FACULTY OF ADVOCATES

Response from the Faculty of Advocates

To

The Local Government and Communities Committee

In respect of

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

We refer to the email from Douglas Millar, Assistant Clerk, Local Government and Communities Committee, to the Faculty of Advocates dated 3 November 2020.

The Committee has asked the Faculty for its views on the stage 1 proceedings of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. We noted that when the Committee first met, members discussed evidence received so far at Stage 1 of the Bill and agreed it would be important to consider carefully the legal aspects of the Bill.

In particular we are told that the Committee wished to know whether any aspect of the drafting might present challenges of interpretation to the Court and whether the Bill if passed is likely to be used much in litigation. Accordingly, the Committee would welcome views from the Faculty of Advocates as to whether they anticipate that the Act would be frequently used as a basis for litigation by local authorities or others, bearing in mind the way it is currently drafted.

Background

The idea of the application of the European Charter of Local Self-Government ("the Charter") by the Scottish Parliament dates back to the debates within the Scottish Constitutional Convention about the form that the new Parliament would take. In *Scotland's Parliament. Scotland's Right* (published on 30 November 1995) the Scottish Constitutional Convention stated (at page 17) (whilst discussing the Act that would create the Scottish Parliament):

> The Act will include a clause committing Scotland's Parliament to secure and maintain a strong and effective system of local government, and will embody the principle of subsidiarity so as to guarantee the important role of local government in service delivery.
>
> The Convention believes that Scotland's Parliament should also embody the principles contained within the European Charter of Local Self Government and in particular Article 4 that "local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority." This will allow local government the flexibility it wants and needs to act in the interest of its citizen in its provision of high and improving standards of service.

No such clause was included in the Scotland Act 1998 and the United Kingdom is the only one of the 47 Members of the Council of Europe that has not transposed the Charter into its own domestic legal system.

Achieving Legal Effect

The question of how to incorporate the Charter raises similar issues to the recent Scottish Government consultation on incorporating the United Nations Convention on the Rights of the Child into Scots law. The Faculty produced a response to that consultation on 14 August 2019 and a copy is attached to this response.

There is also an analogy between the incorporation of the Charter and the incorporation of the European Convention of Human Rights ("the Convention"), which has been made by the promoter of the bill and a number of those who responded to the initial consultation. There are significant differences which, we suggest, need to be considered.

The Committee will be familiar with the manner in which, under the terms of the devolution settlement as set out in the Scotland Act 1998, Scottish Ministers have no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law (Scotland Act 1998 section 57(2)) and the Scottish Parliament cannot legislate in a manner which is incompatible with any of the Convention rights or with EU law (section 29(2)). Whilst the restriction in respect of EU law will change on 1 January 2021, it is inherent in the structure of the devolution settlement that the Parliament and Ministers cannot act outside their powers. This restriction is set from outside – in Westminster legislation.

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. In a different context this is how the Westminster Parliament avoided the provisions of the Fixed-term Parliaments Act 2011 by passing the Early Parliamentary General Election Act 2019 in order to hold the 2019 UK General Election.

Despite this problem, the bill creates an interpretative obligation in sections 4 and 5 to force primary legislation to be interpreted in a way which is compatible with the Charter. The Committee should be aware of the inherent weakness of this approach as a future Scottish Parliament could simply overturn this obligation in a future Act.

We note that other signatories of the Charter appear to have taken different approaches to incorporation. The Monitoring and Election Observation Reports produced by the Council of Europe[1] touch on how States have incorporated the Charter. Many have done so by specifying the powers and duties of local government within their constitution and protecting local government that way.

The primary constitutional document of the devolved institutions in Scotland is the Scotland Act 1998. If entrenchment of the incorporation of the Charter was considered important, the powers and duties of local government could be specified within the Scotland Act and the powers of Parliament and Scottish Ministers restricted in those areas.

The meaning of the Charter

As the Explanatory Notes to the bill explain, there is a long history of attempts to incorporate the Charter into Scots law and given the specific references in *Scotland's Parliament. Scotland's Right* it would appear that the aspiration is entirely in accordance with the founding principles of devolution.

If the bill becomes law, local authorities and other interested parties will be able to challenge, via judicial review, administrative decisions of Scottish Ministers, subordinate legislation and even (through interpretation) primary legislation such as the Local Government Finance Act 1992 on the ground that the decision or legislation undermines the existing powers of local

[1] https://www.coe.int/en/web/congress/congress-reports#{%2254213415%22:[11]}

government or reduces the discretion of those local authorities to design services for local conditions.

However, 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.

We note that in the Faculty response to the recent Scottish Government consultation on incorporating the United Nations Convention on the Rights of the Child into Scots law the Faculty raised a similar point and we would encourage the Committee to consider what other sources of jurisprudence could be considered by the courts when interpreting the Charter.

