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Local Government and Communities Committee Comataidh Riaghaltas Ionadail is Coimhearsnachdan

Stage 1 Report on the European Charter of Local Self-Government (Scotland) Bill



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Local Government and Communities Committee

To consider and report on communities, housing, local government, measures against poverty, planning and regeneration matters falling within the responsibility of the Cabinet Secretary for Communities and Local Government.



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Introduction

1. The [European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill](#) was introduced in the Scottish Parliament on 5 May 2020. It is a Member's Bill introduced by Andy Wightman MSP. The Local Government and Communities Committee was appointed lead committee to report to Parliament on the general principles of the Bill at Stage 1.
2. The Committee launched a [call for views](#) on the Bill over the summer, posing five questions about the Bill. We received [22 responses](#):
 - Eight were from local government: six were from councils; one was from COSLA, the umbrella body for councils; and one was from SOLAR, which represents local government-employed lawyers and administrators;
 - Two were from bodies representing the legal profession: the Law Society of Scotland and the Faculty of Advocates. Both bodies had been expressly invited by the Committee to comment on legal and drafting aspects of the Bill;
 - Two were from charities or community bodies;
 - One was from a think-tank;
 - eight were from individuals, three of whom provided evidence in their capacity as academic specialists in areas relevant to the Bill;
 - One was from the Scottish Government.
3. We held [four separate oral evidence sessions](#) over three meetings: two with stakeholders, one with the Scottish Government, and a closing session with Mr Wightman. We are, as ever, grateful to all to those who assisted in our scrutiny. Mr Wightman also [consulted](#) on his proposal before the Bill was introduced, and was assisted in policy development, consultation and drafting by the Parliament's Non-Government Bills Unit.
4. Andy Wightman is a Member of the Local Government and Communities Committee. In line with Rule 9.13A of Standing Orders, Mr Wightman took no part in the consideration of any draft of this report or its final agreement.

The European Charter of Local Self-Government

5. The aim of the Bill is to strengthen local government by incorporating the [European Charter of Local Self-Government](#) into Scots law. The Charter was created in 1985 by the [Council of Europe](#), an international organisation formed in the aftermath of World War II to promote democracy and protect human rights and the rule of law across the European continent. As a Member State of the Council, the UK in 1997 ratified the Charter. (The Council is a separate body from the European Union and Brexit has had no direct impact on UK membership of the Council.) The Council saw the Charter as necessary in order to establish common minimum standards in measuring and safeguarding the rights of local authorities.
6. The Charter sets out a number of key principles to protect the basic powers of local

authorities. These seek to demarcate fundamental areas in relation to which local government should have substantial autonomy, or a distinct purpose, or be entitled to support or resources. The Charter has 11 Articles, further subdivided into 31 paragraphs. Amongst key principles enunciated are (paraphrasing in some cases):

- that council members should be directly elected by universal suffrage;
- that councils have a right to be consulted, insofar as this is possible, in relation to matters which concern them directly;
- that council boundaries shall not be changed without local consultation;
- that any administrative supervision by a higher authority (such as a national government) shall normally aim only at ensuring compliance with the law or constitutional principles;
- that councils are entitled to derive part of their income from local taxes and (within the limits of statute) to determine the rate;
- that councils should have access to "sufficiently diversified and buoyant" sources of finance, so as to be able to afford the services they provide and to keep pace with increased demand;
- that they may dispose freely of the financial resources to which they are entitled within the framework of their existing powers;
- that, as far as possible, grants to local authorities should not be earmarked for the financing of specific projects, and that grant money should not remove the basic freedom of local authorities to exercise policy discretion;
- that local authorities may, within the framework of the law, access the national capital market in order to borrow for capital investment;
- that they should have access to judicial remedies to secure their legal or constitutional rights.

7. Member states were not required to formally adopt all 31 paragraphs of the Charter, but the UK chose to do so when it ratified the Charter.

Outline of the Bill

8. The Policy Memorandum accompanying the Bill states that, while the Charter forms part of the UK's international legal commitments, it cannot be directly relied upon as an authority to settle cases in the Scottish courts. This interpretation was not substantially challenged during Stage 1 and the Committee takes this to mean it is accepted. The main aim of the Bill is to change this, so that people or organisations may challenge the Scottish Government in court if its laws or decisions are not compatible with the Charter.
9. In summary:
 - Section 1 introduces the "Charter Articles": 10 of the 11 Articles of the Charter,

as set out in the schedule to the Bill, in the official English version of the Charter. (The missing Article - Article 1 - is purely declaratory). Section 1 also gives the Scottish Ministers the power to amend the Bill should the UK sign up to changes to the Charter;

- Section 2 places a general duty on the Scottish Ministers to exercise their functions compatibly with the Charter articles;
 - Section 4 requires any legislation concerning a matter within the competency of the Scottish Parliament to be read and given effect to, so far as possible, in a way compatible with the Charter articles;
 - Section 5 entitles a court to make a "declaration of incompatibility" in any proceedings in which it is determining whether a provision in an Act or a statutory instrument is compatible with the Charter articles. Only the Court of Session or the UK Supreme Court (i.e. a higher civil court) may make such a declaration. When Mr Wightman gave evidence, he clarified that it was his view that a declaration of incompatibility would not be the only sanction available in any action brought under the Bill. Other remedies ordinarily available under a judicial review would also be available. But this was a new remedy specific to the Bill;ⁱ
 - Section 6 empowers the Scottish Ministers to make such provision as they consider necessary or expedient in consequence of a declaration of incompatibility, by way of regulations. This includes provision to modify an Act (provided it is within the competence of the Scottish Parliament);
 - Section 7 allows the court to limit the consequences of a ruling that the Scottish Government has not complied with any of the duties set out elsewhere in the Bill (for instance, the duty to exercise functions compatibly with the Charter articles). It may do so by providing that the effects of the ruling are not retrospective. Or it may give the Scottish Government some time to take corrective action to address the ruling;
 - Section 8 requires any MSP introducing a public Bill to make a statement about the extent to which, in the Member's view, the Bill is compatible with the Charter Articles;
 - Sections 9, 10 and 11 are standard provisions concerning regulation-making powers, commencement, and the short title of the Bill should it become an Act. Under section 10, the substantive provisions of the Bill would come into effect six months from the date of the Bill's enactment.
10. There is also section 3, which creates what the section title describes as "duty to promote local self-government". This is more precisely defined in the body of the provision as a duty on the Scottish Ministers "to keep under consideration whether there are any steps which they could take which would or might safeguard and reinforce local self-government and increase the autonomy of local authorities and if they consider it appropriate to do so, take any of the steps identified by that consideration". In addition, the Scottish Ministers must publish a report every five

ⁱ Official Report, 9 December col. 33

years on the steps they have taken to promote local self-government and increase the sector's autonomy.

