of this dossier we have discussed the content of the below position with our political leadership, officers across Scottish local authorities, the Scottish Government and our local government counterparts elsewhere in the UK.

Consultation questions

Question 1

Do you have comments on the context in Chapter 1?

- a. The **Convention of Scottish Local Authorities (COSLA)** is the representative voice of all Scottish Local Authorities both nationally and internationally and therefore welcomes the opportunity of participating in this consultation. Many provisions directly affecting Councils are introduced or modified in the Lisbon Treaty, and therefore COSLA has been actively making the case for a more structured partnership working between central and devolved governments with local government is defined.
- b. We have engaged in the discussions that led to the Localism Act and we welcome this consultation and indeed the Policy Statement. We obviously regret that decision to move forward this policy statement has not come as a matter of principle in terms of good governance in central local relations on EU legislation but as a way to address but as a way to address the potentially serious implications for Councils on the EU fines provisions in the Localism Act. We nevertheless believe that the policy statement makes indeed good progress in good partnership and even multilevel governance that should be actively pursued.
- c. In addition of being a matter of good governance this policy statement should lay out robust arrangements that are preventative of fines to be imposed in the first place.
- d. During the drafting and legislative procedure of this Act, COSLA expressed its view against the fact that the Minister's powers would be discretionary in deciding to pass down the fines. While acknowledging that *discretionary* also means that the Minister's decision need not to be always in favour of passing down the fines we nevertheless that a degree of discretion remains as such in the final Act . We nevertheless very much welcome the creation of the advisory panel and this statement as foreseen in Section 49 of the Act.
- e. We welcome that the HMG recognises that Local Government is also government when it comes to EU legislation. It is unfortunate that this statement is made precisely as an argument to justify passing down fines. However looking ahead we expect the government will also upheld the principles of this policy statement when formulating UK negotiation positions on matters that are directly the competence of local government.
- f. In that regard, when the policy statement says that:

“The purpose of the policy statement is solely to comply with the Secretary of State’s duty under section 49 of the Act. The effect of the statement is comprehensively set out in that section, which requires a Minister of the Crown and an independent advisory panel established under section 53 to have regard to the statement in exercising functions under Part 2 in relation to an EU financial

sanction.”

- g. We hope that “solely” does not mean that his policy statement is merely to comply with the letter rather than the spirit of section 49 which is to develop a culture of partnership working between the UK and local government when it comes to EU legislation and policies.
- h. We note that section 49 does not generate a statutory legal standing the policy statement. While in an ideal scenario we would obviously be keen that such a statutory requirement of central government to engage with local government in EU matters of clear local relevance existed already, we now would like to ensure that the implementation of this policy statement moves from the UK government to consult as a “matter of good practice” ,as described in the consultation paper but leading towards a more joined up and structured approach between HMG and local government across the EU.

Overall comments:

- We welcome the clarifications on the provisions as regards Devolved Administrations and Devolved Matters;
 - We would urge HMG to clarify which reserved areas are either clearly or likely to affect Scottish Councils in the context of the Localism Act Part 2.
 - We welcome the creation of the advisory panel and its provisions as regards the provision of COSLA nominees;
 - We call for the Advisory Panel Decisions to be binding on the ministers when reached unanimously and backed in legal and factual evidence.
 - We welcome the recognition by the Policy Statement of the Principle of Judicial Review. In view of the institutional nature of these provisions we believe that the appropriate jurisdiction is the UK Supreme Court.
 - We most particularly welcome the provisions on partnership working between the UK and local government across the UK;
- i. COSLA is ready and keen in engaging in a solid and structured partnership working with the UK Government in addressing local government impacts of EU legislation in terms of legal competence, economic or capacity burden
- j. We believe that this partnership working should comprise the pre-legislative, negotiation and implementation phases; the modalities for such partnership working should be pre-defined , stable, transparent and predictable;

Question 2

Do you have comments on the purpose or relevance of this policy statement?

Provided in Q1

Question 3

Do you have comments on how the powers on non-devolved matters would be applied and the role of devolved administrations?

