

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the European Charter of Local Self-Government (Incorporation) (Scotland) Bill introduced in the Scottish Parliament on 5 May 2020. It has been prepared by the Parliament's Non-Government Bills Unit (NGBU) on behalf of Andy Wightman MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 70–LC);
- a Financial Memorandum (SP Bill 70–FM);
- Explanatory Notes (SP Bill 70–EN).

Policy objectives of the Bill

3. The Bill aims to strengthen the status and standing of local government by incorporating the European Charter of Local Self-Government (“the Charter”)¹ into Scots law.

¹ European Charter of Local Self-Government, Council of Europe, 1985. Available at

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4. The Bill provides that executive actions of Scottish Ministers within devolved competence, and legislation that is within the legislative competence of the Scottish Parliament, must be compatible with the Charter; it creates a basis on which action can be taken in the courts to challenge any such action by Scottish Ministers or any such legislation that may not be compatible with the Charter; it requires the courts to interpret such legislation as compatible with the Charter if it is possible to do so; and it provides the courts with remedies in cases of incompatibility.
5. The member believes that this should enhance local government's status in law and provide legal guarantees of the status, powers and finances of local government. It should also provide for a check on the powers of the Scottish Government and the Scottish Parliament in so far as these interact with the terms of the Charter.
6. The member wishes to draw attention to the Charter as a meaningful international treaty that has been signed, and ratified, by the United Kingdom. The overarching ambition is that the Bill will help to ensure that the principles of the Charter are embedded in policy-making and thinking, and that formal enforcement is rarely needed.

Background

7. The member's view is that over the past century the status, powers and freedoms of local government have been slowly eroded and marginalised. Governments of all persuasions have tended to concentrate more executive and fiscal power to the centre. At the same time, whole spheres of local governance (such as Scotland's former 196 town councils) have been eliminated.
8. Over the 20 years since the Scottish Parliament was established, local democracy has been neglected and Scottish Ministers have assumed greater influence over local government affairs by exerting control over local tax rates and mandating specific policy outcomes in relation to the statutory powers of local government. That this has often been facilitated by local government itself does not in any way affect the ongoing erosion of local autonomy.

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>. Accessed on 27 February 2020.

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9. The European Charter of Local Self-Government was designed to provide a guarantee of minimum constitutional safeguards for the status of local government across member states of the Council of Europe. As an international treaty, however, it can only have full effect in law once it is incorporated into domestic law, which is what this Bill is designed to do.

The Council of Europe and the Charter

10. The Council of Europe was founded in 1949 as an international organisation to promote democracy and protect human rights and the rule of law across the continent of Europe. It has 47 member states and the UK is one of the eight founding members.

11. The European Charter of Local Self-Government was drawn up by the Council of Europe and opened to signature by its member states in October 1985.

12. The Explanatory Report to the Charter describes its purpose as follows—

“... to make good the lack of common European standards for measuring and safeguarding the rights of local authorities, which are closest to the citizen and give him the opportunity of participating effectively in the making of decisions affecting his everyday environment. The Charter commits the parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities.”²

13. The Charter made no provision for arbitration or judicial oversight. Monitoring of compliance with the Charter is carried out by the Council of Europe’s Congress of Local and Regional Authorities (“the Congress”) through a programme of country-by-country monitoring reports. Rapporteurs, appointed by the Congress, report on how the signatory states are complying with the provisions of the Charter.³

² Explanatory Report to the European Charter of Local Self-Government, 1985, ETS 122, p. 2-3. Available at <https://rm.coe.int/16800ca437>. Accessed on 15 July 2019.

³ <https://www.coe.int/en/web/congress/monitoring-of-the-european-charter-of-local-self-government>. Accessed on 11 November 2019.

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The Charter and the UK

14. The Charter was signed by the UK Government in June 1997, ratified by the UK in April 1998 and entered into force in respect of the UK on 1 August 1998. The Charter has been ratified by all 47 Council of Europe Member States.

15. As part of the ratification process, and as set out in Article 12, under Part II of the Charter (Miscellaneous provisions), signatory states had to undertake to consider themselves bound by at least twenty paragraphs of Part I of the Charter, with at least ten of those from a prescribed list. The UK Government agreed to be bound by all the Articles of Part I and, in relation to Scotland, defined the scope of the Charter as confined to all councils constituted under Section 2 of the Local Government (Scotland) Act 1994.⁴ This therefore relates to the 32 councils, or local authorities, that are the basis for local government in Scotland today.⁵ Parts II and III of the Charter relate to procedural matters.

16. There are 10 substantive articles in Part I of the Charter, comprising a total of 31 paragraphs. They cover the following headings:

- Constitutional and legal foundation for local self-government (Article 2)
- Concept of local self-government (Article 3)
- Scope of local self-government (Article 4)
- Protection of local authority boundaries (Article 5)
- Appropriate administrative structures and resources for the tasks of local authorities (Article 6)
- Conditions under which responsibilities at local level are exercised (Article 7)
- Administrative supervision of local authorities' activities (Article 8)

⁴ List of Reservations and Declarations (by country) for the European Charter of Local Self-Government. Available at:https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122/declarations?p_auth=Vp4xBdh0. Accessed on 10 February 2020.

⁵ <https://www.gov.scot/policies/local-government/>

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- Financial resources of local authorities (Article 9)
- Local authorities' right to associate (Article 10)
- Legal protection of local self-government (Article 11)

17. The Charter has not been incorporated into domestic law in the UK. As the UK has a dualist legal system, domestic and international law are distinct and separate from one another. To give it the same legal authority as domestic law, international law must generally be incorporated into domestic law. This is in contrast to monist legal systems, in which international law is automatically incorporated into national law, has direct legal effect and can be relied upon in domestic courts.

18. In this context, the member's intention with this Bill is to achieve the incorporation of the Charter into domestic law in Scotland, to give it legal effect and allow compliance with the Charter to be enforced in the Scottish courts. This would mean that individuals and organisation who are concerned that a provision of legislation, or action or decision taken by Scottish Ministers, may not be compatible with the provisions of the Charter can challenge the executive action (provided it is within devolved competence) or legislation (provided it is within the legislative competence of the Scottish Parliament), in a domestic court.

Council of Europe assessment of local government in the UK

19. The regular monitoring of the application of the European Charter of Local Self Government by signatory states is carried out by a committee of the Council of Europe's Congress of Local and Regional Authorities: The Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee).⁶ Reviews of the UK were carried out in 1998 and 2014. According to a briefing produced by the Local Government

⁶ <https://www.coe.int/en/web/congress/monitoring-committee>. Accessed on 4 November 2019.

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Association in April 2017, the next Council of Europe peer review of local government in the UK is scheduled for 2020.⁷

20. In 1997, the year the UK ratified the Charter, Resolution 58⁸ of the Congress of the Council of Europe stated that it —

“Considers that major problems of local democracy exist in the following countries: Croatia, Bulgaria, Latvia, Moldova, Ukraine and the United Kingdom.”

21. The first monitoring visits to the UK were carried out in late 1997 and early 1998 and reported on later in 1998.⁹ The review was limited to England, Scotland and Wales given that, at that time, the peace process was the “key issue” for Northern Ireland. The Congress recommendations following the visit referred to the changing context in the United Kingdom under the (then) new Government elected on 1 May 1997 and to the ongoing process of devolution and plans for a Scottish Parliament and Welsh Assembly. The rapporteurs recognised the differences between the British legal system and most continental systems and the absence, in that respect, of a written constitution. In the subsequent Recommendation 49,¹⁰ specific recommendations included—

⁷ Local Government Association Briefing: Legislating for the United Kingdom’s Withdrawal from the EU, April 2017, p. 4. Available at <https://www.local.gov.uk/sites/default/files/documents/April%202017%20LGA%20briefing%20-%20Legislating%20for%20the%20United%20Kingdom%E2%80%99s%20withdrawal%20from%20the%20EU.pdf>. Accessed on 4 November 2019.

⁸ Congress of Local and Regional Authorities of Europe, Resolution 58, Session 4, p.5. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168071911b>. Accessed on 26 February 2020.