11. Section 3 differs from other sections in not being part of any enforcement mechanism in relation to the Charter Articles (which it does not mention). On the other hand, and as some evidence noted, the duty in section 3 could be said to be within the spirit of the Charter and an overall aim of building a culture supportive of a confident and independent local government sector.ⁱⁱ The Committee notes that the power given to the courts under section 7 would apply to a breach of the duty in section 3 as it would to a breach of the duty to uphold the Charter Articles.

ii COSLA, written evidence.

General principles of the Bill

12. The Committee's primary duty at Stage 1 is to report on the general principles of the Bill. We understand the Bill to have one main purpose: to strengthen and secure the legal and constitutional status of local government by incorporating the European Charter of Local Self-Government into Scots law.

Meaning of "incorporation"

13. "Incorporate" or cognates is not a term used anywhere in the Bill other than in the short title. However, the Policy Memorandumⁱⁱⁱ states that the Bill amounts to the "direct incorporation" of the Charter into Scots law on the ground that the actual wording of the Charter Articles appears in the schedule. No evidence was presented at Stage 1 directly addressing the questions of whether "incorporation", in relation to international charters or treaties is a term of art in a Scottish or UK legal context or instead does not have a settled and precise legal meaning.
14. One way to incorporate the Charter Articles in Scots law might have been to make general provision to the effect that the Charter Articles "have effect" in Scots law. Another would be to seek to "translate" the Charter Articles in full into statutory language with which Scots law is perhaps more familiar, as a series of legally enforceable propositions, as in a Bill of Rights. As set out in the summary above, this is not the approach taken in the Bill. Instead, a broad and general duty of compliance, in relation to the Charter Articles, is imposed on the Scottish Ministers, the judicial consequences of this not being met are set out, and there is further provision intended to create a framework for the development of Charter-compliant laws and policies.
15. For their part, stakeholders providing evidence at Stage 1, including those with legal expertise, appeared content to agree that the Bill, in effect, incorporates the Charter, or at least did not object to this framing.^{iv} The Committee notes views^v that much of the general architecture of the Bill -for instance the creation of a "declaration of incompatibility" power- is not dissimilar to that of the Human Rights Act 1998, which is sometimes described as having "incorporated" into UK law the rights ("Convention rights") set out in the European Convention on Human Rights.
16. The Policy Memorandum discusses the option of "translating" the articles into Scots law. This is in the context more of reflecting on whether this approach would have delivered a more legally watertight outcome than simply reproducing the Charter Articles verbatim, rather than discussing what is meant by "incorporation". It concludes that this approach:

ⁱⁱⁱ At paragraph 61

^{iv} Professor Himsworth, written evidence; Law Society of Scotland, written evidence

^v Faculty of Advocates, written evidence; Law Society of Scotland, written evidence. Both also noted that some aspects of the Bill were significantly different to the 1998 Act

” ... 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.

The extent to which the Bill provides legal certainty, or might become a vehicle for speculative legal action, is returned to later.

17. Many stakeholders thought the Bill was important because it would fundamentally change the constitutional relationship between local and central government. In language of this sort, there is an implication, if not quite of permanency, then at least of rootedness: as one witness put it "the Bill is about enshrining something in law so it is always there".^{vi} However, the Faculty of Advocates noted that whereas the Scottish Parliament is forbidden by its own parent Act (the Scotland Act 1998) to legislate in a way inconsistent with Convention rights:

” It is rather more difficult for the Parliament to legislate to restrict its own powers by preventing it from legislating in future in a manner that would be incompatible with the Charter. The current Parliament cannot restrict its successors so, once the Charter is incorporated in an Act of the Scottish Parliament, a future Parliament could choose to legislate in a manner that was incompatible with the Charter and repeal to some extent any Act that restricted its power to do so.

18. The Committee also notes that the Bill does not address breaches of the Charter Articles by the UK Government or agencies and that any amendment seeking to bring this about is unlikely to be competent.^{vii}
19. It is not obvious, within the current constitutional settlement, what the solution to the issue the Faculty has identified would be. Whether this is a problem strongly in need of a solution is perhaps a matter of a perspective. The absence of any special status for the Charter within the statute book (whatever that would mean in practice) would mean that, like any other statutory law, it could be amended in future, in the light of experience. (This is provided that any such amendment is within the overall competence of the Scottish Parliament). The Committee notes SOLAR's view that the approach to incorporation taken in the Bill seems "practicable and workable", taking into account the absence of a written constitution in the UK, and Professor emeritus Chris Himsworth's comment that the Bill is a "pragmatic" approach to giving the Charter effect in Scots law.^{viii}

^{vi} COSLA, Official Report, 18 November, col 35

^{vii} Professor Himsworth, 18 November, cols 23-24; Cabinet Secretary for Communities and Local Government, 2 December, cols 12-13

^{viii} Written evidence of both

Rationale for the Bill

20. Mr Wightman's contention is that the Bill is necessary, or at least desirable, to address the long-term erosion of the local government sector's status, power and autonomy. The Policy Memorandum says this has been at the expense of "the centre",^{ix} which the Committee takes to mean the Scottish Government, its agencies, and non-departmental public bodies exercising devolved responsibilities. The Policy Memorandum says that since devolution:

” ... 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.^x

21. The Memorandum does not expand in detail on this view; for instance, by citing statistics on council finances or participation at local elections, or by listing legislation introduced during the devolution era that has limited councils' autonomy. It does note Council of Europe rapporteurs' views, following a 2014 visit, that whilst the UK largely met its Charter obligations, it had not firmly secured the constitutional status of local government. In the light of the visit, the Council's Congress resolved that UK local government was under-resourced, noting specifically that powers in relation to business rates had been partly devolved to local authorities in England and Wales but not in Scotland.^{xi}
22. The Memorandum also refers to views expressed in major reports on constitutional issues during the devolution era, to the general effect that local government has not flourished during this period or has even gone backwards in status, and that the relationship of central and local government needs a reset. It records unsuccessful previous efforts to incorporate the Charter or a local government "power of general competence" (a concept borrowed from Article 4 of the Charter), into Scots law in the Scottish Parliament.^{xii}
23. The contention that the status of local government has diminished during the devolution era was not addressed at length or in detail in much written evidence, although some arguments, and examples, supporting this contention were provided.^{xiii} It would appear that many in local government, and many observers of local government, regard this view as reasonably settled, and not requiring extensive discussion. Some organisations may have considered that they had addressed these issues sufficiently in Mr Wightman's earlier consultation on his Bill proposals.^{xiv} However, one issue raised consistently was a view that central government did not treat local government as an equal partner when it came to considering reforms with a significant impact on local government, and that any consultation on such proposals tended to come late in the day.^{xv}

ix Paragraph 7

x Paragraph 8

xi Discussed at paragraphs 19-23 of the Policy Memorandum

xii At paragraphs 24-43

xiii Alexander Evison, written evidence; Shetland Council, written evidence, and Official

24. As a result particularly of its scrutiny of the local government budget over the last four-and-a-half years, the Committee is aware of views that the sector lacks the funding, policy levers and revenue-raising powers it needs in order to innovate, spend to save, and plan strategically. Council Leader Bell of Shetland Council told the Committee that:

” It is becoming more difficult for me, as a councillor, to explain to people in simple terms the differences we can make, because 60 percent of our revenue budget goes on national outcomes. In that sense, we are becoming very much like a health board.^{xvi}

As we noted in our most recent budget scrutiny, these concerns have been particularly acute in this financial year, owing to the devastating impact of the current health crisis. Some Stage 1 evidence alluded to events since March 2020 as underlining the need for a more confident and empowered local government sector, better able to respond to crises such as the pandemic. The Committee also notes views that there is a risk, during a crisis, of local government powers being passed to the centre and not afterwards being returned in full.^{xvii}

25. There is data to confirm the view that financial support for the sector has not kept pace with general public funding since the 2008 crisis and has decreased in real terms, albeit that this trend has slowed or even reversed more recently.^{xviii} The Committee accepts that there will always be competition for finite resources and that priorities change over time. In this connection, we note that over one third of Scottish Government spending is now allocated to the Health and Sport portfolio. There is also a widely shared perception that the scope of council duties has increased, either because of new responsibilities being added through legislation or because of demographic or social changes. Whilst this is perhaps harder to measure objectively, there is again some evidence for this, for instance in growing pressures on social care provision for older people.^{xix}
26. In past budget scrutiny, we have summarised the impact of these twin pressures as a view that councils "must do more with less" and queried the long-term sustainability of the current funding model.^{xx} Our budget scrutiny has also tracked the vigorous debate, ongoing for many years, as to whether there is the right balance of discretionary and allocated spending within local government or whether too much spending is ring-fenced. The debate is made more complex by disagreement even over key definitions, such as "ring-fenced". Some Stage 1

Report, 18 November, cols 34 and 40) Reform Scotland, written evidence

xiv e.g. COSLA, written evidence

xv COSLA, Official Report, 18 November, col 32; Shetland Council, written evidence

xvi Official Report, 18 November, col 43

xvii Reform Scotland, written evidence; Mary MacCallum Sullivan, written evidence, Shetland Council, 18 November, col 42-43

xviii SPICE briefing papers [Local Government Finance, Facts and Figures 1999-2017](#) and [Local Government Finance: Facts and Figures 2013-14 to 2020-21](#)

xix e.g. The Accounts Commission, [Social Work in Scotland](#), September 2016; and Audit Scotland: and [Health and social care integration Update on progress](#), November 2018

evidence alluded to these matters in support of the contention that the Bill was needed.^{xxi} As has been outlined above, there are provisions in the Charter that may be of direct relevance to debates of this nature.

27. The Committee also notes, and is concerned by, views that participation in local elections has reduced, and that in some areas it can be a struggle to find candidates to stand.^{xxii}
28. The Policy Memorandum also states a positive case for the Bill: It should enhance local government's status in law and provide legal guarantees of its powers and finance. It should provide a check on the powers of the Scottish Parliament as concerns their actions in relation to local government.^{xxiii} And it should enable better partnership between local and central government.^{xxiv} The Memorandum suggests that it is inconsistent to oppose incorporating the Charter into Scots law in the way proposed in the Bill when there are examples of the UK or Scottish Government incorporating other international agreements into our domestic law using similar reasons for doing so that the Member in Charge has put forward for this Bill.^{xxv}
29. Most stakeholders at Stage 1 tended to strongly agree with Mr Wightman that incorporating the Charter would bring about positive change. Views included:
- That it would better guarantee local government's distinct autonomy, remits and rights,^{xxvi} replacing, as one submission put it, "tiers of influence" in civic governance -with local government impliedly near the bottom of the pyramid- with "spheres of influence";^{xxvii}
 - That it would formalise the recognition of the local government sector as an autonomous partner in the governance of Scotland and ensure greater parity of esteem;^{xxviii}
 - That it would reduce public confusion about the different roles of different tiers of government in Scotland;^{xxix}
 - That it would raise currently poor awareness of what the Charter Articles actually say in central and local government;^{xxx}
 - That by improving the relationship between the state and local government, and by making councils feel more listened to, it could help improve outcomes and renew democratic participation across Scotland, and encourage more people to participate in council democracy.^{xxxi}

xx [https:// Budget 2020-21: Committee letter to Scottish Government, 31 October 2019](https://www.budget.scot.nhs.uk/budget-2020-21/committee-letter-to-scottish-government-31-october-2019)

xxi Shetland Island Council, written evidence; Reform Scotland, written evidence

xxii Shetland Islands Council, written evidence and Official Report 18 November, col 36

xxiii Paragraph 5

xxiv Paragraph 40

xxv Paragraphs 52-60

xxvi ALYVE, written evidence

30. The Member in Charge also considers that the Bill will address what he sees as an anomaly, as Scotland (along with the rest of the UK) is an outlier, in European terms, in having neither enshrined the powers and freedoms of local government in a written constitution nor passed the Charter into domestic law. This view was also generally supported.^{xxxii} COSLA President Councillor Alison Evison said it was an "oddity" that Scotland, with its 600-year history of local government, lagged behind its continental neighbours in this way.^{xxxiii} COSLA's written evidence said it was "highly unusual" that the powers of local government:

” ... 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.