- a. We disagree with the consultation document statement that “*all four administrations agree that, to the extent that financial penalties are imposed on the UK as a result of any failure of implementation or enforcement, or any damages or costs arise as a result, responsibility for meeting them will be borne by the administration(s) responsible for the failure*” This would imply that the specific EU fines Localism Act provisions would be eventually applied in Scotland one way or another. This has not been outlined by the Scottish Government to either COSLA or the Councils and it is our position that it should not be the case.
- b. COSLA welcomes that the statement clearly recognises that the act is applicable in Scotland only to reserved local government matters. Conversely Devolved administrations and specifically Scottish ones are in no way required to implement this legislation or adopt a similar piece of legislation through the Scottish Parliament. While many of the partnership issues we outline here we believe are fully applicable to develop similar arrangements with the Scottish Government on joined up EU policy development, our response to this consultation in must in no way be seen as tacit endorsement for the Localism Act part 2 provisions be replicated through devolved legislation.
- c. We are aware of the fact that as the rest of the UK is going to implement this act directly or through mirror powers raises the question whether to do do the same in Scotland to keep in line with UK provisions.
- d. By contrast we believe that it is precisely due to the nature of the Devolution settlement that it is perfectly natural that there are legislation that are nonexistent in one part of the UK and the opposite elsewhere. So far we understand from officials that the current situation will not be changed and we would expect it to remain like that for the time being.
- e. Clearly some fines will reach Scotland, by virtue of either through the Localism Act when it comes for reserved matters affecting local government UK wide, or by virtue of the Memorandum of Understanding. And therefore the apportionment formulas that are outlined in the consultation document are sensible as they reflect the existing arrangements.
- f. Also regards to the fines applicable to Scottish Councils on reserved matters the consultation with Devolved administrations prior to issue a warning notice is more than pertinent.

- g. However as regards to Devolved functions, while the UK Government would pass the fine to the Devolved administration how to finance it, it would be entirely up to the Scottish institutions to decide. As discussed there is no indication of changes in the status quo.
- h. Finally COSLA very much urges the UK Government to provide a clear list of areas where there is a reasonable chance that reserved local government matters could be affected by non compliance EU legislation. Although we anticipate this would be small, local government in Scotland being for the most part a devolved matter, so far we have received only general indications of the issue that could be affected. This is generating unnecessary disquiet and legal uncertainty about the degree and frequency these Act Part 2 provisions would affect a Scottish Council hence we would request a list of the areas that there is a reasonable risk of that happening.

Question 4

Do you have comments on the proposed approach in relation to local government?

- a. We do welcome the clear and unambiguous recognition by the UK Government that *“Local government is one of the democratically elected tiers of government in the UK. Local authorities have a broad span of responsibilities, covering a large range of issues which affect people locally. Many of these responsibilities are affected by EU laws and regulations.”*
- b. It is obvious that this simple fact has been overlooked in the past when examining the burden of EU legislation. It has often been down to the proactive efforts of COSLA and our sister organisations elsewhere, and local authorities themselves to highlight to DA/HMG the local impact (negative or positive of EU draft legislation)
- c. Therefore we strongly welcome that the Policy statement recognises the following:
- *“the UK Government specifically names local government as a key sector for involvement”.*
 - *“ UK Government would involve local government – or a suitable representative body as appropriate – at the following stages:*
 - *In time to influence EU negotiations – the relevant UK Government Department would look to identify local implications, where known (for example, technical administrative, resource and financial implications), in the relevant Explanatory Memorandum which it prepares on the EU legislative proposal and be accessible to the local government sector to discuss any local implications. “*
- d. COSLA is keen to be meaningfully involved in any early UK position formulation procedure for EU legislation affecting local government. Both for reserved and non devolved matters. It is understood that for the latter we would seek a similar engagement in Scotland to inform the Scottish position. Notwithstanding of

arrangements particular to Scotland, because the UK Government would often have only a few weeks to formulate its position we believe that double route for Scottish Local Government through DA and HMG would be more effective.

