

EAST RENFREWSHIRE COUNCIL12 September 2018Report by Deputy Chief Executive and Chief Officer - Legal & ProcurementLEGAL STANDING OF LOCAL GOVERNMENT**PURPOSE OF REPORT**

1. To advise members of a draft proposal for a Members' Bill to be brought before Scottish Parliament seeking to put the European Charter of Local Self Government ("the Charter") into law in Scotland and to seek approval to submit a summary response which supports that principle.

RECOMMENDATION

2. The Cabinet is invited to support the submission of a response to the initial consultation on proposals for a Members' Bill seeking to legally incorporate the European Charter of Local Self Government into Scottish law which supports the principle of strengthening the legal status of Local Government in Scotland.

BACKGROUND

3. This report advises members on proposals for the development of a Members' Bill by Andy Wightman MSP which would have the effect of enshrining the terms of the Charter into law in Scotland thereby strengthening the status of Local Government.

4. At present Local Government in Scotland is wholly subject to the will of Parliament, which has the discretion to set its shape, size, powers and functions. The status and basic powers of Local Government in Scotland are not guaranteed in law. This is in contrast to common international practice where Local Government's basic rights are independently established, often reflected in a written constitution, and National and Local Government are required to work in partnership to exercise their respective roles effectively.

5. One of COSLA's longest held objectives has been to formalise and protect the role of Local Government in the governance of Scotland. COSLA has viewed the incorporation of the European Charter of Local Self Government into domestic law as a way of enabling progress to be made and have supported the development of a proposed Members' Bill by Andy Wightman MSP in this area which could potentially be introduced into Parliament later this year if sufficient support is secured.

THE CHARTER OF LOCAL SELF-GOVERNMENT

6. The Council of Europe is an international organisation that brings together 47 governments from across Europe whose aim is to uphold human rights, democracy and the rule of law in Europe. The organisation is distinct from the 28 nation European Union. The Charter of Local Self Government is part of the Council of Europe's treaty framework and guarantees the political, administrative and financial independence of local authorities to work in the interests of the local population, acting within the limits of the law. The Charter includes a number of provisions and a summary of these is provided at Annex 1.

7. The Charter was ratified by the UK in 1998 meaning that the government agreed to be bound by its terms in relation to the provision of local government within the UK. However, as an international treaty it has no direct effect in its own right in the UK and individuals who believe its terms have been breached have no legal recourse with which to enforce its provisions. In order to make it enforceable the Charter would require to be incorporated into domestic law and it is this process which is being consulted upon. Click [here](#) for link to full consultation document.

EAST RENFREWSHIRE'S RESPONSE TO CONSULTATION

8. COSLA has encouraged councils to support the prospect of a Members' Bill setting out local democratic rights in Scotland. It is proposed that the Council respond to this request by indicating its support for all efforts to enshrine Local Government's right to exist in law. Incorporation into domestic law would secure that right in a manner comparable to having it guaranteed in a written constitution and would build in protections that already exist for other tiers of government. The Charter includes provisions ensuring communities of the right to participate in decisions that affect them and this is very much aligned with the Council's partnership working and fairer East Ren plans. It is proposed that a summary response to this effect is submitted to the consultation process.

9. East Renfrewshire's response will be in line with COSLA's response to the consultation, attached as Annex 2. COSLA's response highlights that incorporating the European Charter of into Scottish Law is an opportunity to strengthen Scotland's overall system of democracy whilst improving outcomes, empowering citizens and reducing inequalities.

FINANCE AND EFFICIENCY

10. There are no financial or efficiency implications of the council lending support to the proposed Members' Bill.

CONCLUSION

11. The proposed Members' Bill provides an opportunity to formalise and protect the role of Local Government in the governance of Scotland. Participation in the current consultation will assist in influencing the terms of any bill going forward.

RECOMMENDATION

12. The Cabinet is invited to support the principle of strengthening the legal status of Local Government by supporting the initial consultation on proposals for a Members' Bill seeking to legally incorporate the European Charter of Local Self Government into Scottish law.

