



## The Fundamental Rights of the Local State

A proposal for a Bill to incorporate the European Charter of Local Self-Government into law in Scotland

Consultation by  
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[www.europeancharter.scot](http://www.europeancharter.scot)

29 June 2018

## **CONTENTS**

**Foreword by Andy Wightman MSP**

**How the consultation process works**

**Aim of the proposed Bill**

- **Background**
- **The European Charter of Local Self-Government**
- **The Charter in Scotland**
- **The legal framework in Scotland**

**Detail of the proposed Bill**

- **Why incorporation is required**
- **What does incorporation mean?**
- **Consequences of incorporation**
- **Implementation and costs**
- **Equalities issues**
- **Sustainability development issues**

**Annex I – The European Charter of Local Self-Government**

**Questions**

**How to respond to this consultation**

**Privacy notice**

## FOREWORD

*The strength of free peoples lies in the municipality. Municipal institutions are to liberty what primary schools are to learning; they put it within easy reach of the people; they let it taste its peaceful exercise and accustom them to making use of it. Without municipal institutions a nation can give itself a free government, but it will not have the spirit of liberty.*

Alex de Tocqueville, *Democracy in America* (1835)

Scotland's local government has a long and varied history since the 12<sup>th</sup> century when the first Royal Burghs were established. These local institutions and the later parishes, counties, districts and regions have provided the people of Scotland with the most local and continuous governance of many of the things that matter most to them.

Over the past century, however, the status, powers and freedoms of local government have been slowly eroded and marginalised. Governments of all persuasions have tended to assume that the answer to providing more effective public services is to exercise power and control from the centre. At the same time, whole spheres of local governance (such as Scotland's former 196 town councils) have been eliminated.

Over the 19 years since the Scottish Parliament was established, local democracy has been seen as the unfinished business of devolution. Whilst not all agree on the specifics, there is a growing political consensus that the challenges and opportunities facing communities across Scotland require more local solutions.

That's why I believe that we need to deepen and strengthen our system of local governance and this proposed Member's Bill is a step along that road.

As the McIntosh Commission on Local Government noted in 1999:

*"It could be said that Scotland today simply does not have a system of local government in the sense in which many other countries still do. The 32 councils now existing are, in effect, what in other countries are called county councils or provinces"*<sup>1</sup>

In 2013, the Convention of Scottish Local Authorities (COSLA) argued that:

*"Scotland is one of the most centralised countries in Europe. It is no coincidence that our European neighbours are often more successful at improving outcomes, and have much greater turn out at elections.*

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<sup>1</sup> Scottish Government (22 June 1999). *McIntosh findings published today* (news release). Available at: <http://www.gov.scot/News/Releases/1999/06/fc688349-b6fb-4ce8-800c-d05d7f59fb5b>. Accessed 21 June 2018.

*“We cannot hope to emulate the success of these countries without acknowledging that these councils and their services are constitutionally protected and their funding secured by law, even with regard to national policy making.”<sup>2</sup>*

It was in this context that COSLA established the cross-party Commission on Strengthening Local Democracy.<sup>3</sup> In its final report, published in August 2014, it recommended that all of the articles of the European Charter of Local Self Government<sup>4</sup> (hereafter referred to as the Charter) be incorporated into the law of Scotland.

The Charter is a Council of Europe treaty, ratified by the UK in 1998, which seeks to enshrine a series of legal rights for local government. Incorporating the Charter into Scots law would strengthen the constitutional role of local government and provide citizens with a domestic remedy in the event that the provisions of the Charter were being violated.

I am pleased, therefore, to publish this consultation for a proposed Member’s Bill to make provision for the incorporation into Scots law of the European Charter of Local Self-Government.

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<sup>2</sup> Local Matters (2013). *COSLA’s Vision for Stronger Local Democracy*.

<sup>3</sup> Commission on Strengthening Local Democracy. <https://www.localdemocracy.info/>. Accessed 21 June 2018.

<sup>4</sup> Council of Europe (1984). *European Charter of Local Self-Government*. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122>. Accessed 21 June 2018.

## HOW THE CONSULTATION PROCESS WORKS

This consultation relates to a draft proposal I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

At the end of the consultation period, all the responses will be analysed. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Government Bills Unit (NGBU) and will therefore comply with the Unit's good practice criteria. NGBU will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at;  
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Email: [andy.wightman.msp@parliament.scot](mailto:andy.wightman.msp@parliament.scot)  
Tel. No. 0131 348 6368

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website ([www.parliament.scot](http://www.parliament.scot)) under Parliamentary Business / Bills / Proposals for Members' Bills.