- e. We currently work with both administrations both to define the Scottish and UK wide position so we see this statement as a first step towards a more structured and predictable engagement with either government. We would of course undertake this from a position of institutional partnership with both Administrations by providing the same input to both Scottish and UK Governments.
- f. It is also indeed welcome that the UK Government is one of the first ones to draw from the provisions on the Lisbon Treaty Subsidiarity Protocol and in so doing, set up subsidiarity assessment (i.e. impact in local and, we assume, devolved governments) of draft EU legislation.
- g. COSLA is keen to provide the UK government "early warning to the early warning" on matters affecting Scottish local government. Drawing from our considerably large body of collective expertise drawn from our European counterparts we usually are able to anticipate the launch and main elements of a forthcoming piece of legislation or policy paper within six to even twelve months in advance. In other words, we are very keen to move from the existing practice when it is down to COSLA to approach HMG in a proactive, and ad hoc manner and to develop to develop a more systematic approach.
- h. While it is to be welcoming that the different ministries are making progress in publicly consulting on an ever growing EU issues, there are many issues in which due to time constraints or their specific technical nature there is no proper early engagement with local government. More often than not COSLA and our counterparts elsewhere will have views already formulated but relaying them to the appropriate official is not a straightforward matter when time presses. This is a drawback that should be addressed by implementing robust forward look and pre-legislative with local government representatives so we can work with government in scoping and addressing the local government impact of EU legislation.
- i. In terms of detailed policy development **we would suggest to adopt the Dutch model of engagement** , including the adoption of joint "Issue based work teams" of civil servants and local government officers to formulate and implement phases of key policies or specific pieces of legislation.
- j. Together with our work with the Devolved institutions we believe that a systematic, holistic approach would many gap or inconsistencies on local government impacts in key EU dossiers. A basic principle to govern this relationship is that this framework would not require additional capacity or resources, and it will ideally; reduce the individual burden and capacity of local and Member State bodies.

" All Explanatory Memoranda will be circulated to the Local Government Association, for their awareness on behalf of their members, and to the local government representative bodies in Scotland, Wales and Northern Ireland, if they

so choose;”

- k. COSLA would indeed welcome that all EM are circulated directly to us. Currently we either ask for them or wait until it is available in the Cabinet Office website. This is not always a time efficient process hence we would welcome that once EM are finalised they are routinely. We will ensure awareness across local government practitioners.

“Ahead of transposition into domestic law – the relevant UK Government Department should also take into consideration the New Burdens doctrine, which is part of a suite of measures to ensure council tax payers in England do not face excessive increases, and the Better Regulation Executive guiding principles that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors. The purpose of this involvement would be to inform local government of any new legal obligations arising from new EU laws and the UK implementing measures and to give local government the opportunity to inform the legislative process”.

- l. Although this would apply mostly to England in non-reserved matters, we would welcome that intelligence in burdens is also shared with us in reserved and not reserved matters, as this can also help discussions with Scottish Government on the Scottish leg of the implementation process.

“ At an early stage in defending any potential infraction case (covering any failure to fulfil the UK’s obligations under the treaties or legally binding measures adopted under them), the UK Government would also liaise with any local authority directly involved in the case, including prior to any referral to court under Article 258 of the Treaty of the Functioning of the European Union. Such local authorities would have a critical role to play in providing evidence to be used in the preparation of the UK’s defence. “

- m. COSLA believes that liaising with the local authority directly involved is not just a matter of best practice but also the appropriate legal procedure particularly if at the end of the process there will be penalties to be paid by the given council. If this engagement with the concerned council is not made at the outset of the infraction procedure we believe that then the application of the Part 2 of the Localism Act would be open to legal challenge, as the UK Government would have failed to receive the adequate allegations and evidence from the suspect Council, which would then harm the UK ability to properly make its case in the ECJ. Because of the potential ramification of cases brought to court in terms of setting precedent for other rulings we would be keen that COSLA is informed of these processes so that we can help in avoiding other Scottish Councils finding themselves in the same situation as the suspect Council.

“This is in line with the principles of localism, fairness and partnership and would provide for a more developed role for local government, with timely involvement and input on issues which are most likely to impact on local authorities. It would assist

the UK Government to evidence and cost draft EU measures. It would minimise the risk of infractions occurring, and the imposition of financial penalties under Article 260(2).”

- n. All in all thoroughly applied with the caveats highlighted above this procedure would put the UK in those Member States that already have a robust Multi-Level Governance approach in place when dealing with EU policy and legislation.