31. The Faculty of Advocates expressed formal neutrality on whether it supported the Bill. But it stated that the United Kingdom was alone amongst the 47 Members of the Council of Europe in not having transposed the Charter into its own domestic legal system. It also drew the Committee's attention to proposals in the pre-devolution era (from the Scottish Constitutional Convention) to guarantee the status of local government in a Scotland Act that were not followed up.^{xxxiv} Professor Richard Kerley said that present Scottish local authorities were little different in law from other public bodies. He said there was a clear case to entrench the status of local government in law "because like Parliament local governments are also democratically elected - and representative democracy demands a more entrenched institutional position than government agencies and quangos".^{xxxv} For his part, the Member in charge noted that Scotland (along with the rest of the UK) was arguably in breach of the Charter, by virtue of the fact that the principle of local self-government was not enshrined in Scots law (as required under Article 2).^{xxxvi}
32. COSLA summarised the benefits of incorporating the Charter as:

^{xxvii} SOLAR, written evidence

^{xxviii} South Lanarkshire Council, written evidence

^{xxix} South Lanarkshire Council, written evidence

^{xxx} SOLAR, Official Report, 18 November, col 36

^{xxxi} COSLA, written submission; Cllr Evison (COSLA), Official Report, 18 November, col 39

^{xxxii} Dr Serafin Pazos-Vidal, written evidence

^{xxxiii} Official Report, 18 November, col 31

^{xxxiv} Faculty of Advocates, written evidence

^{xxxv} Written evidence

^{xxxvi} Official Report, 9 December, col 25



- Doing so would strengthen local and national governments' ability to work jointly to improve outcomes in communities across Scotland;
- It would strengthen Scotland's democracy by ensuring that communities enjoy the same local democratic rights that are already commonplace across Europe and beyond;
- 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;
- It would ensure that Scotland fully complies with international treaty obligations, and addresses outstanding issues that have previously been identified in this regard.^{xxxvii}

What impact would the Bill actually have?

33. A key consideration for the Committee at Stage 1 has been attempting to gauge how much of an impact the Bill would have. We have not found this straightforward. Some evidence has been to the effect that the Bill is somewhat technical or has referred to the symbolic value of passing or indeed not passing it.^{xxxviii} The prospect of the Bill having much financial impact, either on councils or on central government, or of it leading to a step change in the way councils work and provide services has been doubted.^{xxxix} The Scottish Government itself said that it was already bound to adhere to the principles set out in the Bill. (The Committee takes this to mean bound under international law).^{xl} SOLAR's representative told the Committee there was "a danger that we exaggerate what the Bill will actually do."^{xli}
34. At the same time, and as already noted, many stakeholders viewed the Bill as important, necessary and even potentially transformative in terms of the constitutional and working relationship between the state and local government.
35. Some evidence sought to reconcile these two positions by arguing that the Bill would be more of a "prompt":^{xlii} an enabler of good practice and good partnership working rather than a disruptive game-changer.^{xliii} Requirements in the Bill, such as the requirement for a legislative statement on compatibility, would reduce the risk of future laws or policies being in conflict with the Charter Articles.^{xliv} As COSLA stated:

^{xxxvii} Written evidence

^{xxxviii} SOLAR, Official Report, 18 November, col 32; Shetland, Official Report, 18 November, col 33

^{xxxix} e.g. West Lothian Council, written evidence

^{xl} Written evidence and Official Report, 2 December, cols 10-12

^{xli} Official Report, 18 November, col 32

” "... although incorporation of the Charter into domestic law does not eliminate the potential for the national government and parliament of the day to make bad decisions, it can be used to enable both spheres of government to agree to make good decisions."^{xliv}

36. It is also relevant to highlight section 7 of the Bill, which gives courts a discretionary power to, in effect, limit the consequences of a ruling that the Scottish Ministers breached a duty to exercise functions compatibly with the Charter Articles. The court may limit or remove any retrospective effect of this decision and it may suspend the decision to allow the breach to be addressed. This section was generally welcomed as a pragmatic and realistic constraint that ought to ensure that court remedies were proportionate to the matter in hand, and enable account to be taken of different situations in different local authorities.^{xlvi}
37. A number of submissions indicated that the Bill might help facilitate a rebalancing of powers away from central government and towards local government, and that this would be a public good. Reform Scotland said the Bill should be seen as only a "first step" in the process of greater devolution of powers, including tax raising powers, to local government.^{xlvi} When Mr Wightman gave evidence in person, he clarified that, while he personally supported the further devolution of powers to local government, this was not something that the Bill, in itself, would do. The Cabinet Secretary also confirmed she was aware of no current barriers to the devolution of further powers to local government that would come down if the Bill were passed.^{xlvi}
38. A number of stakeholders raised the issue of the nature and register of language employed in the Charter. South Lanarkshire Council (who supported the Bill) commented that the Articles "were not intended to have legal status but to be more declaratory principles in purpose" and that they contained subjective terminology.^{xlvi} This was one of the main reasons why the Scottish Government initially reserved its position on the Bill. It described the Bill as a "significant constitutional change" -despite also commenting that it was already bound by the Charter- and raised concerns about the level of uncertainty that passing the Bill might raise:

^{xlvi} Professor Richard Kerley, written evidence

^{xlvi} Shetland Islands Council, Official Report, 18 November, col 33

^{xlvi} South Lanarkshire Council, written evidence; SOLAR, written evidence

^{xlvi} Written evidence

^{xlvi} COSLA, written evidence; Angus Council, written evidence; Law Society of Scotland, written evidence; SOLAR, written evidence; West Lothian, written evidence; ALYVE, written evidence; Professor Himsworth (written evidence) supported section 7 but made made technical comments as to its drafting that we expect the Member in Charge will have considered.