## AIM OF THE PROPOSED BILL

### Background

This consultation paper sets out the background and rationale for a proposed Member's Bill to incorporate the Charter into Scots law. The purpose of the consultation is to seek views on:

- a. Whether you agree that the Charter should be incorporated; and
- b. Whether there are any legal questions that need to be addressed in the Bill.

This consultation paper provides some background to international treaties, the Council of Europe and the issues involved in incorporation. It then provides an outline of the proposed Bill before asking a number of questions which form the core of this consultation.

### The European Charter of Local Self-Government

The Charter is a treaty of the Council of Europe.<sup>5</sup> The Charter was adopted in June 1985 and it is now in force in every member state of the Council of Europe. The UK signed the Charter on 3 June 1997, ratified the Charter on 24 April 1998 and it came into force on 1 August 1998.

Article 12 of the Charter provides that each signatory "undertakes to consider itself bound by at least twenty paragraphs of Part I of the Charter" with at least ten selected from a prescribed list. Each signatory is required to notify the Secretary General of the Council which of the provisions it has selected when it ratifies the Charter. In ratifying the Charter in 1998, the UK agreed to be bound by all the Articles of Part I of the Charter (Parts II and III relate to procedural matters) in relation to all 32 councils established by the Local Government (Scotland) Act 1994. The full text of the Charter is annexed to this consultation. In summary, its ten substantive articles:

- Recognise the principles of local self-government in domestic legislation and, where practicable, in the constitution;

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<sup>5</sup> The Council of Europe was founded in 1949 as an international European organisation to promote democracy and protect human rights and the rule of law across the continent of Europe. The Council of Europe is an international organisation comprising 47 member states and the United Kingdom is one of the eight founding members. Of the 223 international treaties introduced by the Council of Europe, the best known is the European Convention on Human Rights and Fundamental Freedoms (ECHR). The UK is obliged to observe and implement all international treaties and the Scottish Government and Scottish Parliament have the same obligations in relation to those parts of international agreements that relate to devolved matters. Details of the Treaty are available on the Council of Europe's website at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122>. Accessed 21 June 2018.

- 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;
- Prescribe the basic powers and responsibilities of local authorities in law;
- Require prior consultation of local communities in relation to any changes in local authority boundaries;
- Enable local authorities to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management;
- Ensure that the conditions of office of local elected representatives provide for free exercise of their functions;
- Ensure that any administrative supervision of local authorities is only exercised according to procedures and in such cases as are provided for by the constitution or by statute;
- 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
- Entitle local authorities, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.

The Charter makes no provision for any arbitration or judicial oversight of the provisions of the treaty. Instead, the observation of the articles of the Charter is monitored by the Council of Europe's internal structures. This is now done through a programme of country by country monitoring by rapporteurs appointed by the Council's Congress of Local and Regional Authorities.

Local government across the UK has long supported the Charter, with COSLA arguing as far back as 1981 that the reforms to the fiscal autonomy of local government being taken forward by the UK Government would be in breach of the – at that point – draft Charter's provisions.<sup>6</sup>

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<sup>6</sup> See Official Report of the Sixteenth Ordinary Session of the Council of Europe Congress of Local and Regional Authorities in Europe 27-20 October 1981. The draft charter in circulation in 1981 was virtually identical to the Charter that was eventually agreed and adopted.

Congress resolution 58 (1997) identified the United Kingdom as one of the countries where major problems of local democracy existed. In response to a monitoring visit to the UK in 1998, the recommendations of the Congress included:<sup>7</sup>

- To increase seriously local government's financial capacities by developing a much higher share of 'own income' as compared to State grants, and by abolishing practices such as rate-capping, as well as by localising the business rate; and
- To establish that the principles accepted by the UK within the Charter should be incorporated in domestic law and considered as binding by the courts.

By 2014, following a monitoring visit by Council of Europe rapporteurs to the UK, which included a specific visit to Scotland, Congress once again expressed concern in resolution 353, 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".*<sup>8</sup>

## **The Charter in Scotland**

The question of the constitutional status of local government came into sharp focus with the establishment of the Scottish Parliament and concerns it would lead to a centralisation of power within Scotland to the detriment of local authorities.

In 1999, the McIntosh Commission on Local Government recommended a series of reforms to strengthen and formalise the role of local government within the new devolved arrangements.<sup>9</sup>

Since the establishment of the Scottish Parliament, there have been only sporadic mentions of the Charter but in recent years there has been a growing interest in the role it might play in strengthening local democracy.