⁹ Report on Local and Regional Democracy in the United Kingdom, CG (5) 7 Part II. Available at: <https://rm.coe.int/168071af17>. Accessed on 26 February 2020.

¹⁰ Local and Regional Democracy in the United Kingdom, Recommendation 49, 1998. Available at: <https://rm.coe.int/0900001680718e14>. Accessed on 10 February 2020.

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- “to establish a legal framework giving local government a clear basis and a general competence for the benefit of its citizens and other inhabitants, including the issue of community leadership;
- to clarify the distinction between powers delegated to local government by national government, as compared to local government’s own powers;
- to increase seriously local government’s financial capacities by developing a much higher share of their own income as compared to State grants, and by abolishing practices like “rate capping”, as well as by re-localising the “business rate”;
- to give local authorities greater accountability towards citizens;
- to reduce the power of outside bodies on local government management in fields such as “value for money” or “best value”;
- to ensure that elected mayors/councillors, etc. who have to work full time, should be able to draw a decent income from their activity without being placed in an awkward position when compared to the senior officials working for them;
- to establish that the principles accepted by the United Kingdom within the European Charter of Local Self-Government should be incorporated in the domestic law and considered as binding by the British courts.”

22. The recommendations stemming from the subsequent 2014 monitoring visit by the Council of Europe Congress rapporteurs referred to the fact that “...compared to 1998, the situation has improved, notably through the devolution process”.¹¹ They noted that local government in the United Kingdom, in general, complied with the obligations taken under the Charter, and referred to a number of positive developments. At the same time the Congress also expressed a number of concerns, including that—

“the Constitutional or legislative recognition and entrenchment of (the right to) local self-government does not exist in the United

¹¹ Local and Regional Democracy in the United Kingdom CG(26)10; Recommendation 353, 2014, p.54. Available at: http://europeancharter.scot/wp-content/uploads/2018/06/UK_monitoring_report_2014.pdf Accessed on 10 February 2020.

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Kingdom (including Scotland), and that the introduction of a general power for local authorities does not go far enough in satisfying the spirit of the Charter;”

and that—

“local authorities do not have adequate financial resources, are under severe constraints as a consequence of cuts and indebtedness, and are faring worse than other public sectors and the national government in weathering the effects of the economic crisis (in spite of very welcome government reform of 2013, localising business taxes in England and Wales but not in Scotland), all of which contribute to a situation that raises issues under Article 9 of the Charter.”¹²

23. An overview of the outcomes of the 2014 monitoring visit can be found on the Carta Monitoring site of the Council of Europe’s Congress.¹³

Local government, Scottish devolution and the European Charter

24. A 1998 House of Commons Library Research Paper stated that the Scottish Parliament would be bound by the Council of Europe’s Charter of Local Self-Government, which had been signed at that point but not yet ratified. It went on to state that the Charter sets standards for central-local relations designed to protect local government autonomy. Although the wording was considered sufficiently loose not to present government with challenges in terms of compliance, the research paper did refer to commentators on local government tending towards the view that ratifying the Charter could help underpin central-local relations as it could be seen as a mark of trust.¹⁴ The research paper also referred to concerns, voiced

¹² Local and Regional Democracy in the United Kingdom CG(26)10; Recommendation 353, 2014, p.3. Available at: http://europeancharter.scot/wp-content/uploads/2018/06/UK_monitoring_report_2014.pdf Accessed on 10 February 2020.

¹³ Carta Monitoring website available at <https://www.congress-monitoring.eu/en/10-pays.html>. Accessed on 4 November 2019.

¹⁴ The Scotland Bill: the Scottish Parliament and Local Government, Research Paper 98/5, House of Commons Library, 7 January 1998, p. 7.

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by some, over the impact that the (new) Scottish Parliament and a Scottish Government would have on the powers and autonomy of local government.¹⁵

25. Recommendations published in 1999 by the McIntosh Commission on Local Government and the Scottish Parliament proposed a series of reforms to strengthen and formalise the role of local government within the new devolved arrangements.¹⁶

26. In recent years there has been a growing interest in the Charter in Scotland and in the UK as a whole. In Scotland, the focus has been, in particular, on the standing of local government within the context of devolution.

27. One analysis published in 2013 of whether local government in England complied with the European Charter referred to work done by Select Committees in the UK Parliament.¹⁷ The report quotes the House of Commons Communities and Local Government Committee 2009 “Report on the Balance of Power: Central and Local Government” which, in considering whether a constitutional settlement would be important, advocated that the UK Government introduce ‘constitutional’ legislation to

Available at: <https://researchbriefings.files.parliament.uk/documents/RP98-5/RP98-5.pdf>. Accessed on 8 July 2019.

¹⁵ The Scotland Bill: the Scottish Parliament and Local Government, Research Paper 98/5, House of Commons Library, 7 January 1998, pp. 16-17. Available at:

<https://researchbriefings.files.parliament.uk/documents/RP98-5/RP98-5.pdf>. Accessed on 8 July 2019.

¹⁶ ‘McIntosh findings published today’, Scottish Government News Release, June 1999. Available at:

<https://www2.gov.scot/News/Releases/1999/06/fc688349-b6fb-4ce8-800c-d05d7f59fb5b>. Accessed on 20 February 2020.

¹⁷ Smith, J., Local Government in England: Do we comply with the European Charter on Local Self-Government. Analysis and Report, May 2013. Available at: http://europeancharter.scot/wp-content/uploads/2018/06/Smith_Independent-report-on-European-charter-of-local-self-government.pdf. Accessed on 2 September 2019.

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place the European Charter of Local Self-Government on a statutory basis.¹⁸

28. The Charter was the subject of discussion, and a Stage 3 amendment, during the passage of the Community Empowerment (Scotland) Bill in the Scottish Parliament in 2014-2015.

29. In its evidence to the Parliament's Local Government and Regeneration Committee on the Bill, the Convention of Scottish Local Authorities (COSLA) addressed its ambition to put the position of local self-government on a constitutional footing and that, "... the most practicable way to do this in the short terms is by giving life to the European Charter of Local Self-Government through the enactment of domestic legislation." It went on to state that, "Protection within a constitution would be our preferred method as we believe that a legislative approach could, theoretically, be eroded through later Parliamentary decisions. Nonetheless, the protection conferred through legislation is still significant and something that we firmly support."¹⁹

30. At Stage 2, Tavish Scott MSP lodged an amendment to introduce a power of general competence for local authorities, arguing that—

"... devolution should not stop in this building; rather, we should ensure that local government and those who serve communities, representing all political parties and none, have the ability to use

¹⁸ "Report on the Balance of Power: Central and Local Government", House of Commons Communities and Local Government Committee, 2009, p.56. Available at: <https://publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/33/33i.pdf>. Accessed on 20 February 2020.

¹⁹ COSLA's response to the Local Government and Regeneration Committee's call for evidence on the Community Empowerment (Scotland) Bill, p.1-2. Available at: http://www.parliament.scot/S4_LocalGovernmentandRegenerationCommittee/General%20Documents/156_COSLA.pdf. Accessed on 9 October 2019.

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the power of general competence in the most sensible and constructive way for the people whom they serve.”²⁰

31. The amendment was disagreed to. In the debate on the amendment the Scottish Government minister referred to the position of COSLA, which welcomed the amendment but stated that it “it would be simpler and preferable to further the power of local government through the Bill by using this opportunity to embed the European Charter on Local Self-Government in the Act”.²¹

32. At Stage 3, Tavish Scott MSP lodged an amendment seeking to impose a duty on Scottish Ministers, in exercising their functions, to observe and promote the principles and provisions of the Charter. The amendment was disagreed to.²²

33. During the Stage 3 debate on the amendment, the minister explained the position of the Scottish Government—

“Our actions are ... already guided by the provisions of the charter. It commits us to applying basic rules guaranteeing the political, administrative and financial independence of local authorities. Crucially, it provides the principle of local self-government will be recognised in domestic legislation and, where practicable, in the constitution. The explanatory notes to the charter already recognise that states that do not have a written constitution, such as the UK, will be unable to give that

²⁰ Scottish Parliament Official Report, Local Government and Regeneration Committee, Wednesday 11 March 2015, Column 3. Available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9830&mode=pdf>. Accessed on 17 October 2019.