^{xlvi} Official Report, 18 November, col 17

^{xlvi} Official Report, 2 November, col 9

^{xlvi} Written evidence

” There are a number of questions around the legal process, impact and consequences of the Bill which need to be carefully considered. COSLA themselves noted in their response to Mr Wightman’s consultation that some provisions of the Charter are heavily qualified and much of the language is imprecise, meaning that they may need to be redrafted and made more prescriptive to give them greater effect and that more evidence and detailed analysis of how the provisions can be practical enforced is needed.ⁱ

39. The Faculty of Advocates reminded the Committee that, before Convention rights became directly applicable in Scots law, many public authorities had already been -as they saw it- applying Convention rights principles in their work and decision-making. Public bodies, including the courts, had then audited their procedures further in the run up to the 1998 Act becoming law. The Faculty reminded the Committee that this had not stopped our legal system being "embarrassed" by adverse Supreme Court rulings not long after the 1998 Act came into force. The Faculty went on to note of section 2 that it:

” ... requires Scottish Ministers to act compatibly with the Charter when exercising their functions. This is not necessarily the same as the requirement not to act in a manner that is incompatible with the Charter. Arguably a requirement to act compatibly with the Charter is a higher standard than a requirement not to act incompatibly with the Charter.ⁱⁱ

40. The Faculty added that section 2:

” ... could have a significant effect. The six parts of Article 4 of the charter – and particularly parts 3, 4, 5 and 6ⁱⁱⁱ all set out principles that it could be argued by those involved in local government have been overlooked by Scottish Ministers to some extent in every year since devolution. This section will empower local authorities to judicially review the decisions of Scottish Ministers – including secondary legislation – and we can certainly see how it would be used when local government feels that its freedom of action is being restricted.^{liii}

41. Asked to clarify whether he thought the main purpose of the Bill was to "send a message" or whether it marked a "significant constitutional change", Mr Wightman said he thought the answer lay somewhere in the middle:

ⁱ Written evidence

ⁱⁱ Written evidence

ⁱⁱⁱ These read as follows: 3 Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy. 4 Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law. 5 Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions. 6 Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.

^{liii} Written evidence

” It is not a bill that merely sends a message. It sends a message—a very important political message—and it incorporates an important principle, but it also has substantive legal effect. At the moment, if any local authority or citizen believes that the charter is not being complied with in any way, they can reference that in any court proceedings, but the court cannot rule on that question, because the charter is not part of Scots law. The court might say, “That is all very interesting, but there is nothing we can do about it.” Giving legal teeth to the charter is the main means by which the bill seeks to strengthen local government. In doing so, it sends a very strong signal.^{liv}

42. Mr Wightman said that the effect would be to make local government less dependent on the political climate and the strength or weakness of relations with central government at any given time, and reduce the risk of central government overreach.^{lv} He also underlined that the Bill did not give the court any power to strike out primary legislation, only to make a declaration of incompatibility, the consequences of which would be more political than directly legal.^{lvi} He acknowledged it would be difficult to predict what practical consequences would arise from making Articles such as Article 9 (financial resources of local government) enforceable in domestic law, saying it would be for local authorities to consider such questions, but that it would “change the dynamic of future discussions about finance” between central and local government.^{lvii}

Litigation arising from duties created by the Bill

43. A further question arising from consideration of the Bill's impact is as to whether the Bill might lead to a spike in litigation. Would matters normally litigated in the political arena -for instance, the extent to which the Scottish Government ring-fences local government spending- instead end up in the courts?
44. In the Policy Memorandum, the Member in Charge indicates that he had considered the option of creating an office of independent commissioner to consider complaints about breaches of the Charter Articles, and with the power to issue sanctions for breaches, rather than, or instead of, allowing such complaints to go straight to the courts. A slight majority of respondents to the Member's pre-introductory consultation had favoured this proposal but, on reflection, he had decided not to proceed with it. He recognised that individual complainers might find the avenue of complaining to a commissioner less intimidating or costly than bringing a judicial review, but considered that most challenges under the Bill would be likely to come from local authorities. He thought that the Bill's underlying aim of creating a new constitutional framework for relations between the state and local government would be better served by creating a direct right to legal recourse.^{lviii}

^{liv} Official Report, 9 December, col 27

^{lv} Official Report, 9 December, col 28

^{lvi} Official Report, 9 December, col 33

^{lvii} Official Report, 9 December, col 28

^{lviii} Policy Memorandum, paragraphs 98-105

45. The Committee raised the issue of an independent commissioner with witnesses during oral evidence sessions on the Bill. There was general agreement, including from the Scottish Government,^{lix} that it had been right not to proceed with this proposal. Professor Kerley said it would impede "the simple direct measure of access to the legal process."^{lx}
46. The Financial Memorandum states that the Bill "does not make legal challenge inevitable or even likely". It explains that the Bill does not create any new mechanism for legal challenge, which would therefore be by judicial review. This is only available where other judicial remedies have been exhausted and the petitioner -in the opinion of the court at a preliminary point in the process- has a reasonable prospect of success. The petitioner must also demonstrate "sufficient interest". An action for judicial review can only be raised in the Court of Session rather than a lower court, and judicial review cases currently constitute a low percentage of the cases the Court typically hears in a year.^{lxi}
47. COSLA and SOLAR both considered it very unlikely that the Bill would give rise to much litigation. SOLAR described court challenge as "the nuclear option - an effective deterrent which everyone would strive to avoid."^{lxii} COSLA's view was that the overall effect of the Bill would, in any case, be to encourage cooperation upstream of any possible legal conflict.^{lxiii} The Committee was also reminded that, while the Bill would expand the category of cases where a local authority could raise a petition for judicial review against the government, this could already happen under the current law.^{lxiv}
48. While some witnesses saw the imprecision of the Charter Articles as adding to the risk of speculative legal actions, others thought the opposite. For Professor Kerley the quite widespread use of hedging language in the Charter ("as far as possible"; "within the framework of the law", etc.) led him to doubt whether local authorities would have success seeking to use the Charter as a "protective wall" to prevent changes taking place which they opposed:
- ” The consequence of such extensive qualification is that governments can, within the generous boundaries of the 'The Charter', make extensive changes to various institutions of local self-government with some degree of confidence that this can be formally justified - if they are ever challenged.^{lxv}
49. In oral evidence, he elaborated that this did not mean that the Charter was a "dead letter" but that it put the onus on the state to ensure that it followed the right procedures, and consulted adequately, before making changes that impacted on local government. If so, then it would be likely ultimately to achieve the change it