Question 5

Do you have comments on whether public authorities, which are not local authorities, would wish to see equivalent provisions for involvement? If so, please explain what these would be and how any capacity constraints, such as for smaller organisations, could be managed.

n.a.

Question 6

Do you have any comments on the principle and general application of working in partnership?

- a. The Section Working in Partnership of the Consultation document has two parts, the first one argues the case for the Localism Act 2 on EU fines and the second sets some basic provisions on partnership working.
- b. Starting with the case on the directive. The Government believes that prior to the Act, “there was no mechanism in place to ensure that public authorities were held to account for their part in any failure to comply with European law. The only approach for non-compliance would have been to subject public authorities to UK domestic judicial proceedings”.
- c. We remain unconvinced that there is the need for such provisions to be enacted. The punitive approach is unlikely to improve compliance. If a Council infringes EU law, for instance in environment , energy efficiency, urban mobility or sustainable procurement, , this is often the result in the commitments it has seen imposed over are simply not feasible. All too often the Commission places on Councils burdens that they are not realistic.
- d. Member States tend to overlook this in the negotiation phase unless COSLA-equivalent organisations to raise concerns. Weak argumentation at the negotiation stage weak engagement at the implementation stage and often little or no additional resources to implement ever growing EU obligations results in under compliance and ultimately Court Sanctions.
- e. This is why we place much more emphasis in the partnership culture in

prevention of non compliance that should stem from this Policy Statement than the punitive aspect of the Bill that it will either not result in material improvement of implementation or , if thoroughly implemented would made financially more difficult for Councils to progress towards meeting EU obligations

f. Secondly, on the partnership element, the statement says:

“The UK Government, as a matter of good practice, would seek to engage with affected parties when negotiating and transposing EU laws. This helps to ensure that expertise, knowledge and experience of external parties is drawn upon as the UK Government formulates its position and approach.”

g. COSLA believes that it is not a mere practice of good practice but it is a necessary legal requirement in a system where EU Treaties and legislation have supremacy and direct effect in UK, Scottish and Local administrations.

h. We believe that the final version of the policy statement should follow the following principles:

1. UK and Local Government will regularly jointly look at the annual and medium term European priorities and identify in detail which areas they will work together, agreeing timescales, key actors involved, jointly expected outcomes and the measures that each side will undertake to achieve them. This will be prepared by officers but endorsed and regularly monitored by the political representatives. This is notwithstanding of relevant Devolved-local arrangements.
2. Cooperation on EU issues between both UK and Local Government is based on mutual respect and equal partnership. This partnership relationship stems from the fact that Central Government/Devolved Administrations and Local Government are all tiers of government, and indeed of the State, with clear legal competences and democratic accountability. This puts local government in a drastically different situation compared with civil society stakeholders when it comes to formulating, negotiating and implementing EU legislation.
3. Each side recognises the value, at all times, of coordinated policy formulation and influencing, and expects their respective staff to work together in identifying and developing their respective key contacts, including MEPs and European Commission.
4. Each side commits itself to mutually consult, via the appropriate officer in the first instance, and through political member engagement for final approval, over their positions on any major EU initiative or areas where there is a source of likely tension before the matters are pursued publicly.

In Q1 and Q4 we provide our views on how this should be undertaken.

Question 7

Do you have comments on the processes for designation and the time and opportunity given for corrective action?

- a. We indeed agree with the statement that *“Partnership working could help to avoid any EU financial sanctions in the first instance. The Government and public authorities must take all reasonable steps to comply with EU laws”*.
- b. We would like that the final version of this Policy Statement and subsequent implementing legislation or provisions clearly indicate that authorities would not be held responsible for breaches of EU law that are not within their power to avoid.
- c. If in spite of that, any legal proceedings against the UK for infringement of EU law by Local Authorities(s) the concerned local authority should be informed and be requested views by the UK government at all stages of the process.
- d. The fact that the concerned authorities would be named under a designation order through the UK Parliament should at least add proper scrutiny of the Ministers’ decision.
- e. We believe is it entirely consistent with the principle of proportionality that the authority would be given opportunity to comply before incurring a financial sanction.