²¹ Scottish Parliament Official Report, Local Government and Regeneration Committee, Wednesday 11 March 2015, Columns 6-7. Available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9830&mode=pdf>. Accessed on 17 October 2019.

²² See amendment 151 on p3 of the Marshalled list of amendments. The amendment was disagreed to (For 52, Against 68, Abstentions 0).

Available at:

[http://www.scottish.parliament.uk/S4/Bills/Community%20Empowerment%20\(Scotland\)%20Bill/b52as4-stage3-ml.pdf](http://www.scottish.parliament.uk/S4/Bills/Community%20Empowerment%20(Scotland)%20Bill/b52as4-stage3-ml.pdf). Accessed on 3 July 2019.

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constitutional protection. This Government believes in a written constitution and would wish to see local government covered by it. A mention only in legislation does not carry the same force or have the same effect and could be annulled by future Governments rather more easily.”²³

34. In August 2014 COSLA’s Commission on Strengthening Local Democracy produced its final report “Effective Democracy: Reconnecting with Communities.” It contained a range of proposals on strengthening local democracy. These included—

“The Commission recommends that all of the principles and provisions of the European Charter of Local Self Government be adopted into law in Scotland in order to enshrine subsidiarity and the competences of local governance. We also recommend that an independent Commissioner is established to scrutinise the compatibility of UK and Scottish Government policy and practice with the law. We further recommend that Ministers are legally required to undertake ‘subsidiarity impact assessments’ on national policy and legislation.”²⁴

35. Similarly, in its response to the Smith Commission Report in October 2014, COSLA stated that there was a need for the debate at the time to consider the position of local government as well as that of national government. It reiterated its proposal that the European Charter of Local Self-Government be placed on a statutory footing.²⁵ In its response to the consultation on the draft proposal for this Bill, COSLA explained—

²³ Official Report of the Scottish Parliament, 17 June 2015, Column 66.

Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10020&mode=pdf>. Accessed on 14 August 2019.

²⁴ Effective Democracy: Reconnecting with Communities, Report by The Commission on Strengthening Local Democracy, August 2014, p12.

Available at:

<https://www.cosla.gov.uk/sites/default/files/private/thecommissiononstrengtheninglocaldemocracyfinalreportaugust2014.pdf>. Accessed on 3 July 2019.

²⁵ COSLA Response to the Smith Commission, October 2014 Available at <https://webarchive.nationalarchives.gov.uk/20151202171052/http://www.sm>

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“Legal incorporation would not therefore entail significant change to the current landscape, but crucially would ensure that local democracy is fundamentally built into Scotland’s system of democratic governance in a way which is not possible at the moment. Indeed, one of the benefits of incorporation is not to create the conditions for conflict or judicial review, but rather to ease relationships between the different spheres through early stage joint working on areas of shared competencies.”²⁶

36. During the same period, there was interest in other parts of the UK in the European Charter of Local Self-Government. The Welsh Local Government Association (WLGA) published a report in November 2015 on “Localism 2016-2021: A plan for public services in Wales”²⁷, in which it referred to four core principles endorsed by all four local government associations (WLGA, LGA²⁸, NILGA²⁹, COSLA) as—

“We must establish a principle of subsidiarity; the presumption that power is transferred to the level of government closest to the people ... We want the legal position of local government to be secured and enhanced ... We want greater fiscal autonomy for local government ... We want the full adoption of the principles set out in the European Charter of Local Self-Government.”

37. In March 2016 the All-Party Parliamentary Group on Reform, Decentralisation and Devolution in the United Kingdom published a report

ith-commission.scot/resources/submissions-organisations/. Accessed on 12 August 2019.

²⁶ COSLA Response to Andy Wightman MSP’s consultation on draft proposal for the present Bill. Available at <https://drive.google.com/file/d/15egW9UQd479mh81TTJG196PUCIhZ0JGC/view>. Accessed on 12 September 2019.

²⁷ Localism 2016-2021: A plan for public services in Wales, November 2015, p.7. Available at: [https://www.local.gov.uk/sites/default/files/documents/2-c81](https://www.local.gov.uk/sites/default/files/documents/2-c81.pdf).pdf Accessed on 3 July 2019.

²⁸ Local Government Association

²⁹ Northern Ireland Local Government Association

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on Devolution and the Union³⁰, as a result of an inquiry into better devolution for the whole UK. It stated—

“The European Charter on Local Self-Government, to which the UK has committed, offers a foundation of principles on which to build. There needs to be a new legal basis for the independence of local government; a clearer constitutional footing made through primary legislation that, as much as possible, constitutes an enforceable legal embodiment of the principle of subsidiarity. The panel recommends transposing the European Charter on Local Self-Government into primary legislation”.

38. The Charter was also raised in General Questions in the Scottish Parliament on 8 September 2016 when Patrick Harvie MSP asked the then Cabinet Secretary for Finance and the Constitution, Derek Mackay MSP, whether the Scottish Government’s proposals for changes to council tax complied with its treaty obligations under the European Charter of Local Self-Government, citing Article 9 of the Charter. The Cabinet Secretary responded—

“Mr Harvie asked whether our proposals are legally compliant and I answered yes—they are in keeping with the spirit of the European Charter of Local Self-Government, in that local authorities will, as I said, keep every penny of council tax that they raise. ... [The] Parliament and the Government have every right to legislate on council tax. If we did not, why would we be laying regulations to legislate?”³¹

39. In December 2017, the Scottish Government and COSLA jointly launched a Local Governance Review. The aim is to consider how

³⁰ Devolution and the Union: A higher ambition, All-Party Parliamentary Group on Reform, Decentralisation and Devolution in the United Kingdom, March 2016, p31. Available at:

<https://www.local.gov.uk/sites/default/files/documents/devolution-and-union-high-637.pdf>. Accessed on 3 July 2019.

³¹ Official Report of the Scottish Parliament, 8 September 2016, S50-00111. Available at:

http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10502&mode=html#iob_96688. Accessed on 10 February 2020.

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powers, responsibilities and resources are shared across national and local spheres of government and with communities. It covers two strands. The first, related to community decision-making is called Democracy Matters.³² The second strand deals specifically with public sector governance. As part of the first engagement phase of the review, public sector organisations were invited to suggest alternative arrangements for public service governance. An analysis of the responses was published in May 2019.³³

40. Section 3.8 of the analysis of responses is entitled ‘European Charter of Local Self-Government’ and summarises the views of those public sector organisations that expressed support in the consultation for the incorporation of the Charter, including for example the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR). Some of the advantages of incorporating the Charter into law in Scotland identified by respondents include—

- strengthening local and Scottish Government’s ability to work jointly to improve outcomes in communities across Scotland;
- delivering 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;
- ensuring Scotland fully complies with international treaty obligations and addresses outstanding issues that have previously been identified.³⁴

³² Further details on the Local Governance Review available at <https://www.gov.scot/publications/local-governance-review-analysis-responses-democracy-matters/>. Accessed 8 July 2019.

³³ Local Governance Review - public sector governance: analysis of responses, 16 May 2019. Available at: <https://www.gov.scot/publications/local-governance-review-analysis-responses-ask-public-sector-organisations-outline-alternative-arrangements-public-service-governance/>. Accessed 8 July 2019.

³⁴ Local Governance Review - public sector governance: analysis of responses, 16 May 2019, p. 13. Available at: <https://www.gov.scot/publications/local-governance-review-analysis->

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41. In an October 2019 report by the Consultative Steering Group (CSG) on the Scottish Parliament, reviewing 20 years of the Scottish Parliament and developments since it produced its original report ‘Shaping Scotland’s Parliament’ in December 1998, the Steering Group recalls that the Scottish Constitutional Convention—

“... recommended that the Scotland Act should commit the Scottish Parliament to securing and maintaining a strong and effective system of local government, embodying the principle of subsidiarity. It also recommended that the Parliament should embody the principles contained in the European Charter of Local Self Government, in particular a principle of general competence.”