^{lix} Official Report, 2 December, col 13

^{lx} Official Report, 18 November, col 22

^{lxi} Paragraphs 11-13

^{lxii} Written evidence

^{lxiii} Written evidence

^{lxiv} COSLA, supplementary written evidence and Official Report, 18 November, col 18

^{lxv} Written evidence

wished.^{lxvi} The SOLAR witness had similar views, considering that the chances of a successful judicial review under the Bill, if enacted, would be low^{lxvii} while COSLA described the language in the Charter as "not so prescriptive as to provide an insurmountable barrier for any national government and parliament were they determined to impose its [sic] will upon local government."^{lxviii}

50. South Lanarkshire Council thought the passing the Bill might give rise to challenges in relation to historical legislation and decisions, particularly in relation to local government financing and the governance arrangements on the exercise of their functions made prior to its passing where that legislation is perceived as being incompatible with the Charter Articles.^{lix} However, Professor Himsworth considered it unlikely that actions based on historical decisions would meet threshold requirements for raising a judicial review.^{lxx}
51. Both the Law Society and the Faculty of Advocates thought it was very hard to predict how much litigation there would be. The Society said it would depend on multiple factors including the risk appetite of the parties, the availability of public funds and the political climate.^{lxxi} The Faculty of Advocates commented that:

” ... the standards set out in the Charter are aspirational and unlike the European Convention of Human Rights there is no court making regular decisions that interpret the rights or duties set out in the Charter. The lack of a corpus of case law interpreting the Charter (in contrast with the situation that applies to the Convention) could create uncertainty and a lack of willingness to intervene by the courts.^{lxxii}

52. The Faculty went on to comment that the lack of clear fount of jurisprudence may pose difficulties for courts seeking to apply section 4, which imposes a requirement for any legislation within the competence of the Scottish Parliament to be read, and given effect to, in a way compatible with the Charter Articles.(In this connection, the Committee notes that only two instances of a court elsewhere in Europe finding that a government breached the Charter were brought to our attention during Stage 1. Both concerned substantial reforms of local governance structures.^{lxxiii}) In relation to section 5, which gives courts the power to make a declaration of incompatibility in relation to legislation, the Faculty again considered it an open question whether the courts would end up making much use of this power.^{lxxiv}
53. Responding to the variety of views on the impact of the Bill and the prospect of it

^{lxvi} Official Report, 18 November, cols 24-25

^{lxvii} Official Report, 18 November, col 37

^{lxviii} Written evidence

^{lix} Written evidence

^{lxx} Official Report, 18 November, col 23

^{lxxi} Written evidence

^{lxxii} Written evidence

^{lxxiii} COSLA, supplementary evidence; Serafin Pazos-Vidal, written evidence

^{lxxiv} Faculty of Advocates, written evidence

giving rise to legislation, Mr Wightman reiterated that the Bill "was not sanctions driven. It is designed to change the culture of compliance".^{lxxv} He said lodging a petition for judicial review is never something that a council would undertake lightly or without due diligence and it was hard to envisage the Bill leading to political or frivolous legislation.^{lxxvi}

Scottish Government's considered position on the Bill

54. As noted earlier, the Scottish Government initially took a neutral position on the Bill. By the time the Cabinet Secretary gave evidence, she said the Scottish Government now took the view that incorporating the Charter into Scots law "might be one way of demonstrating our commitment to building a strong and lasting relationship with local government".^{lxxvii} Following a process of considering the implications of the Bill with due diligence, she said the Scottish Government was now ready to support the Bill. She described the Bill as "a platform to further improve the relationship that we have with local government."^{lxxviii} In relation to issues such as improving democratic participation or the diversity of representation in local government, she agreed that incorporating the Charter was not, in itself, a game-changer, but said that it could help.^{lxxix} The Cabinet Secretary said that there were amendments the Scottish Government would like to see made to the Bill, but all were of a minor and technical nature.^{lxxx}
55. In response to claims of an erosion in local government status, influence and autonomy, the Scottish Government's Stage 1 evidence has accentuated the positive. Its written evidence referred its recent agreement with COSLA to develop a multi-year fiscal framework and the joint establishment with COSLA of a Local Governance Review, intended to lead to greater devolution of decision-making to communities. However, it acknowledged in relation to the review that "whilst some progress has been made the results of what more can be achieved is [sic] still in development."^{lxxxi} The Committee has noted perceptions since the Review was established that progress has been slow (albeit making allowances for the impact of the pandemic) and that its intended outcomes remain opaque. In our most recent budget scrutiny, we requested a Scottish Government update on its progress.^{lxxxii}

^{lxxv} Official Report, 9 December, col 25

^{lxxvi} Official Report, 9 December, col 36

^{lxxvii} Official Report, 2 December, col 3

^{lxxviii} Official Report, 2 December, col 6

^{lxxix} Official Report, 2 December, col 14

^{lxxx} Official Report, 2 December, col 4

^{lxxxi} Scottish Government, written evidence

^{lxxxii} Available at: https://www.parliament.scot/S5_Local_Gov/General%20Documents/Budget202122CabSecCLG.pdf

56. The Cabinet Secretary for Communities and Local Government told the Committee that the Review "creates an opportunity to promote the biggest shift of power since devolution". She took issue with the claim that there had been an erosion in the power and influence of local government, referring for instance to the Scottish Government's effective joint working with COSLA and with councils on combatting the coronavirus panic since the crisis had first broken.^{lxxxiii}
57. As regards the prospect of increased litigation, the Cabinet Secretary said that the Scottish Government had considered this a potential financial risk but was now reasonably reassured that an increase in legal actions was something that everyone wanted to avoid.^{lxxxiv}

Committee conclusion

58. The Committee supports the general principles of the European Charter of Local Self-Government (Scotland) Bill. The Committee accepts that agreeing to the Bill would, to all intents amount to incorporating the Charter into Scots law, meaning that it could be directly relied upon as an authoritative legal source under certain circumstances (as laid out in the Bill).