During the passage of the Community Empowerment (Scotland) Bill in 2014-15, an amendment was lodged at Stage 3 by Tavish Scott MSP that would have imposed a

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<sup>7</sup>Report on Local and Regional Democracy in the United Kingdom - CG (5) 7 Part II <https://rm.coe.int/168071af17> Accessed 22 June 2018.

<sup>8</sup> Congress of Local and Regional Authorities (2014). *Recommendation 353 (2014), Local and regional democracy in the United Kingdom*. Available at: [https://search.coe.int/congress/Pages/result\\_details.aspx?ObjectId=0900001680719267](https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=0900001680719267) Accessed 21 June 2018.

<sup>9</sup> Scottish Government (22 June 1999). *McIntosh findings published today* (news release). Available at: <http://www.gov.scot/News/Releases/1999/06/fc688349-b6fb-4ce8-800c-d05d7f59fb5b> Accessed 21 June 2018

duty on Scottish Ministers, in exercising their functions, to observe and promote the principles and provisions of the Charter.<sup>10</sup>

More recently, COSLA's Commission on Strengthening Local Democracy recommended incorporating the Charter into Scots law. In its final report, the Commission argued that, in order to strengthen and deepen local democracy, local government's existence and functions should be placed on a firmer statutory footing. Whilst it recognised that Scotland and the UK were unusual in not having a codified, written constitution, the statutory incorporation of the Charter was nevertheless viewed as a means to secure certain fundamental rights that would otherwise be provided by a constitution or basic law.

### **The legal framework in Scotland**

Schedule 5 to the Scotland Act 1998 lists the subject-matters that are "reserved" to the UK Parliament (meaning that the Scottish Parliament cannot legislate on them), and this includes:

*7. – (1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.*

*(2) Sub-paragraph (1) does not reserve –*

- (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,*
- (b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.*

In other words, the Scottish Parliament can legislate for the purpose of observing and implementing international obligations so far as they relate to devolved matters. With regard to the European Convention on Human Rights (ECHR) and EU law, the Parliament has additional obligations and legislation must not be incompatible with any of the Convention rights or with Community law.

Ultimately, responsibility for complying with the terms of international obligations falls to the UK as the party to international treaties. The UK Government can be held to account in a variety of ways, including recourse to the courts, in relation to alleged breaches of Convention Rights or EU law.

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<sup>10</sup> Amendment 151 – see page 3 of the Marshalled List: [http://www.scottish.parliament.uk/S4\\_Bills/Community%20Empowerment%20\(Scotland\)%20Bill/b52as4-stage3-ml.pdf](http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52as4-stage3-ml.pdf). Accessed 21 June 2018. The motion was disagreed to (For 52, Against 68, Abstentions 0).

Under section 58 of the Scotland Act 1998, the Secretary of State can also, by Order, revoke secondary legislation that s/he has reasonable grounds to believe is incompatible with international obligations. S/he may also direct Scottish Ministers either to implement such obligations or to halt any action which is held to be incompatible. This power has never been used.

Both the ECHR and EU law include provisions and mechanisms that enable any person to take legal action against the UK Government, Scottish Ministers, local government and public bodies (such as Police Scotland) where they believe that Convention Rights or EU law has been breached. No such procedures or mechanisms are available in most other international obligations, including in the Charter. Citizens, thus, have no recourse to a legal remedy if they believe that the Charter has been violated by executive or legislative action. Remedying this deficiency is the purpose of this proposed legislation.

The proposed Bill would incorporate the Charter into Scots law and allow anyone to take action in Scottish courts to challenge any action by Scottish Ministers or Act of the Scottish Parliament they believed were in contravention of the Charter. Furthermore, it would provide local government with a stronger statutory framework within which its rights are guaranteed and protected against encroachment.

## **DETAIL OF THE PROPOSED BILL**

### **Why incorporation is required**

It can often be difficult to hold Governments to account for any breach of an international treaty unless there are provisions within the treaty itself that explicitly create some kind of legal dispute mechanism. A good example is the ECHR which, as part of its provisions, created the European Court of Human Rights where parties can take cases to uphold their human rights under the Convention.

Many international treaties, however, do not contain any specific means of dispute resolution. This does not matter to a great extent in countries with a so-called *monistic* legal system where international law is automatically incorporated into the law of the state and will have direct legal effect in domestic courts. The UK, however, has a *dualist* legal system whereby domestic law and international law are distinct and separate from each other. Broadly speaking, international law must be incorporated into domestic law by legislation in order for it to have the same legal authority as domestic law and unincorporated international law can only be used by the courts as an interpretative tool.