42. In the CSG’s view, what it has witnessed instead is a weakening of the position of local government in Scotland with tighter control over local budgets and spending priorities being exercised by successive governments.

“Our view is that the benefits of bringing decision-making back to Edinburgh in 1999 should flow through to proper empowerment of local communities through their local representative bodies. In the absence of a written constitution, consideration should be given to how best to enshrine and strengthen the powers of local government with a view to creating parity of esteem with central government.”³⁵

43. The Charter, and the question of incorporation, has remained a feature of the debate in Scotland on local government in recent years. This Bill now seeks to achieve the incorporation that has been called upon by so many for so long.

[responses-ask-public-sector-organisations-outline-alternative-arrangements-public-service-governance/](#). Accessed 8 July 2019.

³⁵ Reflections on 20 Years of the Scottish Parliament, Report by the Consultative Steering Group on the Scottish Parliament, October 2019, paragraphs 13 and 14. Available at [https://www.parliament.scot/CSG_2019_\(002\).pdf](https://www.parliament.scot/CSG_2019_(002).pdf). Accessed on 9 October 2019.

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Competence of the Scottish Parliament and scope of the Bill

44. International relations, including relations with the EU and international organisations, are reserved under Schedule 5 to the Scotland Act 1998. However, the reservation does not reserve observing and implementing international obligations. Accordingly, the Scottish Parliament can legislate to implement an international obligation of the United Kingdom in so far as it relates to devolved matters and is not the subject of any other limit on legislative competence.

45. In Scotland, local government, the legislative/administrative framework, policy and elections, are devolved matters; as is local government finance to a considerable degree. Prior to 1999, the UK Parliament legislated separately for Scottish local government. The key pieces of legislation governing local government in Scotland today are: the Local Government (Scotland) Act 1973, the Local Government etc. (Scotland) Act 1994, the Local Government in Scotland Act 2003 and the Local Governance (Scotland) Act 2004.

46. It is not only primary legislation setting out the roles and responsibilities of local government (such as the Acts referred to above) that has an impact on local government. Other primary and secondary legislation impacts on the responsibilities of local government in Scotland and the way in which it carries out its work. Similarly, executive action can also have an impact on what local government does and how it functions.

47. The member wishes to ensure that any legislation that is within the legislative competence of the Scottish Parliament, and decisions and actions by Scottish Ministers within devolved competence, are compliant with the principles set out in the European Charter of Local Self-Government. By incorporating the European Charter into Scots law, the Bill seeks to achieve this objective.

48. Although the UK and Scottish Governments are already bound by the principles of the Charter, those principles are not part of the law that can be enforced directly in Scottish courts. This Bill seeks to enable such enforcement by incorporating the Charter into Scots law in such a way as to enable it to be relied on in court.

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Status of the European charter of local self-government in domestic law

49. According to a 2011 study carried out by the Chamber of Local Authorities³⁶ of the Congress of Local and Regional Authorities on the European Charter of Local Self-Government in domestic law³⁷, signatory countries can be classified in different ways according to their reception of international treaties (for example whether or not international treaties are automatically incorporated into a country's domestic legal system) and the extent to which an international treaty is seen as a source of law that is directly applicable in the domestic system. The diversity of political and legal systems, and the different traditions of local government, mean that the picture across Europe is very varied.

50. As already mentioned, the UK is regarded as a state with a dualist approach to the relationship between international and domestic law. In a 1998 report published by the Congress of Local and Regional Authorities of the Council of Europe, which considers the incorporation of the European Charter of Local Self-Government in the legal system of ratifying countries, the dualist approach is described as follows—

“In the states favouring the dualist approach, the rules of international law are directed only at the states: these rules place the state under an international obligation in the international legal system but are not capable of being raised directly by the state's subjects, be they persons under private law or public law. If the state has accepted an international obligation which intends to have consequences in its domestic law at the level of its legal persons, it is up to the state to change its domestic legislation and regulations so as to be in accordance with the obligations it has

³⁶ Further information on the Chamber of Local Authorities of the Congress of Local and Regional Authorities can be found here

<https://www.coe.int/en/web/congress/chamber-of-local-authorities>.

Accessed on 3 December 2019.

³⁷The European Charter on Local Self-Government in domestic law, Chamber of Local Authorities, Congress of Local and Regional Authorities, Council of Europe, CPL(21)2, 28 September 2011. Available at https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=090000168071a4b6#_Toc239157705. Accessed on 13 August 2019.

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accepted at the international level. Only measures of domestic law aimed at translating the state's international obligations into the national legal system are capable of creating rights and obligations for subjects of domestic law. Under such an approach, a violation at the domestic law level of an international convention, such as the European Charter of Local Self-Government may not be pleaded before the national courts if this translation has not taken place. For only the measures taken in the national legal system by the state to ensure the implementation of the Charter may, if appropriate, be pleaded before the national courts".³⁸

51. The purpose of this Bill is to achieve the incorporation of the Charter into domestic law in Scotland and to give it legal effect in Scottish courts. Issues may arise in terms of whether the provisions of the Charter are self-executing. The Scottish Government's consultation on incorporating the United Nations Convention on the Rights of the Child (UNCRC) into domestic law in Scotland (see paragraphs 56-60 below) refers to self-executing rights and describes them as rights that can be enforced directly without additional, detailed legislation.³⁹ In the case of this Bill, the member's view is that it will be for the courts to consider and deal with issues of interpretation and application in due course.

³⁸ The Incorporation of the European Charter of Local Self-Government in the Legal System of Ratifying Countries and Legal Protection of Local Self-Government, Report by J-M Woehrling, 1998. Available in Annex to CPL (4) 7 Part II, at https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=090000168071991b. Accessed on 2 December 2019.

³⁹ Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland, Scottish Government, May 2019, p. 12. Available at <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>. Accessed on 9 October 2019.

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Examples of other international treaties

European Convention on Human Rights

52. The European Convention on Human Rights⁴⁰ is an international Treaty of the Council of Europe. It was opened for signature in Rome in 1950 and came into force in 1953. It was the first instrument that gave effect to the rights set out in the 1948 United Nations Universal Declaration of Human Rights, guaranteeing civil and political rights.⁴¹ It also established the European Court of Human Rights, in Strasbourg, with the jurisdiction to find against member states that do not fulfil their obligations under the Treaty.⁴²

53. In the UK, the Human Rights Act 1998⁴³ gives effect to the rights and freedoms guaranteed under the European Convention on Human Rights by incorporating them into UK domestic law. As a result of this, anyone who believes their Convention rights have been breached can take their case to a British court, and public bodies are required to respect and protect these rights in exercising their functions. It is unlawful for a public authority to act in a way which is incompatible with a Convention right. If an Act of the UK Parliament is found to be incompatible with Convention rights, the courts can make a declaration of incompatibility. The Act in respect of which the declaration is made remains valid.⁴⁴ It is then up to the UK Parliament to decide whether to amend or repeal the Act or the UK Government to decide whether to make a remedial order to remove the incompatibility.

54. The context is different in Scotland. As noted above, the Human Rights Act 1998 does not give a court the power to strike down Acts of the

⁴⁰ https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed on 2 September 2019.

⁴¹ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts>. Accessed on 2 September 2019.

⁴² https://www.echr.coe.int/Documents/50Questions_ENG.pdf. Accessed on 2 September 2019.

⁴³ <http://www.legislation.gov.uk/ukpga/1998/42/contents>. Accessed on 2 September 2019.

⁴⁴ <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>. Accessed on 2 September 2019.

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UK Parliament that it considers incompatible with the Convention rights. But if the incompatible legislation is (or forms part of) an Act of the Scottish Parliament, then the court can strike it down under the Scotland Act 1998. Under that Act, a provision of an Act of the Scottish Parliament that is incompatible with any of the Convention rights is outside the competence of the Scottish Parliament, and (as a result) is “not law”. This model of incorporation has been described as ‘full constitutionalisation’ by James Wolffe QC (currently the Lord Advocate) in a 2014 lecture: legislative and executive powers of the devolved institutions are constrained, and their laws and actions can be struck down if they are incompatible with Convention rights.⁴⁵ Equally, under the Scotland Act 1998 the Scottish Government has no power to act incompatibly with Convention rights.