When the Human Rights Act 1998 became law, many public bodies spent a considerable amount of time trying to work out whether their practices were compatible with the Convention and there was much discussion of the extent to which existing legislation was Convention-compatible. That process took place at a time when it was already the practice of the courts to take account of the Convention as an aid to interpretation and yet Scotland was still embarrassed by the judicial determination that some of its judges were not independent (*Starrs v Ruxton* 2000 JC 208) and that suspects were entitled to legal advice in police stations (*Cadder v HMA* [2010] UKSC 43).

In Human Rights cases the Supreme Court of the United Kingdom often considers decisions on human rights issues by the highest courts in the Commonwealth on the basis that they share many of the same traditions of respect for human rights. Jurisprudence of the constitutional courts of other signatories to the Charter and the line of jurisprudence around the effect and meaning of the Principle of Subsidiarity within European Union Law might be of similar assistance in interpreting the Charter articles in Scotland.

We would encourage the Committee to consider the extent to which decisions routinely made by Scottish Ministers – particularly in respect of local government finance, the planning system and the allocation of powers to new public bodies that are not local government – are incompatible with the terms of the Charter. The Committee could also consider whether the Charter as it is worded is specific enough to enable the extent of such incompatibility to be

understood with sufficient clarity to enable Scottish Ministers and the Parliament to anticipate possible challenges to their actions using the opportunities created in this bill.

Over and above those general concerns we have some observations to make on the sections that create specific duties.

Duty to act compatibly with the Charter Articles – Section 2

This section 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.

This section goes much further than the Stage 3 amendment proposed by Tavish Scott MSP to the Community Empowerment (Scotland) Bill[2] which only required Scottish Ministers to observe and promote the principles and provisions of the Charter.

In our view, this section could have a significant effect. The six parts of Article 4 of the charter – and particularly parts 3, 4, 5 and 6 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.

Duty to promote local self-government – Section 3

This section is clearly intended to cause Scottish Ministers to take account of the Charter when making decisions and to report back to Parliament. We note that as drafted the Bill does not impose a 'due regard' duty on Scottish Ministers and it is unclear whether this is deliberate.

[2] See amendment 151 on p3 of the Marshalled list of amendments. The amendment was disagreed to (For 52, Against 68, Abstentions 0).Available at:http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52as4-stage3-ml.pdf.

Such duties – for example the public sector duty regarding socio-economic inequalities in section 1 of the Equality Act 2010 – require authorities when making decisions to have due regard to some particular factor. If the intention of the drafter is to impose such an obligation, then it may be clearer if section 3(1) is drafted to impose a 'due regard' duty on Scottish Ministers.

There is, of course, a substantial body of case law in relation to the 'due regard' duty[3]. It allows authorities to balance compliance with other considerations, including other duties. 'Due regard' could therefore be viewed as a "soft" approach which does not provide for rights to be easily enforced.

Interpretation of legislation – Section 4

We note that the promoter of the Bill wishes this to take a similar approach to the interpretative obligation placed on courts by section 3 of the Human Rights Act 1998. Given that through the Human Rights Act the Westminster Parliament sought to impose such an interpretative obligation in respect of legislation passed by future parliaments the analogy is apt. However, as discussed above, in the section headed "The meaning of the Charter", the lack of a clear fount of jurisprudence in this area may pose difficulties for the courts.

Declaration of incompatibility – Section 5

This section – like section 2 and section 4 - also raises issues of certainty. It is clearly envisaged that the Court of Session will, probably in petitions for judicial review, potentially make declarations of incompatibility in respect of legislation passed by the Scottish Parliament after the passage of this bill.

We wonder whether judges will be reluctant to intervene. In the absence of convincing authority from countries that have incorporated the Charter into their constitutions, they may take the view that the Charter does not add much to the common law and decide not to overrule Parliament or change the way legislation is interpreted. We note that when considering the Charter in 2008 in the Court of Appeal of England and Wales, in *Shrewsbury & Atcham Borough Council, Congleton Borough Council v The Secretary of State for Communities and*

[3] Eg *R. (on the application of Domb) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941; *R. (on the application of Meany) v Harlow DC* [2009] EWHC 559 (Admin); *R. (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141.

*Local Government v Shropshire County Counci*l [2008] EWCA Civ 148, the then Lord Justice Carnwath observed at [41], in the context of a proposal to replace two-tier local government in some parts of England with unitary authorities: "At most, perhaps, the Charter emphasises the need for central government to tread warily in this area, with due respect for the independent democratic role of local government. But I would regard that as a principle already embedded in the common law (see *Secretary of State v Tameside BC* [1977] AC 1014 , 1047H–1048C, per Lord Wilberforce)".

Remaining Sections

We have nothing further to add in respect of the balance of the bill.