By incorporating the Charter into Scots law, the fundamental purpose is to make it justiciable in the courts of Scotland. In other words, if any party believed that any of the provisions of the Charter were being breached by executive actions of the Scottish Government, or by laws passed by the Scottish Parliament, they would be able to take a case to a Scottish court to have the arguments heard and decided upon.

## **What does incorporation mean?**

There is no one, standard way to incorporate international obligations and it could be done in a number of different ways. An example of a relatively comprehensive form of incorporation is the Human Rights Act 1998.<sup>11</sup> I recognise my proposal raises a number of complex issues which would require to be reviewed fully before legislation is drafted, taking into account also interaction with existing provisions within the Scotland Act 1998. Those issues include:

- Method by which the Charter is incorporated. For example, should the Charter be incorporated in a schedule to the Act or would the Act reference the Charter? The method of incorporation would need to allow sufficient flexibility to incorporate any amendments to the Charter or changes to those provisions ratified by the UK;
- Complaints mechanism. For example, should any complaints in relation to breaches of the Charter be made through existing court processes or via a Commissioner created for the purpose; and
- Judicial remedies. What judicial remedies should be available where an executive action or legislation was found to breach the Charter? Should it be possible to declare an action or legislation incompatible with the Charter? How far might the legislation go in terms of specifying judicial remedies?

While the particular approach to be taken with my proposed Bill would require careful consideration, and a full assessment made of what might be set out there, my preference would be:

- for the Bill to incorporate the Charter's provisions in a schedule,
- for the courts be the route through which any complaint be made about incompatibility of any executive or legislative act, and
- in terms of judicial remedies, for the courts to have the power to require executive action to remedy any breaches identified and to strike down any incompatible legislation.

## **Consequences of incorporation**

The consequences of incorporation would include:

- Enhanced status in law for local government;
- Legal guarantees of the status, powers and finances of local government;
- Providing citizens with the means by which to uphold the obligations of the Charter by empowering citizens to challenge any action of the Executive or Parliament which they consider violates the terms of the Charter;

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<sup>11</sup> The Human Rights Act 1998 provides for matters relating to the interpretation, public authorities' duties, remedies, derogations as well as related rights and proceedings consequent to the ECHR.

- Fettering the discretion of the Scottish Government to exercise its executive powers and the Scottish Parliament to exercise its legislative powers in ways which violate international law as set out in the Charter;
- Incorporation of the Charter might have impacts on existing legislation or in relation to the status, powers and finances of local government; and
- Given the limited examples of where international law has been incorporated into domestic law, there may be unintended consequences. This consultation will allow for any unintended consequences to be identified and solutions highlighted.

### **Implementation and costs**

On the one hand, the Bill would require no specific action and incur no additional costs following enactment as it simply provides a mechanism for alleged breaches of the Charter to be challenged. If a Commissioner was created to consider complaints under the Bill, however, there would be moderate costs associated with setting up that post.

On the other hand, there may be consequences (and would be some costs) where the Bill were to be used as a specific reference point for challenging an Act of the Scottish Parliament or actions of Scottish Ministers

Citizens or local authorities might consider that actions of the Scottish Government or existing legislative provisions violate the Charter or conflict with its provisions. Costs would be incurred if these parties chose to raise legal proceedings to challenge such actions of legal provisions. Where the courts did find that an Act of the Scottish Parliament or action of Scottish Ministers constituted a breach of the Charter, there would very likely be costs associated with remedying the breach.

### **Equalities issues**

It is not anticipated that the proposed Bill would have any negative impact on any groups with protected characteristics under the Equality Act 2010.

It is noted, however, that the Bill would not be able to overcome any of the existing barriers which make it difficult for some people with learning difficulties to use the legal system to protect their rights.

### **Sustainable development issues**

As part of the preparation for the proposed Bill, it was considered how the policy would impact on the sustainable development of the economy, society, environment and governance.

It is not considered that any issues would arise from the draft proposal which would negatively impact on the sustainable development of the economy, society, environment and governance.

## **European Charter of Local Self-Government**

Strasbourg, 15.X.1985

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### **Preamble**

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Considering that one of the methods by which this aim is to be achieved is through agreements in the administrative field;

Considering that the local authorities are one of the main foundations of any democratic regime;

Considering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe;

Considering that it is at local level that this right can be most directly exercised;

Convinced that the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen;

Aware that the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power;

Asserting that this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment,

Have agreed as follows:

### **Article 1**

The Parties undertake to consider themselves bound by the following articles in the manner and to the extent prescribed in Article 12 of this Charter.