55. In the case of this Bill, the ‘full constitutionalisation’ approach has not been adopted because of the likelihood that such an approach would be outwith the competence of the Scottish Parliament. This is explained in more detail in paragraph 77.

United Nations Convention on the Rights of the Child

56. The United Nations Convention on the Rights of the Child (UNCRC) is an international treaty agreed in 1989 and ratified by the UK in 1991.

57. The Scottish Government has committed to legislate to incorporate the UNCRC into Scots law.⁴⁶ In May 2019 it launched a consultation to seek views on the approach to take in incorporating the UNCRC into domestic law in Scotland. The consultation document states that whilst treaties such as the UNCRC are usually implemented in Scotland through detailed legislation, giving effect to the treaty rights—

“To give greater assurance that UNCRC rights will be respected in all circumstances, we plan either to directly incorporate those rights as closely as is achievable in the Scottish context, or to

⁴⁵ James Wolffe Q.C., “Economic and Social Rights in Scotland: Lessons from the past; options for the future”, Lecture on International Human Rights Day, 2014. Available at <http://www.scottishhumanrights.com/media/1469/wolffe2014lecture.pdf>. Accessed on 3 September 2019.

⁴⁶ <https://www.gov.scot/policies/human-rights/childrens-rights/> Accessed on 2 September 2019.

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transpose those rights by enacting a suite of Scottish children’s rights.”

58. In its consultation, the Scottish Government is rehearsing many of the same issues as the current Bill; for example, the possible framework of requirements that can be imposed, remedies available to the Courts, and the justiciability of Convention provisions.

59. One clear conclusion drawn by the consultation document is that—

“It would not be open to the Parliament to create new limitations on its own legislative competence: that could only be done by amending provisions of the Scotland Act 1998 that the Parliament cannot modify. It follows that the Bill incorporating the UNCRC could not provide that a provision in an ASP (whether an existing ASP or a future ASP) is not law so far as it is incompatible with the UNCRC rights.”⁴⁷

60. The analysis of responses to the consultation was published on 20 November 2019. In a Ministerial Statement on the same day, Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney, confirmed the intention of the Scottish Government to introduce a Bill in 2020 to incorporate the UNCRC into Scots law.

“The bill that I will introduce next year will instead take a maximalist approach. In every case possible, we will seek to incorporate the convention’s articles in full and directly, using the language of the convention. Our only limitation will be the limit of the powers of this Parliament, to which many of us obviously object.”⁴⁸

⁴⁷ Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland, Scottish Government, May 2019, p. 31. Available at <https://www.gov.scot/publications/childrens-rights-consultation-incorporating-uncrc-rights-child-domestic-law-scotland/>. Accessed on 9 October 2019.

⁴⁸ Ministerial Statement by John Swinney, Deputy First Minister and Cabinet Secretary for Education and Skills, Official Report of the Scottish Parliament, 20 November 2019, column 3. Available at

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Approach to incorporating the European charter of local self-government

61. This Bill proposes the direct incorporation of the European Charter of Local Self-Government, by reproducing the exact wording of the relevant Charter Articles, in the schedule to the Bill.

Interpretation of Charter provisions

62. Some of the provisions of the Charter are framed in general terms, reflecting the nature of the document as an international treaty, designed to reflect a wide range of systems and traditions across Europe.

Furthermore, as the domestic courts have not, to date, had any role in interpreting and enforcing the Charter, there is no existing case law on its application in a Scottish context.

63. The Council of Europe has provided some guidance on which of the Charter provisions it considers have self-executing content (Article 3, paragraph 2; Article 4, paragraphs 5 and 6; Article 5; Article 7, paragraphs 1 and 3; Article 8; Article 10 and Article 11). Furthermore, it believes that its national monitoring reports also provide guidance on the ongoing interpretation and application of Charter provisions.⁴⁹

64. In terms of whether provisions of the Charter are justiciable, the member is aware that the courts may sometimes take the view that it is not possible to rule on whether a particular provision in legislation, or a particular executive act, is compatible with a provision of the Charter. This may arise, for example, if the case turns on competing political interpretations of Charter provisions on the appropriate distribution of powers between spheres of government.

65. It is the member's view that, under this Bill it will be for the courts to decide, on a case by case basis, whether it is possible to reach a

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12376&mode=pdf>. Accessed on 21 November 2019.

⁴⁹ The European Charter on Local Self-Government in domestic law, Chamber of Local Authorities, Congress of Local and Regional Authorities, Council of Europe, CPL(21)2, 28 September 2011. Available at https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=090000168071a4b6#_Toc239157705. Accessed on 13 August 2019

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conclusion on a dispute about the compatibility or otherwise of legislation or executive act with the Charter.

Scope of the Bill

66. Under the Bill, the scope of what can be challenged through the courts for incompatibility with the European Charter of Local Self-Government includes all legislation on the statute book in Scotland that is within the legislative competence of the Scottish Parliament. This includes Acts of the Scottish Parliament, together with those provisions in Acts of the UK Parliament that could be included in an Act of the Scottish Parliament. It also includes provision in subordinate legislation made by Scottish Ministers (in Scottish Statutory Instruments) or made by Ministers of the Crown (in Statutory Instruments) which (in either case) could be included in an Act of the Scottish Parliament.

67. The scope of the Bill also includes (non-legislative) executive actions of Scottish Ministers, where these relate to Ministerial functions that fall within “devolved competence” (as that term is defined in section 54 of the Scotland Act 1998). This refers to the functions Scottish Ministers have that overlap with things that the Scottish Parliament has the power to legislate about, so excludes certain additional functions that the Scottish Ministers have in reserved areas.⁵⁰

Framework of requirements

68. The Bill’s approach to incorporation is defined, not just by the scope of what may be challenged, but also by the framework of requirements that the Bill places on relevant public authorities.

Duty to act compatibly

69. The Bill includes (in section 2) a duty on Scottish Ministers, in exercising their functions, as far as they are within devolved competence (see paragraph 67), to act in a way that is compatible with the Charter Articles. This includes when making subordinate legislation. It also

⁵⁰ An example is the power that Scottish Ministers have to decide on certain applications in the energy sector, where that power is exercisable in Scotland by the Scottish Ministers (rather than by UK Government Ministers) within a legislative framework that the Scottish Parliament has no power to alter.

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includes a failure to act; in other words, if taking a particular action would be necessary to ensure compliance with the Charter, then a failure so to act would breach the duty to act compatibly with the Charter. It does not include the preparation, introduction and promotion of primary legislation (but see also section 8, which requires Ministers to make a statement when a Bill is introduced about its compatibility or otherwise with the Charter).

Duty to promote local self-government

70. To ensure that the spirit of the Charter provisions is embedded in the policy-making process in a proportionate way, the Bill also places a duty on Scottish Ministers to promote local self-government in Scotland (section 3). They must keep under consideration steps that they could take that might serve to safeguard and reinforce local self-government and increase the autonomy of local authorities. This draws on the wording of the Preamble to the European Charter. The member's objective is to make the spirit of the Charter Articles an integral part of ministers' thinking when policy is being designed and developed.

71. Furthermore, there is also a requirement on Scottish Ministers to consult those with an interest in local government. It does not set out how this should be done; but aims to open up the process to those with an interest in, or who are likely to be affected, by the actions of Scottish Ministers in relation to local government.

72. Finally, ministers are required, at least once every five years, to lay before the Scottish Parliament and publish a report detailing the steps they have taken to promote local self-government in Scotland, and their plans to do so in the period up until the next report is due. This will serve to ensure a regular review of, and opportunity to debate, how the provisions of the Charter are being interpreted, promoted and strengthened.