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Summary of the substantive articles contained within the Charter of Local Self-Government.

1. Recognise the principles of local self-government in domestic legislation and, where practicable, in the constitution;
2. Embed the rights and abilities of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population;
3. Prescribed the basic powers and responsibilities of local authorities in law;
4. Require prior consultation of local communities in relation to any changes in local authority boundaries;
5. Enable local authorities to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management;
6. Ensure that the conditions of office of local elected representatives provide for free exercise of their functions;
7. Ensure that any administrative provision of local authorities is only exercised according to procedures and in such cases as are provided for by the constitution or by statute;
8. Guarantee local authorities, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers, and ensure that local authorities' financial resources are commensurate with the responsibilities provided for by the constitution and the law; and
9. Entitle local authorities in exercising their powers, to cooperate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.

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DRAFT COSLA RESPONSE**Aim and approach****1. The Charter should be incorporated into Scots law. Do you agree with this statement?**

- X Fully agree
 Partially agree
 Neutral (neither agree nor disagree)
 Partially disagree
 Fully disagree
 Unsure

Please explain the reasons for your response.

COSLA believes that incorporating the Charter of Local Self Government into law in Scotland can fundamentally strengthen Scotland's overall system of democracy and create the foundations for an enduring and progressive partnership between national government, local government and communities.

Incorporating the Charter into Scots Law is not therefore a symbolic step or just a matter of democratic principle- we believe that it is key to building on local and national government's joint commitment to improve outcomes and renew democratic participation across Scotland.

Scotland has a long and proud history of local decision making. From the original court of Burghs in the 1200s, to the formal Convention of the Royal Burghs in 1405, and to the municipalities of the 1800s, local government has long been a key part of the relationship between the people and their state.

Many of these principles are firmly embedded in our history and culture, featuring as far back as the Declaration of Arbroath (1320) and the Claim or Right Act (1689). Over the last 150 years, municipal innovations around gas, electricity, water, telecoms and beyond also played an instrumental role in shaping modern Scotland, and today millions of people rely on the services that local government provides.

As a nation there is therefore a broad consensus around 'bottom up' governance, in which democratic power comes from citizens and should be exercised as close to them as practicable.

Yet despite this, local democracy in Scotland and the UK is also highly unusual because its basic powers and rights are not set out in law in the way that is commonplace internationally. Instead, it is the Scottish Parliament and Ministers that have sole power to set the shape, size, powers and functions of local decision making.

Throughout this response, we therefore highlight key reasons why COSLA believes that the European Charter of Local Self- Government should be incorporated into law in Scotland:

- Firstly, doing so would strengthen local and national government's ability to work jointly to improve outcomes in communities across Scotland.
- Secondly, it would strengthen Scotland's democracy by ensuring that communities enjoy the same local democratic rights that are already commonplace across Europe and beyond.
- Thirdly, it would deliver 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.
- Fourthly, it would ensure that Scotland fully complies with international treaty obligations, and addresses outstanding issues that have previously been identified in this regard.

These points are explored below and guide our response to the questions set out in the remainder of this consultation.

Improving Outcomes

COSLA is fundamentally committed to improving outcomes across Scotland, and was a cosignatory to the revised National Performance Framework in June 2018.

National elected government has a clear mandate to set outcomes for the nation and protect in law all of our rights as citizens. However, we believe that to successfully deliver these outcomes, local government and communities need to work in ways that suit local circumstances and priorities.

There is now a broad consensus that despite best intentions, the centralised approach which came to characterise the last half of the 20th century was not only unsuccessful at reducing the enduring inequalities facing many communities, but also contributed to a culture of disempowerment and alienation from decision making across government at all levels, and which on many measures made Scotland the most centralised country in Europe.

So too is there consensus that 'one size fits all' ways of doing things no longer fit Scotland today, and that working from the top down cannot deliver the outcomes our communities need. What works best in small rural communities does not always fit Scotland's cities, just as the challenges and opportunities in our towns are not the same as on our islands.