## Part I

### **Article 2 – Constitutional and legal foundation for local self-government**

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

### **Article 3 – Concept of local self-government**

1 Local self-government denotes the right and the ability 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.

2 This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.

### **Article 4 – Scope of local self-government**

1 The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.

2 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.

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.

**Article 5 – Protection of local authority boundaries**

Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.

**Article 6 – Appropriate administrative structures and resources for the tasks of local authorities**

1 Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

2 The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.

**Article 7 – Conditions under which responsibilities at local level are exercised**

1 The conditions of office of local elected representatives shall provide for free exercise of their functions.

2 They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.

3 Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.

**Article 8 – Administrative supervision of local authorities' activities**

1 Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.

2 Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.

3 Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.

**Article 9 – Financial resources of local authorities**

1 Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.

2 Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.

3 Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.

4 The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.

5 The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.

6 Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.

7 As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.

8 For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.

**Article 10 – Local authorities' right to associate**

1 Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.

2 The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.

3 Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.

### **Article 11 – Legal protection of local self-government**

Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.

### **Part II – Miscellaneous provisions**

#### **Article 12 – Undertakings**

1 Each Party undertakes to consider itself bound by at least twenty paragraphs of Part I of the Charter, at least ten of which shall be selected from among the following paragraphs:

- Article 2,
- Article 3, paragraphs 1 and 2,
- Article 4, paragraphs 1, 2 and 4,
- Article 5,
- Article 7, paragraph 1,
- Article 8, paragraph 2,
- Article 9, paragraphs 1, 2 and 3,
- Article 10, paragraph 1,
- Article 11.

2 Each Contracting State, when depositing its instrument of ratification, acceptance or approval, shall notify to the Secretary General of the Council of Europe of the paragraphs selected in accordance with the provisions of paragraph 1 of this article.

3 Any Party may, at any later time, notify the Secretary General that it considers itself bound by any paragraphs of this Charter which it has not already accepted under the terms of paragraph 1 of this article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification, acceptance or approval of the Party so notifying, and shall have the same effect as from the first day of the month following the expiration of a period of three months after the date of the receipt of the notification by the Secretary General.

#### **Article 13 – Authorities to which the Charter applies**

The principles of local self-government contained in the present Charter apply to all the categories of local authorities existing within the territory of the Party. However, each Party may, when depositing its instrument of ratification, acceptance or approval, specify the categories of local or regional authorities to which it intends to confine the scope of the Charter or which it intends to exclude from its scope. It may also include further categories of local or regional authorities within the scope of the Charter by subsequent notification to the Secretary General of the Council of Europe.

### **Article 14 – Provision of information**

Each Party shall forward to the Secretary General of the Council of Europe all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of this Charter.

### **Part III**

### **Article 15 – Signature, ratification and entry into force**

1 This Charter shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 This Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date on which four member States of the Council of Europe have expressed their consent to be bound by the Charter in accordance with the provisions of the preceding paragraph.

3 In respect of any member State which subsequently expresses its consent to be bound by it, the Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

### **Article 16 – Territorial clause**

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Charter shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Charter to any other territory specified in the declaration. In respect of such territory the Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

**Article 17 – Denunciation**

1 Any Party may denounce this Charter at any time after the expiration of a period of five years from the date on which the Charter entered into force for it. Six months' notice shall be given to the Secretary General of the Council of Europe. Such denunciation shall not affect the validity of the Charter in respect of the other Parties provided that at all times there are not less than four such Parties.

2 Any Party may, in accordance with the provisions set out in the preceding paragraph, denounce any paragraph of Part I of the Charter accepted by it provided that the Party remains bound by the number and type of paragraphs stipulated in Article 12, paragraph 1. Any Party which, upon denouncing a paragraph, no longer meets the requirements of Article 12, paragraph 1, shall be considered as also having denounced the Charter itself.

**Article 18 – Notifications**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Charter in accordance with Article 15;
- d any notification received in application of the provisions of Article 12, paragraphs 2 and 3;
- e any notification received in application of the provisions of Article 13;
- f any other act, notification or communication relating to this Charter.

In witness whereof the undersigned, being duly authorised thereto, have signed this Charter.

Done at Strasbourg, this 15th day of October 1985, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

## QUESTIONS

### ABOUT YOU

(Note: Information entered in the “About you” section may be published as part of your response except where indicated in **bold**.)