59. The Committee supports incorporating the Charter into Scots law because:
- We accept -as successive UK and Scottish Governments have done- that the Charter lays out principles of good governance in relation to the local government sector which everyone should be able to support, and helps protect councils' status, resources and autonomy. We believe strongly in having a flourishing local government sector in Scotland and we believe that following the principles set out in the Charter is one way of helping achieve this. Enshrining the Charter in Scots law should bring it closer to citizens and communities;
 - We support the principle of increased devolution of decision-making to local government and believe incorporating the Charter into Scots law makes this more achievable;
 - While we do not agree with the Member in Charge that local government in Scotland has been "neglected" under devolution, we agree that there is room for a levelling-up in the relationship between Holyrood and the local government sector. Incorporating the Charter into Scots law is not a magic wand and some expectations expressed in evidence about what the Bill may achieve could be seen as unrealistic. But we agree that passing the Bill creates the opportunity and space for local and central government to re-commit together to an effective, respectful and inclusive working partnership;

^{lxxxiii} Official Report, 2 December, cols 3 and 5

^{lxxxiv} Official Report, 2 December, col 6

- We agree that the Bill would rectify an anomaly: it would mean that Scotland would no longer be one of the last remaining jurisdictions in the continent of Europe not to have given the Charter direct legal standing in domestic law.

60. In considering whether to agree to the general principles, the Parliament should note two matters. First, agreeing to the Bill would not "enshrine" the Charter in the sense of giving it a distinct constitutional status. It would be part of the text of an Act of the Scottish Parliament, capable of being amended in the light of experience, in the same way as the text of any other ASP could be amended. There are also some limitations and mitigations set out in the Bill as to what a court can do when it finds that the Charter has been breached.

61. Secondly, there is some uncertainty as what the legal impact of incorporating the Charter into domestic law would be, including how frequently it would give rise to litigation, how likely the courts would be to agree that there has been a breach, and what the wider consequences of the finding of a breach could be. Most stakeholders agree with the Member in Charge that litigation would generally be avoided, and this includes local government stakeholders. They think the Bill would not be disruptive but would act more as a spur for local and central government to cooperate effectively, to make better laws and policies, and to avoid conflict. There was also a view that the open-ended and hedged nature of much of the language in the Charter would likely mitigate against a narrow judicial interpretation of what particular provisions "must" mean.

62. The Committee is reassured by these views. The legal reach of the Charter is nonetheless somewhat uncertain. It is not clear how the courts would handle cases, or issues of legislative interpretation under section 4 of the Act, that relate to matters which the Charter appears to address, but which hitherto have been seen as belonging more to the policy than the legal sphere. Examples might include legislation reorganising local services following what the local government sector perceives as a lack of proper consultation, or funding being ring-fenced or allocated in a particular way, or council revenue-raising being restrained in a particular way.

63. Therefore, if the Parliament agrees to the Bill, it should do so, in the awareness of a possibility of future cases testing the legal meaning of particular paragraphs in the Charter. There might be some uncertainty, and the possibility of cases with significant consequences, until domestic jurisprudence on the Charter becomes more settled.

Other issues raised during Stage 1

64. Some matters ancillary to the general principles were raised during Stage 1.

Breadth of the section 2 duty

65. Professor Chris Himsworth supported the Bill but suggested it could be broadened out to public bodies other than just the Scottish Government:

” I do understand that the paramount Charter concern is the curtailment of “central government” authorities and that the Scottish Ministers are, therefore, most involved but why should such other public bodies ... not also be required to act compatibly?^{lxxxv}

66. Professor Himsworth indicated that, in making this suggestion, he was taking his cue from the Charter itself, which was framed in positive terms about the things local authorities can do, rather than who is constrained from limiting councils' powers. He suggested that it would be within the spirit of the Charter to amend the Bill so as "to repel any threats to that autonomy, wherever they come from". He gave as an example the responsibility to appropriately consult local authorities set out in the Charter, noting that the Scottish Government was not the only public body empowered to take important decisions that might affect local authorities.^{lxxxvi} The Committee presumes that any amendment along the lines Professor Himsworth suggested would principally be to section 2.
67. Other witnesses expressed some sympathy with the logic of Professor Himsworth's proposal but were concerned that the Bill should not be made more complex. Councillor Evison said that COSLA was happy with the Bill as it was.^{lxxxvii} The Cabinet Secretary told the Committee that she considered the parameters of the Bill were "fine, and we do not feel that we need to extend them further".^{lxxxviii}

68. The Committee understands the logic of extending the requirement to adhere to the Charter Articles to public bodies in Scotland other than the Scottish Government. However, if the Parliament were to agree to the Bill, we consider that it would be better to first see how the duty beds in, and only consider broadening the Bill in this way in the light of experience.

^{lxxxv} Written evidence

^{lxxxvi} Official Report, 18 November, cols 19-20

^{lxxxvii} Official Report, 18 November, cols 36-37

^{lxxxviii} Official Report, 2 December, col 8

Duty to promote local self-government and to report to Parliament

69. Most evidence strongly supported section 3 which creates two main duties for the Scottish Government:

- A duty summarised in the section heading as a duty "to promote local self-government";
- A duty to report to Parliament at least once every five years on (to paraphrase) steps taken to safeguard local government and promote local autonomy.

Both duties were generally seen as strongly complementary to the overall aim of the Bill of ensuring that adherence to the Charter articles is baked in to the Scottish Government's thinking on any new law, policy or action that may impact on local government. It was argued that putting the first duty on the face of the Bill could help engender the cultural change that would reduce the risk of conflict or even litigation further downstream and enable strategic discussion of practical steps to address matters limiting local government's full potential,^{lxxxix} while the second duty would engender debate on local government, keep Ministers focussed, and ensure greater transparency and accountability.^{xc}

70. The Faculty of Advocates suggested that the wording of the first test might be improved by requiring the Scottish Ministers to have "due regard" to taking steps to increase council autonomy, etc. It said this was a test courts were familiar with in relation to roughly analogous duties set out in existing statutes.^{xc} We expect this is a suggestion the Member in Charge would take into consideration should the Bill reach its amending stages. There were likewise some minor drafting suggestions from Professor Himsworth that we expect the Member in charge will have noted.^{xcii}

71. The Cabinet Secretary told the Committee that the requirement to report imposed on the Scottish Government by section 3 appeared broadly reasonable, but that it might benefit from some minor technical amendments to clarify the exact nature of the duty imposed.^{xciii}

72. The Committee welcomes section 3, which imposes a duty on the Scottish Government to actively consider how to strengthen local government and how to devolve more autonomy to it. We also welcome the requirement imposed in section 3 for the Scottish Government to report every five years on how it has increased the autonomy of local government.