In other words, it is now accepted that the challenges and opportunities Scotland faces *require* a more local approach to decision making and public services. Change is already taking place, for example in relation to empowering communities to participate in decision making and budgeting. The Community Empowerment (Scotland) Act 2016, for example, gives life to an annex to the Council of Europe Charter on Local Self-Governance, requiring municipalities to make arrangements to engage with their local citizens. Legal rights to participate, the community right to buy, citizens panels and participatory budgeting all have their legal basis here.

With broad consensus now achieved, incorporation of the Charter into law is therefore the next step on Scotland's progressive democratic journey, and provides an ideal mechanism to create a new relationship between national and local government which recognises the diversity of our communities, and which galvanises and strengthens a more progressive, participative and effective approach to delivering outcomes.

Strengthening Communities' Democratic Rights

The Charter of Local Self Government is the benchmark international treaty which sets standards for protecting the rights of local authorities and the right of local people to participate in their decisions. Its purpose is therefore to bring power closer to local people and set out the basic local democratic powers and freedoms they should enjoy.

The principles laid down in the Charter have already been universally recognised in the domestic legal systems of each of the other 46 members of the Council of Europe. In many of these countries and beyond, the principle of local self-government is also written into national Constitutions. As the sole member yet to do so, we are therefore significantly out of step with most other European countries.

Similar principles are also common around the world; in 2005, for example, the "Aberdeen Agenda" established standards for local democracy and good governance which were formally incorporated into the new Commonwealth Charter by Heads of Government in 2013.

Incorporating the Charter into law would allow Scotland to join this international democratic family and for the first-time guarantee Scotland's local communities the kind of local choices and democratic controls that are already taken for granted elsewhere. In these countries, local democracy is not something to be debated; it is simply part of the governance of the country.

Deepening and Strengthening Partnership between Scotland's Spheres of Government

Despite the establishment of the Scottish Parliament 19 years ago, strengthening local democracy is widely acknowledged to be the unfinished business of devolution. There is currently no overall framework in Scotland or the UK setting out the standard 'rules' by which national and local government should work together to understand their shared responsibilities for improving outcomes across the country. Instead, the system in Scotland remains solely directed by, and dependent on the Scottish Parliament.

That is not to say that good partnerships do not exist at the moment, or that the Scottish Government does not often choose to empower local decision making. However, the key point is that this partnership does still depend on the goodwill and assent of the national government of the day, rather than being entrenched in how we 'do' democracy in Scotland. At the same time the role and functions of the Scottish Parliament and Scottish Government have developed significantly, and there is a strong and growing approach to local engagement and community decision making. The role of local government in this democratic evolution now needs to be similarly strengthened.

The effect of incorporation of the Charter would be to rebalance the relationship and pave the way for a stronger, more long term, and more equal partnership between local and national government, with all of the benefits associated with this for outcomes and democratic vibrancy. It would also clarify and strengthen the relationship between community empowerment and participation, democratic local government decision making, and the roles of the Scottish Parliament and Scottish Government; something that is not always readily understood at the moment.

With the publication of Scotland's revised National Performance Framework, there has never been a better time to make this change. Both national and local government have committed to build momentum and strengthen partnership working between national and local government; the Charter offers a ready-made, internationally recognised vehicle for doing so.

International Treaty Obligations

Finally, incorporation would of course also enable Scotland to fulfil outstanding international treaty obligations in relation to the Charter. In this regard it is important to bear in mind that the UK Government signed the Charter in June 1997, and ratified it in 1998. Whilst the Scotland Act 1998 provides that international relations are reserved matters, it does not reserve observing and implementing these international obligations. For 20 years, therefore, governments in Scotland have technically been subject to its requirements and able to legislate in pursuit of these.

However, despite this the Charter has remained something of a dead letter because it has never been enacted in domestic law, with the consequence that anyone who believes that its provisions are being violated does not have a route through they can challenge this. Over that time, the UK and Scottish Governments have been willing to translate other treaty obligations to protect the environment, promote consumer safety and give people 'data rights'; the precedent has been established, and we see no reason why rights to local self-governance should be treated any differently.

This does not suggest that the provisions of the Charter have been significantly contravened in that time. 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.