Statements about Charter-compatibility of Bills

73. On or before the introduction of a Public Bill, the Scottish Government Minister or other Member of the Scottish Parliament introducing a Bill would be required to make a statement on the extent to which in their view the Bill is compatible with the Charter articles (section 8). This is a mechanism to help ensure that due consideration has been given to the

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issue of compliance with the Charter Articles in the development of the policy and drafting of the Bill. The intention is that in making such a statement, the Member introducing the Bill will be required to address how consideration has been given to the Charter Articles. In the event that the person introducing the Bill does not consider it to be related to the Charter Articles in any way, this could be the substance of their statement.

Interpretative obligation

74. The Bill takes a similar approach to that taken by the Human Rights Act 1998 and the Scotland Act 1998, in that it introduces an interpretative obligation on the courts (section 4). This stipulates that the courts must, so far as is possible, read and give effect to legislation that is within the Parliament's legislative competence in a way that is compatible with the Charter Articles. In other words, simply establishing that a provision could be read and given effect to in a way that is incompatible with the Charter is not enough to allow the provision to be declared incompatible; the court must also be satisfied that the provision cannot also be read and given effect to in a way that is compatible with the Charter.

Remedies available to the courts

Primary legislation

75. Where the Court of Session hears an action for judicial review raised on the grounds that a provision of primary legislation, which is within the legislative competence of the Scottish Parliament, is incompatible with the Charter Articles, it can make a declaration of incompatibility if it decides that it is not possible to read and give effect to the provision in a way that is compatible with the Charter Articles (section 5).

76. The making of a declaration of incompatibility does not itself affect the validity, continuing operation and enforcement of the primary legislation.

77. This approach has been taken on the grounds that a Bill that conferred on the courts a strike-down power with regard to Charter-incompatible provisions of primary legislation would very likely be held to be outside the legislative competence of the Scottish Parliament. This would be due to it being seen as an attempt to impose a new legal constraint on the powers of the Parliament to make primary legislation. As a result of paragraph 4 of Schedule 4 to the Scotland Act 1998, it is not

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possible for the Scottish Parliament to legislate to modify sections 28 to 30A of the Scotland Act 1998 – including the section (section 29) that sets out the restrictions which, if breached, lead to an Act of the Scottish Parliament being outside legislative competence and therefore ‘not law’. Even if the Bill did not directly amend the Scotland Act, but instead made standalone provision that had an equivalent effect (i.e. imposing a new limit on the legislation that the Parliament can competently enact), this is likely to be viewed by the courts as an illicit modification of the Scotland Act in terms of Schedule 4, and so outside the Parliament’s legislative competence.

78. The Bill therefore uses the mechanism of a declaration of incompatibility. Although a declaration of incompatibility itself would have no direct legal effect, a court ruling that a provision in law is incompatible with an international treaty that has been ratified and incorporated into domestic law would nevertheless carry considerable symbolic weight and undoubtedly have political consequences.

79. In such cases it would be left to Scottish Ministers to determine how to address the incompatibility. The Bill seeks to facilitate this by including a provision (section 6) which gives Scottish Ministers the power to take remedial action, by regulations, to address anything they see as necessary as a consequence of such a declaration by the courts. Whilst broad enough to enable Scottish Ministers to respond effectively to the manner in which the courts may express the incompatibility, the provision nevertheless restricts the regulations that may be made to addressing the incompatibility. The regulations may modify any enactment (primary or secondary legislation, whether passed by the UK or Scottish Parliament or made by UK or Scottish Ministers) but may not modify the Act resulting from the Bill. This is to ensure that the incompatibility cannot be resolved, for example, by removing from the scope of the Act the Charter Article with which the legislation was found to be incompatible.

80. Any regulations made to take remedial action following a declaration of incompatibility would be subject to the affirmative procedure, and so would require formal endorsement by the Scottish Parliament.

Subordinate legislation

81. In the case of a judicial review challenge to subordinate legislation, the court must consider whether primary legislation prevents removal of

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any incompatibility. If it does, then the court can make a declaration of incompatibility either in respect of the subordinate legislation, the parent Act, or both.

82. In this case, too, a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the subordinate legislation. In such a case it would be left to Scottish Ministers to determine whether and how to address the incompatibility.

83. In cases where the courts find that subordinate legislation is incompatible with the Charter Articles, and primary legislation does not prevent removal of the incompatibility, it would be open to the court to make a declaration that Scottish Ministers had acted in breach of the section 2 duty (to act compatibly with the Charter Articles).⁵¹ Depending on the nature of the breach the court may be able to 'reduce', or quash, the subordinate legislation. In that event, Scottish Ministers would already have the power to make replacement subordinate legislation (drafted so as to avoid the incompatibility) under the existing provision in the parent Act.

Executive actions

84. In ruling on (non-legislative) executive actions by Scottish Ministers which are challenged under judicial review, the court would have discretion as to the legal remedy it could grant. Options include declarator (effectively ruling that there had been a breach of statutory duty under section 2 of the Bill, which places a duty on Scottish Ministers to act compatibly with the Charter Articles) and reduction (or quashing) of the executive action, the result of which would be as if it had never been done.⁵²

⁵¹ As noted in paragraph 69, the section 2 duty applies only to functions of the Scottish Ministers (including to make subordinate legislation) that are within devolved competence.

⁵² As noted in paragraph 69, these remedies would be available only if the action was taken in exercise of functions that are within devolved competence and did not relate to the preparation, introduction or promotion of primary legislation.

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Power to remove or limit retrospective effect of decisions etc.

85. If the courts find that the Scottish Ministers have breached a duty imposed on them by this Bill, they have the power, under this Bill (section 7), to limit or remove any retrospective effect that their decision may have. They can also suspend the effect of their decision to allow Scottish Ministers time to correct any defect. This is to allow, where appropriate, any adverse effects of their decision to be mitigated.

86. The same mechanism would be available to courts where they find that a provision of subordinate legislation is incompatible with the Charter Articles, and where primary legislation does not prevent removal of the incompatibility. In the event of a decision to quash the Charter-incompatible instrument, courts could limit or remove any retrospective effect that their decision may have and/or to suspend the effect of their decision to allow Scottish Ministers time to remedy the situation.

Legal proceedings

87. The Bill does not specify the legal means by which individuals and organisations could challenge legislation or executive acts on the grounds of incompatibility with the Charter Articles. However, it is envisaged that this would be done using the established process of judicial review. Given that challenges would, for example, be for breach of statutory duty, such cases would almost always be dealt with by judicial review.

88. In Scotland, judicial review involves an individual or body applying to a court, by means of a 'petition', seeking to challenge an action or decision made (normally) by a public body. To obtain permission to have the judicial review action heard, an applicant must be able to demonstrate "standing" (i.e. sufficient interest), and the application must have a real prospect of success. The court may grant permission only if it considers that both requirements are met.

89. Judicial review in Scotland can only be raised in the Outer House of the Court of Session in Edinburgh, from where it can be appealed to the Inner House of the Court of Session and thereafter to the UK Supreme Court.

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90. Section 27A of the Court of Session Act 1988⁵³ states that an application to the Court must be made before the end of the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or such longer period as the Court considers equitable, having regard to all the circumstances.

91. If someone sought to challenge the Charter-compatibility of existing legislation (for example subordinate legislation made years before the Bill came into force)⁵⁴, they could argue that the grounds on which a judicial review challenge could be brought did not exist prior to the date on which the Bill came into force, and hence that the 3-month period only began on that date.

92. Furthermore, section 27A provides for the Court to extend that 3-month period if it considers it equitable to do so in all the circumstances. In considering what is equitable, the Court would be likely to take into account that a challenge could not have been brought prior to the coming into force of the Bill.

93. The traditional grounds of judicial review are (in summary) that the action or decision was illegal; that an improper process was followed; or that the action or decision was so unreasonable as to be irrational. More recently, it has become possible to bring a judicial review action on the grounds of incompatibility with those parts of the European Convention on Human Rights given effect by the Human Rights Act 1998 and, in relation to the Scottish Parliament and Scottish Government, by the Scotland Act 1998.