1. Are you responding as:
- an individual – in which case go to Q2A
  - on behalf of an organisation? – in which case go to Q2B
- 2A. Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose “Member of the public”.)
- Politician (MSP/MP/peer/MEP/Councillor)
  - Professional with experience in a relevant subject
  - Academic with expertise in a relevant subject
  - Member of the public

Optional: You may wish to explain briefly what expertise or experience you have that is relevant to the subject-matter of the consultation:

- 2B. Please select the category which best describes your organisation:
- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
  - Commercial organisation (company, business)
  - Representative organisation (trade union, professional association)
  - Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
  - Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

3. Please choose one of the following:
- I am content for this response to be published and attributed to me or my organisation
  - I would like this response to be published anonymously
  - I would like this response to be considered, but not published (“not for publication”)

If you have requested anonymity or asked for your response not to be published, please give a reason. **(Note: your reason will not be published.)**

4. Please provide your name or the name of your organisation. **(Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.** Otherwise, this is the name that will be published with your response.)

Name:

Please provide a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. **We will not publish these details.**)

Contact details:

5. Data protection declaration

I confirm that I have read and understood the privacy notice attached to this consultation which explains how my personal data will be used.

## YOUR VIEWS ON THE PROPOSAL

(Note: Information entered in the “Your views on the proposal” section may be published unless the response is “not for publication”.)

### Aim and approach

1. The Charter should be incorporated into Scots law. Do you agree with this statement?

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

Please explain the reasons for your response.

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).

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

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).

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
- 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.

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

- 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.

### **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.

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

Please explain the reasons for your response.

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

## **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.

## HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

### Format of responses

You are encouraged to submit your response via an online survey (Smart Survey) if possible, as this is quicker and more efficient both for you and the Parliament. However, if you do not have online access, or prefer not to use Smart Survey, you may also respond by e-mail or in hard copy.

#### *Online survey*

To respond via online survey, please follow this link:

<http://www.smartsurvey.co.uk/s/LocalSelfGovernment/>

The platform for the online survey is Smart Survey, a third party online survey system enabling the SPCB to collect responses to MSP consultations. Smart Survey is based in the UK and is subject to the requirements of the General Data Protection Regulation (GDPR) and any other applicable data protection legislation. Any information you send in response to this consultation (including personal data) will be seen by the MSP progressing the Bill and by staff in NGBU.

Further information on the handling of your data can be found in the Privacy Notice, which is available either via the Smart Survey link above, or at the end of this document.

Smart Survey's privacy policy is available here:

<https://www.smartsurvey.co.uk/privacy-policy>

#### *Electronic or hard copy submissions*

Responses not made via Smart Survey should, if possible, be prepared electronically (preferably in MS Word). Please keep formatting of this document to a minimum. Please send the document by e-mail (as an attachment, rather than in the body of the e-mail) to:

andy.wightman.msp@parliament.scot

Responses prepared in hard copy should either be scanned and sent as an attachment to the above e-mail address or sent by post to:

Andy Wightman MSP  
Scottish Parliament  
Edinburgh EH99 1SP

Responses submitted by e-mail or hard copy may be entered into Smart Survey by my office or by NGBU.

If submitting a response by e-mail or hard copy, please include written confirmation that you have read and understood the privacy notice (set out below).

You may also contact my office by telephone on (0131) 348 6367.

### **Deadline for responses**

All responses should be received no later than **Friday 21 September 2018**. Please let me know in advance of this deadline if you anticipate difficulties meeting it. Responses received after the consultation has closed will not be included in any summary of responses that is prepared.

### **How responses are handled**

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received (other than “not for publication” responses) on my website [www.europeancharter.scot](http://www.europeancharter.scot). Published responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published.

Where responses include content considered to be offensive, defamatory or irrelevant, my office may contact you to agree changes to the content, or may edit the content itself and publish a redacted version.

Copies of all responses will be provided to the Scottish Parliament’s Non-Government Bills Unit (NGBU), so it can prepare a summary that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member’s Bill). The Privacy Notice (below) explains more about how the Parliament will handle your response.

If I lodge a final proposal, I will be obliged to provide copies of responses (other than “not for publication” responses) to the Scottish Parliament’s Information Centre (SPICe). SPICe may make responses available to MSPs or staff on request.

### **Requests for anonymity or for responses not to be published**

If you wish your response to be treated as anonymous or “not for publication”, please indicate this clearly. The Privacy Notice (below) explains how such responses will be handled.

## **Other exceptions to publication**

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory content. If I think your response contains such content, it may be returned to you with an invitation to provide a justification for the content or to edit or remove it. Alternatively, I may publish it with the content edited or removed, or I may disregard the response and destroy it.

## **Data Protection**

As an MSP, I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or ask for it not to be published. I will not publish your signature or personal contact information. The Privacy Notice (below) sets out in more detail what this means.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person's consent in writing and include it with your submission.