It is for this reason that we believe that the Scottish Parliament should now take steps to address this gap by legislating in pursuit of the rights set out in the Charter.

In summary, we consider incorporation of the Charter not to be an end in itself, but a huge opportunity to improve outcomes, empower citizens, and reduce inequalities for the whole of Scotland.

Doing so would not alter the structures of local government in Scotland, unilaterally change specific policies or laws, or make any other changes that are rightly a matter for democratic debate and discussion. Nor would it undermine the clear democratic mandate of national politicians to set outcomes and rights for the whole of Scotland.

However, it would ensure that all spheres of government work together with the communities they serve to deliver outcomes and improve lives in ways that work best for those communities, deliver the kind of democracy first envisaged in the founding days of the Parliament, and introduce rights which are already commonplace across Europe and beyond.

2. Which of the following best expresses your view on how the Charter should be incorporated into Scots law?

The Charter should be incorporated into Scots law in the manner outlined in the consultation document

The Charter should be incorporated into Scots law, but not in the manner outlined in the consultation document

The Charter should not be incorporated into Scots law

Please explain the reason for your response (including, if you have chosen the second option, how you think the Charter should be incorporated into Scots law).

We recognise that there are a range of legal options associated with the precise manner by which incorporation can best be achieved, and which can be developed further as the prospect of a Members' Bill takes further shape. We look forward to supporting these further, and in the first instance, offer the following points for consideration, which cover both the scope to incorporate the Charter in the manner outlined in the consultation, as well as other potential options.

Firstly, for the avoidance of doubt, it was the UK's membership of the European Union, not the Council of Europe, which was subject to the referendum in June 2016. Formally, by leaving the EU, the UK will join the existing 19 non-EU states which belong to the 47-member Council of Europe. Any action or legislation in relation to the Charter is therefore not affected by the Brexit process.

Secondly, the United Kingdom ratified the Charter on 24 April 1998 and it came into force on 1 August 1998. It is important to note that in drafting and bringing forward the Charter, the Council of Europe intended to impose enforceable obligations on ratifying states, not simply a general aspiration or source of guidance. Indeed, several articles reference this objective explicitly. In particular, Article 2 sets out that "the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution."

However it did not establish a mechanism for such enforcement (such as the European Court of Human Rights which was set up to rule on applications alleging violations of the European Convention on Human Rights). Therefore, under the present structure Local Authorities and citizens are unable to seek enforcement of the provisions of the Charter through the legal system.

In federal systems or states with written constitutions, the basic roles and responsibilities of democratically elected local governments are codified in law and the relationships between

different spheres of governance are set out. In Germany, for example Article 28(1) and 28(2) of the Basic Law guarantees the existence of elected councils for counties and municipalities and, “*the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws.*” There are similar constitutional guarantees in Spain, where the constitution states in Article 137 that, “*The State is organised territorially into municipalities, provinces and the Self-governing Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests*” and in France, where the principle has been reinforced under 2003 constitutional reforms.

Scotland and the UK has no written Constitution, and analysis has demonstrated that while there is plenty of legislation governing specific local government services and systems (often in prescriptive terms), the overall *principle* of local self-government is not currently recognised anywhere in legislation. It is for this reason that Council of Europe rapporteurs in 1998 and 2014 (and other commentators) have reported that the UK is in breach of this Article. The 2014 report, for example, found that:

“the Constitutional or legislative recognition and entrenchment of (the right to) local self-government does not exist in the United Kingdom (including in Scotland), and that the introduction of a general power for local authorities does not go far enough in satisfying the spirit of the Charter”.

Given the absence of a written constitution, we consider that incorporation provides a practical and workable alternative. While legislation can of course always be overturned, incorporating the Charter would undoubtedly be a very powerful step, and one which any government would not seek to amend without careful consideration and consultation. Indeed, there is already a tradition of legislation with a ‘quasi constitutional’ status in Scotland and the UK. Doing so for the Charter would, for example, help echo for Scotland’s local sphere of government the constitutional protections provided for the permanence of the Scottish Parliament and Scottish Government created under Section 1 part 2A of the Scotland Act 2016.