94. Courts have a range of remedies available under judicial review. These include declarator (an authoritative statement that an individual or body has a specific right or duty and/or that there has been a failure to act according to the law) and reduction (which involves the court quashing the

⁵³ Court of Session Act 1988, section 27A
<https://www.legislation.gov.uk/ukpga/1988/36/section/27A>. Accessed on 27 February 2020.

⁵⁴ Such subordinate legislation would have been enacted before Ministers were under the s.2 duty to act compatibly with the Charter Articles.

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original decision and putting it back to the decision-maker to consider again).

95. As the member has chosen to make use of this existing court procedure – judicial review – as the mechanism by which a complaint can be brought, there is no need for the Bill to make specific provision for how allegedly Charter-incompatible actions or legislation can be challenged.

Alternative approaches

96. In considering how to incorporate the European Charter on Local Self-Government into Scots law, the member considered a number of questions and chose between alternative approaches to aspects of the Bill.

Direct incorporation or reworded Charter provisions?

97. The first question was whether to maintain the exact wording of the Charter Articles and incorporate them directly, or to legislate by means of new provisions drafted to reflect the aim and purpose of the Articles within a Scottish context. To consider each of the Charter Articles separately and determine what new provision would best reflect them in a Scottish context would have been a considerable undertaking without any guarantee of a different or better outcome. The Charter Articles are worded in a relatively general manner, as they were originally conceived as a set of principles that could fit across a number of different Council of Europe member states with different legal, constitutional and political traditions. For that reason, they will have general applicability in a Scottish context, without further ‘translation’. In the event that some of the Articles prove difficult to apply in some cases, the member is content to leave it to the court to consider and decide what options are available to it, based on the facts and circumstances of the judicial review in question.

Complaints to the Courts or a Commissioner?

98. The second question considered was whether complaints should be addressed through the courts or by means of a Commissioner. The option of an independent Commissioner did gain considerable support during the consultation, with 53% of those responding preferring complaints to a Commissioner with recourse, on appeal, to the courts, and 42% preferring a direct route through the courts. A number of those preferring the

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Commissioner route argued that it would make it more accessible to those for whom recourse through the courts may seem costly or intimidating.

99. Whilst an important and valid concern, the member has concluded that it is more likely that any challenges brought under this Bill will be raised by local authorities. The main focus of the Bill is the constitutional framework of the state and the fettering of the powers of the executive and the legislature when it comes to the powers and responsibilities of local government, as set out in the Charter.

100. In the event that an individual did have concerns, the member is of the view that in practice it is more likely that they would make representations to their local authority, and that it would then be for the local authority to pursue. Furthermore, there are certain tests to be met, for example any individual bringing an action for judicial review (known as “the petitioner”) must have a “sufficient interest”⁵⁵ in the outcome of the case and a real prospect of success.

101. For an individual who did nevertheless seek to bring a challenge through judicial review, there are some options available for them to apply for costs to be covered or limited. For example, legal aid may be available should the person applying meet eligibility criteria. The amount of legal aid given will be dependent on the amount and type of legal representation required, and on whether the individual can afford to contribute personally towards the cost. Furthermore, in some cases the individual may be exempted from court fees, for example when they are in receipt of civil legal aid.⁵⁶

102. Finally, protective expenses orders (PEOs) may also be available in some cases. A court may issue a PEO in cases where court proceedings

⁵⁵ Section 27B of the Court of Session Act 1988 as amended by the Courts Reform (Scotland) Act 2014. Available at: <http://www.legislation.gov.uk/ukpga/1988/36/section/27B>. Accessed on 10 February 2020.

⁵⁶ Scottish Courts and Tribunal Service court fees. Available at: <https://www.scotcourts.gov.uk/taking-action/court-fees>. Accessed on 10 February.

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are considered “prohibitively expensive” for the applicant.⁵⁷ A PEO can limit the applicant’s liability for the defender’s legal expenses. However, while it appears to be open to the courts to issue these orders in any relevant judicial review case, in practice they seem to have thus far been limited to cases which relate to environmental issues. It is therefore unclear whether a petitioner raising a court action under this Bill could expect a PEO to be made.

103. One of the main reasons for opting to proceed without the Commissioner option is that the broad policy objective is to ensure that the principles of the Charter are enshrined in policy making and thinking. The mechanisms of the Bill seek to ensure that this happens, and the member’s hope is that the complaints process should never (or rarely) be needed as a result. The risk inherent in creating the post of a new Commissioner to adjudicate on Charter-related matters is that it may create a culture of inviting challenge, the grounds for which may not always be justifiable, but which would require human and financial resource to address.

104. In this respect, the member agrees with the spirit of the views expressed by SOLAR in its contribution to the Scottish Government’s Local Governance Review, that—

“... a key success measure of incorporation would be that there is not routine recourse to the potential for legal challenge it would ultimately create; much like legislation on equalities, public smoking and seat belts, the law would provide a legal backstop, but in doing so deliver its most significant impact in creating and embedding a partnership approach to policy making, political culture and working practices.”⁵⁸

⁵⁷ Rules on Protective Expenses Order are set out in Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018. Available at: http://www.legislation.gov.uk/ssi/2018/348/pdfs/ssi_20180348_en.pdf. Accessed on 10 February 2020.

⁵⁸ Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) contribution to Local Governance Review, Appendix 1, December 2018. Available at <http://www.solarscotland.org.uk/publications/local-governance-review/>. Accessed on 1 November 2019.

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105. A further reason why the Commissioner option was rejected was the additional cost it would entail, and the added complications it would represent, to set up an entirely new body (a Commissioner, who would need an office and staff). Finally, for the sake of increased simplicity and clarity, the member decided that applying the well-known route of judicial review to challenges on the basis of compliance with the Charter Articles would be the most efficient approach to take.

Who should have standing?

106. The third question was who should be able to challenge a piece of legislation or executive action of Scottish Ministers for being incompatible with the Charter Articles – i.e. the question of who would have ‘standing’. Given that the Charter is focused on guaranteeing the political, administrative and financial independence of local authorities, it was felt that it would, in the main, be local authorities that would be most likely to raise a challenge. However, it is conceivable that an individual (or group of individuals) may raise a challenge, due to their perception of being directly affected by the alleged incompatibility with the Charter, in the general public interest. The member decided that it was important that this remain possible, even if it is less likely in practice.

107. Consideration was also given as to whether it would be necessary to guarantee the right of a local authority to raise a challenge in the courts. The member decided that the preference would be to remain silent on who should have recourse, based on the view that if a local authority had a reasonable claim, then it should be straightforward for it to demonstrate this in court. Providing local authorities with an automatic right to raise judicial review proceedings (without first having to establish “standing”) could lead to cases of misuse purely for political purposes, which would not be desirable.

108. Given the decision to use the process of judicial review to rule on compliance, the normal test in these cases of ‘sufficient interest’ will be applied.

Impact assessments

109. A fourth question was whether to include provision requiring the Scottish Ministers (and possibly other public bodies) to carry out a Charter-specific impact assessment when developing new policies.

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Impact assessments can be helpful tools in ensuring that certain parameters are considered and taken into account at an early stage of policy development. However, there is a risk that excessive use of such tools can render the process less effective and inefficient and can become more of a “tick-box exercise” than a meaningful check. The member’s view is that impact assessments can sometimes be used excessively.

110. The Bill provides other mechanisms, which the member believes should be sufficient to ensure that the Charter principles are embedded in policy-making. These include the duty on Scottish Ministers (under section 3) to promote local self-government in Scotland, with a report at least once every five years, and a requirement (under section 8) that the MSP introducing a Public Bill make a statement on the extent to which, in their view, the Bill is compatible with the Charter Articles.

Consultation

111. The member launched a consultation to accompany the lodging of the draft proposal for the Bill. The consultation⁵⁹ ran from 29 June 2018 to 21 September 2018 and 44 responses were received. A summary of consultation responses was published with the member’s final proposal.⁶⁰

112. A significant majority (39 respondents or 89%) were in support of the proposal that the Charter should be incorporated into Scots law. There was strong support for incorporation to take place in the manner set out in the consultation document, including 18 (42%) respondents supporting complaints being made through the courts and 23 (53%) supporting complaints to a Commissioner in the first instance with recourse to the courts on appeal.