If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: [www.ico.gov.uk](http://www.ico.gov.uk).

## **Freedom of Information (Scotland) Act 2002**

As indicated above, NGBU may have access to information included in, or provided with, your response that I would not normally publish (such as confidential content, or your contact details). Any such information held by the Parliament is subject to the requirements of the FOISA. So if the information is requested by third parties the Scottish Parliament must consider the request and may have to provide the information unless the information falls within one of the exemptions set out in the Act. I cannot therefore guarantee that any such information you send me will not be made public should it be requested under FOISA.

Further information about Freedom of Information can be found at:

[www.itspublicknowledge.info](http://www.itspublicknowledge.info).

## **Privacy Notice**

This privacy notice explains how the personal data which may be included in, or is provided with, your response to a MSP's consultation on a proposal for a Member's Bill will be processed. This data will include any personal data including special categories of personal data (formerly referred to as sensitive personal data) that is included in responses to consultation questions, and will also include your name and your contact details provided with the response. Names and contact details fall into normal category data.

### **Collecting and holding Personal Data**

The Scottish Parliamentary Corporate Body (the SPCB) processes any personal data you send to it, or that the MSP whose consultation you respond to shares with it (under a data-sharing agreement) according to the requirements of the General Data Protection Regulation (EU) 2016/679 (the GDPR) and the Data Protection Act 2018 (the DPA)

Personal data consists of data from which a living individual may be identified. The SPCB will hold any personal data securely, will use it only for the purposes it was collected for and will only pass it to any third parties (other than the MSP whose consultation you respond to) with your consent or according to a legal obligation. Further information about the data protection legislation and your rights is available here:

<https://ico.org.uk/for-the-public/is-my-information-being-handled-correctly/>

### **Sharing Personal Data**

The data collected and generated by Smart Survey will be held by the Non-Government Bills Unit (NGBU), a team in the Scottish Parliament which supports MSPs progressing Members' Bills, and shared with the MSP who is progressing the Bill and staff in the MSP's office. Data submitted by other means (e.g. by email or hard copy) will be held by the MSP's office and shared with NGBU for the purpose of producing a summary of responses to the consultation. The MSP and NGBU are joint data controllers of the data. Under a data-sharing agreement between the MSP and the Scottish Parliament, access to the data is normally limited to NGBU staff working on the Member's Bill/proposal, the MSP and staff in the MSP's office working on the Member's Bill/proposal; but data may also be shared by NGBU with the Scottish Parliament's solicitors in the context of obtaining legal advice.

### **Publishing Personal Data**

"Not for publication" responses will not be published and will only be referred to in the summary of consultation responses in the context of a reference to the number of "not for publication" responses received and, in some cases, in the context of a general

reference that is considered by you to be consistent with the reasons for choosing “not for publication” status for your response.

Anonymous responses will be published without your name attached, your name will not be mentioned in the summary of consultation responses, and any quote from or reference to any of your answers or comments will not be attributed to you by name.

Other responses may be published, together with your name; and quotes from or references to any of your answers or comments, together with your name, may also be published in the summary of consultation responses.

Contact details (e.g. your e-mail address) provided with your response will not be published, but may be used by either the MSP’s office or by NGBU to contact you about your response or to provide you with further information about progress with the proposed Bill.

Where personal data, whether relating to you or to anyone else, is included in that part of your response that is intended for publication, the MSP’s office or NGBU may edit or remove it, or invite you to do so; but in certain circumstances the response may be published with the personal data still included.

Please note, however, that references in the foregoing paragraphs to circumstances in which responses or information will not be published are subject to the Parliament’s legal obligations under the Freedom of Information (Scotland) Act 2002. Under that Act, the Parliament may be obliged to release to a requester information that it holds, which may include personal data in your response (including if the response is “not for publication” or anonymous).

### **Use of Smart Survey software**

The Scottish Parliament is licensed to use Smart Survey which is a third party online survey system enabling the Scottish Parliament to collect responses to MSP consultations, to extract and collate data from those responses, and to generate statistical information about those responses. Smart Survey is based in the UK and is subject to the requirements of data protection legislation.

Any information you send by email or in hard copy in response to a consultation on a proposal for a Member’s Bill may be added manually to Smart Survey by the MSP’s office or by NGBU.

The privacy policy for Smart Survey is available here:

<https://www.smartsurvey.co.uk/privacy-policy>

While the collected data is held on SmartSurvey, access to it is password protected. Where the data is transferred to our own servers at the Scottish Parliament, access will

be restricted to NGBU staff through the application of security caveats to all folders holding consultation data.