Finally, and most importantly, we would argue that regardless of any international obligations or other legal or technical debates, incorporation of the Charter is the right thing to do for Scottish democracy. The fact remains that the Charter is the international standard for democracy, and that if we are serious as a country about partnership across our spheres of government, about improving outcomes, and about renewing and invigorating citizen participation and engagement, then it provides the standard by which this can be achieved. To that extent, while international treaties and other imperatives contribute to the overall sense of ‘unfinished business’ surrounding the Charter in Scotland, it is the positive outcomes that it can deliver for people across Scotland that remain the over-riding priority for us, and the motivating force behind COSLA’s consistent cross-party support for it over many years.

In this respect, while we agree in broad terms that the Charter could be incorporated into Scots Law in the manner outlined in the consultation document through a Schedule to the proposed Act, we are also amenable to a degree of flexibility in how it is delivered or translated into legislation, particularly where this might improve precision and fit with the Scottish system, and offer the following points.

Firstly, there is a question as to whether the margin of appreciation in the provisions as currently drafted would provide the necessary protection to councils and citizens. Some provisions of the Charter are heavily qualified, meaning that these may need to be made more prescriptive to give them greater effect.

We also recognise that the Charter is deliberately drafted to suit a variety of international contexts and systems, with the consequence that aspects of its language are necessarily imprecise. Where appropriate, we envisage that some redrafting of its articles may therefore be practical for these to be as straightforward as possible to interpret in law in Scotland. Indeed, other than in Poland, we are aware that the Charter provisions have generally been subject to a similar process of translation elsewhere. In this regard, we would expect that national and local government would work together to support initial interpretation, including, for example, in relation to the local

public service landscape including relevant Non Departmental Public Bodies. The requirement for this shared and consensual approach is, of course, very much in keeping with the objectives of the Charter.

We are also very open to exploring other potential options too. National and local government could use the Charter as the basis for an enforceable statutory 'code' on local governance, backed by appropriate legislation, setting out in clear terms a distinctly Scottish agreement to deliver local self government, but rooted in the provisions of the Charter.

Alternatively, a duty could be placed on Scottish Ministers "to comply with and promote the provisions of the Charter in the exercise of their powers and functions". In practice, this could ensure that where policy or expenditure proposals address areas of joint competency, Ministers would state the impact on these, the actions taken to consult with Local Government, and any resulting actions to maximise local benefit and local service integration, or minimise any potential negative impacts etc.

Furthermore, we are aware that while the UK ratified the Charter in 1998, this does not extend to the additional protocol on participation that was subsequently added in 2009. We consider this to be an important addition that should be incorporated the arrangements that are made, whether through a schedule or otherwise.

3. What do you think would be the advantages and disadvantages of incorporating the Charter into Scots law?

COSLA believes that incorporation of the Charter would deliver a number of benefits. In particular, while it would introduce for the first time the possibility of legal checks and balances in support of local democratic choices and control, we are clear that the significant practical advantages of incorporation lies in the positive impact that doing so would have on everyday culture and practice. This is because by clarifying the competencies of national and local government in the ways set out in the Charter, both spheres would need to commit to a new level of consensus and partnership working on shared issues, with an associated impact on the outcomes that national and local government can deliver together.

In other words, we consider it very important to stress our expectation 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 back stop, but in doing so deliver its most significant impact in creating and embedding a partnership approach to policy making, political culture and working practices. Indeed, international experience suggests where these rights are set out then many of the debates that have taken place in Scotland about how power is used do not take place; national and local government simply get on with the job of using good democratic governance to focus on improving outcomes across the country together.

We believe that these positive impacts of incorporation would therefore include:

- **More effective and efficient focus on local priorities:** Improving the potential to design and deliver locally flexible services that are more sensitive to the circumstances and needs of different communities locally, with associated benefits for improving their impact, efficiency, and effectiveness, and reducing the levels of public resources devoted to tackling 'failure demand' identified by the Christie Commission.
- **Embedding a long-term partnership between spheres of government:** Deepening, entrenching and making permanent the partnership between national government, local government and communities.
- **Enhancing the relationship between national and local government:** Underpinning the consensual style of politics envisaged in the founding days of the Parliament by requiring stronger arrangements to manage joint competencies between national and local government, and reducing the ability for key changes to be made without

appropriate consultation.