^{lxxxix} COSLA, written evidence; SOLAR, written evidence; Reform Scotland, written evidence

^{xc} COSLA, written evidence; Shetland Islands Council, written evidence; Liz Albert, written evidence; West Lothian Council, written evidence

^{xc} Written evidence

^{xcii} Written evidence

^{xciii} Official Report, 2 December, cols 4 and 7

Costs arising from the Bill

73. In the Financial Memorandum he prepared to accompany the Bill, the Member in Charge estimated direct costs arising from the Bill as low. He estimated implementation costs at around £42,000; these being "familiarisation costs" for officials working in areas where knowing the relevance of Charter Articles to their work would be relevant.^{xciv} The cost of producing a five-yearly report to Parliament under section 3 was estimated at £8400.^{xcv} Most evidence agreed that any direct costs arising from the Bill would be low.^{xcvi}
74. The Financial Memorandum acknowledges the possibility of litigation arising from the Bill and notes that this could lead to both the Scottish Government and the relevant local authority incurring costs. Were an individual to raise an action, there is also the possibility of this having cost implications for the Scottish Legal Aid Board. The Memorandum sets out some indicative figures for the cost of legal action but does not ultimately set out any estimate as it considers this to be speculative and not, in any case, a cost arising directly from the Bill.^{xcvii} Nor does the Memorandum make any estimate as to the cost on the public purse arising from an adverse legal finding against the Scottish Ministers. When he appeared before the Committee, the Member in Charge affirmed that it remained his view, after hearing evidence, that estimating the cost of litigation arising directly from the Bill would be excessively speculative. He said the Committee "need have no concerns about the cost implications of the Bill".^{xcviii}
75. In its written evidence on the Bill, the Scottish Government queried the robustness of the assessment of costs set out in the Memorandum, and suggested that further financial analysis should be undertaken. By the time the Cabinet Secretary gave evidence, she said that the Scottish Government considered the Memorandum to be "broadly fine", bearing in mind assurances given during Stage 1 that litigation was something all parties would be keen to avoid, although the risk of litigation incurring significant costs could not be ruled out.^{xcix}

76. The Committee accepts that costs arising directly from implementation of the Bill would be low. As discussed earlier, the potential for the Bill's enactment giving rise to legal actions that the Scottish Government would be expected to defend cannot be ruled out, although local government stakeholders have given repeated assurances that this is something they would wish to avoid. The prospect of a legal ruling under the Act requiring significant Scottish Government expenditure in order to rectify it cannot be wholly ruled out either. If so, the court would have a discretionary power under section 7 to limit some of the

^{xciv} Paragraphs 35-43

^{xcv} Paragraphs 44-46

^{xcvi} e.g. SOLAR, written evidence; Orkney Islands Council, written evidence

^{xcvii} Paragraphs 11-34 and 47-61

^{xcviii} Official Report, 9 December, col 33

^{xcix} Official Report, 2 December, cols 6 and 15

consequences of a far-reaching ruling.

Preparing for enactment

77. Most evidence supported, or had no strong view, on the position set out in the Bill that substantive provisions would come into force six months after enactment. There were views that, given that most other jurisdictions had long ago given the Charter direct effect in domestic law, there was no good reason for any further delay.^c COSLA described incorporation of the Charter as "overdue".^{ci} However, South Lanarkshire and Orkney Islands Council Council were amongst those to underline the importance of central and local government having sufficient thinking time, to take onboard the implications for their policies and practices of the Charter becoming directly applicable law.^{cii} Comments from Shetland Island Council about current awareness of the Charter being "poor" were set out earlier. In this connection, and as noted earlier, the Member in Charge considers training costs to be the main cost arising from the Bill.
78. The Law Society suggested it would be judicious to build in longer lead-in times than in the Bill to permit local and central government to review their practices and policies.^{ciii}
79. When he gave evidence, Mr Wightman said it remained his view that 6 months was adequate, given that local authorities and central government were already familiar with the text of the Charter which was not a long document.^{civ}
80. If the bill were agreed to, it currently provides that most substantive provisions would come into force after six months. Given that the charter is a well-established document, this appears to the committee to be reasonable. However, it would be prudent, during this period, for there to be awareness-raising about the charter and the consequences of the new act within central and local government.

Delegated powers in the Bill

81. The Bill contains two powers to make delegated powers. The Delegated Powers and Law Reform Committee [reported to this Committee](#) on these. That Committee had no comment to make on one of these powers, in section 1(3), and no

^c SOLAR, written evidence

^{ci} Written evidence

^{cii} Written evidence

^{ciii} Written evidence

^{civ} Official Report, 9 December, col 34

substantive comment was made on that provision during this Committee's Stage 1 scrutiny.

82. The other delegated power, in section 6(1) of the Bill, allows the Scottish Ministers by regulations to make such provision as they consider necessary or expedient in consequence of a declaration of incompatibility by the court under section 5. Such regulations may modify any enactment other than the Bill as enacted.
83. This is, on the face of it, a quite wide-ranging power. In its report, the DPLR Committee raised three questions on it. Simplifying slightly, these were:
 - Whether the circumstances under which the Scottish Ministers may contemplate using the power should be narrowed. Taking a leaf from what was considered to be analogous legislation (on human rights cases), they queried whether the power should only be used where there appear to the Scottish Ministers to be "compelling reasons" to do so;
 - Whether the power included a power to create new criminal offences and, if so, whether that was appropriate;
 - Whether any instrument laid under this power should be subject to the "super-affirmative" procedure, to enable greater Parliamentary scrutiny.
84. The Member in Charge undertook to reflect on these matters further in the event of the Bill reaching the amending stages.^{cv} The Committee notes that the Law Society also made technical comment on this power at Stage 1.^{cvi}
85. The Committee welcomes the undertaking of the Member in Charge to reflect on the wording of the delegated power provision in section 6(1), and whether it requires to be tightened by amendment. As the power is to be exercised by the Scottish Ministers, we expect that he will consult with the Scottish Government about how best to amend the provision, should the Bill pass Stage 1.

^{cv} Official Report, 9 December, cols 34-35

^{cvi} Written evidence