Question 8

Do you have comments on the process for passing on fines?

- a. *We indeed welcome that “Any recovery of costs in relation to EU financial sanctions should be fair, reasonable and proportionate, with transparent, evidence-based decisions”*
- b. We were very concerned at Bill stage when the procedure to passing on fines gave a great scope of discretion to the minister and would limit the judicial review. While we believe that the system as agreed in the final Act does still give a great deal of leeway to the Minister, the creation of an Independent Advisory Panel is welcome.
- c. It is only fair, and it would be rather unusual otherwise, that the panel collectively hears representations from the interested parties before making a reasoned report to the Minister. It is important to clarify the notion of interested party. Clearly the main evidence must come from the concerned local authority or the representatives it so designates. There might be parties that might have a partial interest in the dossier but given the quasi-judicial nature of this process , and the potentially serious consequences to the concerned Council we are keen that the main body of evidence comes from the local authority itself and that this would be the essential evidence that is taken into account. Given the nature of this body and its role in this legislation it would not be appropriate that stakeholders with a general interest in the matter are invited in any substantive

form. The panel purpose is to assess the behaviour of a given local authority compliance with EU law, wider debates on the merits of the given piece of EU legislation or of its UK implementing acts are a matter for parliament and public forum rather than in this panel.

- d. This is not to say that when examining the representation made by the given authority we believe that save in those cases where overriding confidentiality matters dictates otherwise, the work of the Independent Advisory Panel should be undertaken in a public and transparent process. In addition to that the public nature of the final report is of course to be strongly supported.
- e. Finally we welcome that the Policy Statement recognises that local authorities do retain the power of judicial review of the minister's decision. We would urge that the Government clarifies whether this means ordinary courts or the UK Supreme Court.
- f. We believe that the latter is the right place for such judicial review to be exercised, just as it is already the case for Devolved Administrations.

Question 9

Do you have comments regarding the level of detail to cover in this policy statement on criteria to establish the authority's ability to pay the apportioned EU financial sanction? Or is that best left to be defined in individual circumstances?

- a. It is essential that that the ability to pay is taken as a decisive criteria in the Minister's decision to go ahead with a fine. Where the Local Authority can demonstrate that it does not possess the resources, or if it does, the fact of paying would seriously affect its financial sustainability, or the provision of basic public services, the Minister should be decide against passing down the fine. One matter of public interest should not override another.
- b. This is particularly the case in the UK context when Local Government budget depends on a great deal from a Government block grant rather than of its own resources – the opposite situation to that of some other Member States in our part of Europe. When a local authority does not have broad financial autonomy, as it is the case in the UK, any proposed system for passing fines can hardly apply in the same way as it could do in countries where local authorities are financially self sustaining.

Question 10

Do you have comments regarding the membership of an independent advisory panel, including how panel members are selected?

- a. We do welcome the creation of the Advisory Panel as we believe it is a way of ensuring that the Minister's actions are fully accountable and the process is

conducted in a reasoned and rational way. We would object, however to the Panel to be merely advisory.

- b. We believe that if the Advisory Panel reaches a unanimous, legally argued and evidence-backed argued view decisions against passing down the fine the Minister should refrain to do so.
- c. We do welcome that that whenever “ *there is a representative body for the affected authority, this body would be invited to put forward nominations in respect of its members to the Minister for sector expertise*” and the Policy Statement Recognition that “if a Scottish local authority is involved, the Convention of Scottish Local Authorities would be invited to provide nominees”.

Question 11

Do you have comments on the broad terms of reference under Annex A?

- a. Other than what we said in Q10 regarding the Advisory nature of the Panel and its Scottish representation, we do welcome that the panel does not include civil servant. Given the quasi-judicial nature of the panel's role it is fair that no member of the affected authority should be part of the panel.
- b. We are against the idea that there should be cases with a panel of one member only. Even there are matters more straightforward than others if this panel is to exercise a scrutiny role it should have more than one person, ideally more than three but clearly no less than two.

Question 12

Do you have comments on the approach regarding achieving compliance and ending liability?

The approach proposed is consistent with the previous stages of the Policy Statement.