- **Enabling Participation and Engagement:** Ensuring that subsidiarity is as deep as possible by introducing a formal right for people to participate in decisions, and with it further strengthening work on participatory budgeting and engagement.
- **Improving culture and practice:** flowing from this relationship, setting a clear standard and ethos to pursue in relation to policy and practice that over time should permeate culture, guidance and practice across all parts of government and public services, and create a more empowering, inclusive relationship with communities.
- **International Compliance:** Supporting the Scottish Government and the Scottish Parliament to exercise executive and legislative powers in ways that meet international democratic norms and practices, and introducing democratic rights that are common in other countries.
- **Introducing Legal Checks and Balances:** Providing local government and citizens with a means to uphold the obligations of the Charter by creating the possibility of seeking judicial review should the Charter provisions be breached. While unlikely to be heavily used, this potential legal fallback would underpin political and professional pressures for national and local government to work cooperatively.
- **Strengthening democracy and recognising the status and powers of local democratic governance:** Clarifying and confirming in law that democratic power resides with citizens and is shared 'upwards' by communities, rather than exercised from the top down. As we have highlighted in question 2, while there is no written constitution in which to reflect the Right to Local Self Government, incorporation into law would also secure the closest possible equivalent.

We do not anticipate there to be a significant disadvantage to incorporation. In this regard we are equally clear that no part of the Charter would provide a way of undermining legitimate decision-making by the Scottish Government or Parliament, or diluting the outcomes, priorities, and citizen rights that it sets for the whole of Scotland. Instead, it would open the way for local choice and control about how to deliver these in ways that reflect the diversity of local areas and the people that live there. Indeed, as we highlight above, given the recent launch of the revised National Performance Framework, incorporation of the Charter is an opportunity to fully embed the commitment that both national and local spheres of government have made to work in partnership on its delivery.

We are also aware that there may be a concern that incorporation of the Charter could result in potentially frivolous challenges through the courts. While it will be important to uphold rights under the Charter, we are keen to work as partners in a process of incorporation that sets sensible and pragmatic parameters to enforceability.

While a separate matter from the Charter, we believe there is also an opportunity to explore incorporation of the Charter as a way of delivering the principles of subsidiarity and proportionality which the UK Government is seeking to adopt in the context of the UK's exit from the European Union. It would be interesting for parliamentarians and locally elected members to give some consideration as to how this could be brought into the Scottish approach; the simplest way to do so may simply be to embed the European Charter in law.

4. Which of the following best expresses your view about where complaints about a breach of the Charter should be made?

- Complaints about a breach of the Charter should be made through the courts
- Complaints about a breach of the Charter should be made through a commissioner created for the purpose
- Complaints about a breach of the Charter should be made through a commissioner in the first instance, with a right of appeal to the courts

- Complaints about a breach of the Charter should be made through a different mechanism, not the courts or a commissioner
- The Bill should not provide for any complaints mechanism 23

Please explain the reason for your response (including, if you have chosen the fourth option, how you think complaints about a breach of the Charter should be made).

We consider it very unlikely that there would be regular legal challenge regarding a potential breach of the Charter. The very act of creating this possibility is instead a powerful imperative for all concerned to work productively together.

As we have also highlighted, however, the Charter has never been intended simply be a statement of intent, and so it is important to consider how best it can be upheld.

Clearly, unlike the European Court of Human Rights, the Charter does not have its own 'enforcement' mechanism. But just as the ECHR has created rights and obligations for human rights that are now regarded as domestically enforceable, so too do we consider that incorporation of the Charter can be used to set out universal components of local democracy which are capable of being meaningfully and fairly tested.