113. One respondent disagreed with the proposal and three were neutral or unsure. Reasons given were that local authority decision-making would

⁵⁹ Consultation document available at: https://www.parliament.scot/S5MembersBills/20180628_AW_Final_Consultation.pdf. Accessed on 10 February 2020.

⁶⁰ Summary of consultation responses available at: https://www.parliament.scot/S5MembersBills/20181204_Andy_W_ConsultationSummaryFinal2.pdf. Accessed on 20 February 2020.

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not be improved by incorporation; or that incorporation might not make any practical difference.

114. Following the consultation, the member lodged a final proposal for a Member's Bill, together with the consultation summary, on 4 December 2018 and received support from 26 MSPs⁶¹ from four parties, thereby gaining the right to introduce a Bill.

115. The member also had regular liaison with COSLA, and met with Professor Chris Himsworth, author of 'The European Charter of Local Self-Government – a treaty for local democracy' (Edinburgh University Press: 2015).

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

116. An Equality Impact Assessment (EQIA) has been carried out and a summary of its findings is provided below.

117. The EQIA did not demonstrate any particular positive or negative impact with regards to any of the protected characteristics. The Bill is not expected to have a direct effect on protected characteristics, nor to affect the way in which public authorities should take relevant national and European legislation on equalities into account.

118. In the context of the public consultation on the Bill, the view was put forward that certain inequalities already exist in relation to the judicial system and accessing justice. For example, it was mentioned that there is a gender imbalance in the judicial system and that some people with learning difficulties may experience barriers in accessing the justice system. The member regards these as valid considerations. However,

⁶¹ MSPs who supported the Final Proposal: 11 Scottish Labour Party, 5 Conservative and Unionist Party, 5 Scottish Liberal Democrats, 5 Scottish Green Party.

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they will not be affected directly by this Bill. The Bill does not seek to remedy them but is not expected to worsen the situation.

119. It is also acknowledged that any existing challenges some groups may have in accessing justice, including those already affected by socio-economic disadvantage, would not be improved through this Bill. However, the main focus of the Bill being the status and standing of local government vis-à-vis government and the Scottish Parliament, it is not expected that individuals are likely to seek to raise a challenge directly for non-compliance of legislation or an executive action by Scottish Ministers with the Charter Articles.

Human rights

120. The Bill should have no adverse effect on human rights. It is creating a possibility that does not exist at the moment for those with a sufficient interest to raise a challenge in the courts against the alleged Charter-incompatibility of legislation or executive action by Scottish Ministers.

Island communities

121. Given the nature of the Bill, there is the potential for it to have a significant impact on local authorities, including those representing island communities. It is not expected that the impact on island communities in that respect will differ from the impact on other, mainland communities.

Local government

122. Given the nature of the Bill, there is the potential for it to have a significant impact on local authorities. The aim of the Bill is to strengthen the status and standing of local government by incorporating the European Charter of Local Self-Government ('the Charter') into Scots law to enable individuals and organisations to take action in Scottish courts to challenge an executive action by Scottish Ministers that is within devolved competence, or any legislation within the legislative competence of the Scottish Parliament, that they believe is incompatible with the Charter Articles; and by providing the courts with the means to address any such incompatibility.

123. The Bill seeks to encourage an approach that embeds consideration of the Charter into the policy-making process. The view of local government, as expressed in the COSLA response to the public

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consultation on the Bill, is not that the provisions of the Charter have been significantly contravened—

“Indeed, as rapporteur visits have confirmed, Scotland has been broadly compliant with most of its articles. Legal incorporation would not therefore entail significant change to the current landscape, but crucially would ensure that local democracy is fundamentally built into Scotland’s system of democratic governance in a way which is not possible at the moment. Indeed, one of the benefits of incorporation is not to create the conditions for conflict or judicial review, but rather to ease relationships between the different spheres through early stage joint working on areas of shared competencies.”⁶²

124. In terms of potential financial costs to local government, there are no direct financial costs imposed on local government as a result of the Bill. (For further analysis, see the Financial Memorandum.) In commenting on the method of incorporation outlined in the consultation document, COSLA also states—

“We accept that there may be some costs associated with introducing or testing the application of the Charter in the rare circumstances that a breach is felt to have occurred. However, these are trivial compared to the wider efficiencies that are achievable by improving outcomes in this way. We would also anticipate that any such costs are likely to be incurred during the early period following incorporation. Going forward, it is anticipated that once any historic elements are addressed then the policy making and scrutiny process would not require additional resourcing.”⁶³

125. By incorporating the Charter into domestic law, the Bill reinforces in many areas, and strengthens in other areas, the status, powers and competencies of local government. This is anticipated to be to the benefit not only of local government but to the relations between central and local

⁶² COSLA response to public consultation on the Bill. Available at <https://drive.google.com/file/d/15egW9UQd479mh81TTJG196PUCIhZ0JG/view>. Accessed on 9 October 2019.

⁶³ COSLA response to public consultation on the Bill. Available at <https://drive.google.com/file/d/15egW9UQd479mh81TTJG196PUCIhZ0JG/view>. Accessed on 9 October 2019

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government by making clear that the framework set out in the Charter is enforceable in law.

Sustainable development

126. A sustainable development impact assessment (SDIA) was carried out.

127. By seeking to promote local self-government in Scotland and improve the status and standing of local government, the Bill aims to rebalance the relationship between local and central government in Scotland, thereby improving partnership in policy-making and local autonomy in decision-making. For some this is closely linked to improving more tailored and locally-managed policies and services. Seen from this perspective, the Bill could be said to be making local authorities better equipped to improve the lives of those living in their areas, based on their specific needs. This may in turn lead to improvements in some of the areas considered as part of the framework for the sustainable development impact assessment, for example quality of the local environment, local climate adaptation and mitigation action, quality of amenities and the built environment, service provision, resilience of communities and individual well-being.

128. Some may perceive the Bill as an important tool for rebalancing power, and in some cases resources, away from the centre towards local authorities in Scotland. At the same time, some may interpret the same shift as a weakening of central government resources that could impact on its capacity to deliver services effectively and/or govern the economy. Similarly, some may take the view that enabling greater local autonomy in managing policies and services could lead to a differentiated picture across Scotland when it comes to the areas listed in paragraph 131, and a variation between local authorities, which could lead to inequalities.

129. The Bill is not expected to have a substantial impact on the levels of materials and energy used by people, or on the sustainability of the economy; it will not have a particular impact on the way in which the economy is governed or create any unsustainable economic activity. In safeguarding local government's powers relating to raising revenue it could lead to changes in local tax levels.

130. The main focus of the Bill is the constitutional framework of the state and the fettering of the powers of the executive and legislature when it

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comes to the powers and responsibilities of local government as set out in the Charter. Whilst the Bill remains silent on 'standing' and so effectively any individual (not only local government) could challenge legislation or executive actions in court, it is unlikely that this would be the case. Individuals are more likely to make representation to their local authorities.

131. However, it is acknowledged that the nature of the legal procedure for addressing such challenges, that of judicial review, is costly. It also carries with it the risk that, if a challenge fails, the losing party usually has to cover the legal costs of the winning party. Whilst some support is available, and courts may have the power to limit an individual's liability, it remains a costly procedure. The Bill itself will not improve the situation for those that currently face challenges in accessing justice.

132. A number of provisions in the Bill could contribute to good governance. By creating the possibility for challenges to be brought in court it will enable views to be heard in a way previously not available. Other provisions, for example the statement made, on or before introduction of the Bill, on the extent to which the Bill is considered to be compatible with the Charter Articles, and the requirement to report will provide visibility of the issues of local government status and standing and provide an opportunity for debate, providing greater transparency and accountability.

133. Whilst acknowledging that the UK as a whole is generally held to be broadly compatible with the Charter Articles, the requirements on Scottish Ministers to act compatibly with the Charter Articles and to promote local self-government in Scotland may have an impact on policy and decision making.

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