### **Access to, retention and deletion of personal data**

As soon as possible after a summary of consultation responses has been published, or three months after the consultation period has ended, whichever is earlier, all of your data will be deleted from Smart Survey. If, three months after the consultation period has ended, a summary has not been published, then the information that we would normally publish – including all your answers to questions about the proposal (unless your response is “not for publication”) and your name (unless you requested anonymity), but not your contact details – may be downloaded from Smart Survey to SPCB servers and retained until the end of the session of the Parliament in which the consultation took place. If the MSP lodges a final proposal, he/she is required to provide a copy of your response (unless it was “not for publication”), together with your name (unless you requested anonymity), but not your contact details, to the Scottish Parliament Information Centre (SPICe), where it may be retained indefinitely and may be archived.

### **Purpose of the data processing**

The purpose of collecting, storing and sharing personal data contained in consultation responses is to enable Members to consider the views of respondents to inform the development of the Bill, with the support of NGBU. Personal data contained in consultation responses will not be used for any other purpose without the express consent of the data subject.

### **The legal basis**

The legal basis for collecting, holding, sharing and publishing your personal data is that the processing is necessary for the performance of a task carried out in the public interest, or in the substantial public interest, in accordance with Art 6(1)(e) GDPR, s8(d) DPA, or Art 9(1)(g) GDPR, s10 of and paragraph 6 of Schedule 1 of the DPA. The task is the support of Members seeking to introduce Members’ Bills to the Parliament. This is a core task of the SPCB and therefore a Crown function. The adequate support of the Members Bill process and the ability to seek, use and temporarily store personal data including special category data is in the substantial public interest.

If the person responding to the consultation is under the age of 12 then consent from the parent or guardian of the young person will be required to allow the young person to participate in the consultation process (however, the legal basis for the processing of the personal data submitted remains as the public interest task basis identified above).

## Your rights

Data protection legislation sets out the rights which individuals have in relation to personal data held about them by data controllers. Applicable rights are listed below, although whether you will be able to exercise data subject rights in a particular case may depend on the purpose for which the data controller is processing the data and the legal basis upon which the processing takes place. For example, the rights allowing for erasure of personal data (right to be forgotten) and data portability do not apply in cases where personal data is processed for the purpose of the performance of a task carried out in the public interest. The right to object to the processing of personal data for the purpose of a public interest task is restricted if there are legitimate grounds for the processing which override the interest of the data subject. This would be considered on a case by case basis and depends on what personal data is involved and the risks further processing of that data would pose to you. As described above, the collection, storage, sharing and publishing of personal data contained in consultation responses is a task carried out in the public interest, which means that these three data subject rights do not apply here or only in a restricted scope.

***Access to your information*** – You have the right to request a copy of the personal information about you that we hold.

***Correcting your information*** – We want to make sure that your personal information is accurate, complete and up to date and you may ask us to correct any personal information about you that you believe does not meet these standards.

***Objecting to how we may use your information*** – Where we use your personal information to perform tasks carried out in the public interest then, if you ask us to, we will stop using that personal information unless there are overriding legitimate grounds to continue.

***Restricting how we may use your information*** – in some cases, you may ask us to restrict how we use your personal information. This right might apply, for example, where we are checking the accuracy of personal information about you that we hold or assessing the validity of any objection you have made to our use of your information. The right might also apply where this is no longer a basis for using your personal information but you don't want us to delete the data. Where this right is validly exercised, we may only use the relevant personal information with your consent, for legal claims or where there are other public interest grounds to do so.

Please contact us in any of the ways set out in the *Contact information and further advice* section if you wish to exercise any of these rights.

## **Changes to our privacy notice**

We keep this privacy notice under regular review and will place any updates on this website. Paper copies of the privacy notice may also be obtained using the contact information below.

This privacy notice was last updated on 28 June 2018.

## **Contact information and further advice**

If you have any further questions about the way in which we process personal data, or about how to exercise your rights, please contact:

Head of Information Governance

The Scottish Parliament

Edinburgh

EH99 1SP

Telephone: 0131 348 6913 (Text Relay calls welcome)

Textphone: 0800 092 7100

Email: [dataprotection@parliament.scot](mailto:dataprotection@parliament.scot)

## **Complaints**

We seek to resolve directly all complaints about how we handle personal information but you also have the right to lodge a complaint with the Information Commissioner's Office:

- Online: <https://ico.org.uk/global/contact-us/email/>
- By phone: 0303 123 1113