In the absence of a written constitution or other established methodology for establishing and protecting the right to local self government, we therefore consider it appropriate that the courts should play a role in determining any complaints regarding potential breaches of the Charter. Indeed, Article 11 makes reference to:

'legal protection of local self-government' and a 'judicial remedy in order to secure a free exercise of their [local authority] powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation'.

At the moment, of course, the fact that no constitutional or legislative 'right to local self government' exists mean that this is not possible, and it is this that the prospect of incorporation would address.

Given that we do not anticipate incorporation of the Charter to open up widespread legal challenge, we consider that it may be sufficient for any such disputes to be dealt with through the courts rather than through a dedicated commissioner. The creation of an office of Commissioner could be a positive step but it would not provide the same level of protection as a mechanism to enforce the Charter through the courts.

Just as with other rights, though, it is likely that there would need to be active support for this new way of working and to ensure, particularly initially, that the policy and legislative landscape upholds it. In this regard national and local government should work together to scrutinise the compatibility of policy and practice with the law. This would fit with the concept of 'local proofing' impact assessments that have been highlighted in relation to the Islands Bill and other contexts. Such an approach should help ensure that power is always designed to rest at the lowest possible level, and in cultural terms, that local democracy is high on everyone's agenda across local and national government and its agencies. It may also prove particularly useful should there be a need to translate broad language used in the Charter into the specific Scottish context in the ways that we highlight in question 2 above.

While the precise nature of this would be for debate, we consider it possible that a joint committee or similar could be established in Scotland to oversee this process. Some precedent for this already exists; such an arrangement was part of the initial vision of the Scottish Parliament, and exists in a similar form in the Welsh Assembly already. In the context of Brexit too, COSLA has been working with local authority associations from across the UK and with the UK Government to explore future options regarding Bills and significant

policy proposals that impact on Local Government powers and functions. This could potentially include the establishment of an intergovernmental forum through which formal opinion can be understood and progressed, or through which statements of compliance by Ministers can be developed.

5. What judicial remedies do you think should be available where an executive action (or proposed action) was found to be incompatible with the Charter?

- The court should be able to overturn the action and punish the public authority
 X The court should be able to overturn the action (but not punish the authority)
 The court should be able to declare the action unlawful (but not overturn it or punish the authority)
 The court should have no power to declare the action unlawful (or to overturn it or punish the authority)

Please explain the reasons for your response.

Our support for incorporation of the Charter derives from the opportunity that it provides to strengthen and deepen partnership working in pursuit of outcomes, energise participation, and maximise all of the benefits for efficiency, effectiveness and impact associated with designing and delivering services in ways that fit local communities and circumstances.

Our motivation is not to create the circumstances for legal challenge, although we recognise the possibility for this is an important component of giving the Charter 'bite' in ways that have not previously been possible.

It follows, therefore, that should action be found to be incompatible with the Charter then this should be capable of being overturned. Simply declaring the action unlawful would not, in our view, have the effect of upholding the Charter's principles in practice.

However, we see no reasons for such an action to be accompanied with punishment; rather, we would prefer to that the emphasis is on all partners working together to determine suitable improvements or alternatives.

6. What judicial remedies do you think should be available where legislation was found to be incompatible with the Charter?

- X The court should be able to strike down the legislation
 The court should be able to declare the legislation incompatible with the Charter (but not strike it down)
 The court should have no power to declare the legislation incompatible with the Charter (or strike it down)

Please explain the reasons for your response.

Incorporation of the Charter would help ensure that any new legislation upholds the principles of self-government. In practice this would suggest that new laws would not set unnecessary prescription or conditions in relation to matters that are rightly for local democratic decision making. The process of law making would itself benefit from the strong partnership between national and local government that incorporation would create. Provided that this process operates effectively, there would likely to be little or no role for the courts.

Given that no parliament can bind a future parliament, it is unclear how the courts could be given power to strike down a provision in a statute passed by the Scottish Parliament after incorporation of the Charter that was incompatible with the Charter. However if that were put

in place it would clearly provide a high level of protection for the objectives of the Charter. It is notable that where similar power currently exists (for instance, in respect of the European Convention on Human rights pursuant to s29 the Scotland Act 1998) it has been rarely used. Again, we believe, this points to the fact that the incorporation of the Charter would make a significant positive impact on the culture and practice of partnership between national and local government, rather than create the conditions for frequent legal challenges.

Power to declare statutory provisions incompatible with the Charter would provide less protection, however that is not to say that it would be ineffectual. Although such a declaration would not affect the validity, continuing operation, or enforcement of the provision in question, it would almost certainly prompt a subsequent change in the law.

We also note that incorporation could possibly also impact upon the existing body of law applying to Local Government where this is necessary for compliance with the Charter.

General

7. Do you have any other comments or suggestions on the proposal?

Financial implications

8. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

(a) Government and the public sector

- Significant increase in cost
 Some increase in cost
 Broadly cost-neutral
 Some reduction in cost
 Significant reduction in cost
 Unsure

(b) Businesses

- Significant increase in cost
 Some increase in cost
 Broadly cost-neutral
 Some reduction in cost
 Significant reduction in cost
 Unsure

(c) Individuals

- Significant increase in cost
 Some increase in cost
 Broadly cost-neutral
 Some reduction in cost
 Significant reduction in cost
 Unsure

Please explain the reasons for your response.

As we highlight throughout this response, incorporating the Charter into Scots Law is not a symbolic step or just a matter of democratic principle- we believe that it is an important key to unlocking better outcomes across Scotland.

If we are serious about delivering the outcomes set out in the National Performance Framework then COSLA believes that we should therefore be equally serious about modernising and improving the ways in which national and local government can work together to achieve this.

There is now a broad consensus that public service reform should focus on improving how local services can respond positively to local differences and circumstances rather than in traditional 'one size fits all' ways. As a country we already know that centralising services and exercising powers from the top down has not addressed persistent inequalities in Scotland. As the Christie Commission and others have highlighted, these inequalities carry significant social and financial costs that affect everyone in Scotland. We believe that incorporating the Charter can therefore help tackle the 'failure demand' that Christie highlighted, and in doing so improve the efficiency and effectiveness of local public services.

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.

9. Are there ways in which the Bill could achieve its aim more cost-effectively (e.g. by reducing costs or increasing savings)?

Equalities

10. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, race, religion and belief, sex, sexual orientation?

- Positive
 Slightly positive
 Neutral (neither positive nor negative)
 Slightly negative
 Negative
 Unsure

11. In what ways could any negative impact of the Bill on equality be minimised or avoided?

We agree with the consultation that the proposed Bill would not be anticipated to have a negative impact on any groups with protected characteristics under the Equality Act 2010.

We also consider that it may also be helpful to highlight the relationship between the right to local self government, social justice and citizen rights.

Traditionally, there has perhaps often been a cautious approach to empowering local democracy because it has been perceived that variation in local service delivery or approaches can lead to unequal provision. However, this traditional view does not reflect international experience.

In many countries, more localised systems of democracy are also often associated with greater social and economic equality because in those systems there is a strong emphasis on the value of local choice and difference within an over-riding framework of legally specified duties and rights which are mandated by national government. National governments are also capable of taking

steps to address any shortfalls that are identified.

However, local public services are highly empowered to deliver services that meet these rights in ways that meet local circumstances. For example, in Germany each Land works within the standards set out in the Basic Law. In the Swedish model, central legislation establishes minimum standards for a range of social services, and Swedish citizens can challenge local authorities in court if they feel these legal standards have not been achieved. There are many such examples across Europe and beyond.

The central point is that fairness and local differences should not be seen as opposing values, and that it is possible to empower localised and democratically accountable decision making within a framework of fundamental rights that all citizens are entitled to in law. There is local variation in public services around the world, but the difference is that in many other countries this is already seen as a positive consequence of a vibrant democracy. We believe that in Scotland this should also be central to effective public service reform, with national and local government joined in partnership to ensure that the system works together to fulfil its potential.

Sustainability

12. Do you consider that the proposed bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

Yes

No

Unsure

Please explain the reasons for your response.

Please see question 8.