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19 February 2021

Dear James

EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION) (SCOTLAND) BILL

I am writing to you following the lodging of the Scottish Government's Stage 2 amendments to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. These amendments are, by and large, of a technical nature and are intended to improve and provide clarity to the Bill without any impact on its overall policy aims.

I will, of course, provide an explanation of our amendments at Stage 2 but before that I thought it would be helpful to set out the intended improvements that they make to the Bill by sharing a summary of the purpose and effect of each of the Scottish Government amendments (attached below)

Further, following collaborative working with Andy Wightman I have added my name in support of all his amendments.

AILEEN CAMPBELL

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EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION) (SCOTLAND) BILL

The majority of the Government amendments are technical in nature and none of them impact on the overall policy aims of the Bill.

Amendment 1

<p>Text of amendment(s)</p>	<p>Section 1 Aileen Campbell</p> <p>1 In section 1, page 1, line 7, at end insert—</p> <p><() For the purposes of this Act, the Charter Articles are to be read subject to any reservations, objections or interpretative declarations by the United Kingdom as may be in force from time to time.></p>
<p>Purpose & Effect</p>	<p>The purpose of amendment 1 is to clarify that the Charter is applicable subject to any reservations, objections or interpretative declarations by the UK.</p> <p>As it stands the Bill does not reflect the two Declarations in the UK’s Reservations and Declarations for Treaty No.122 - European Charter of Local Self-Government (detail in the background notes) and therefore does not accurately reflect the UK’s ratification of the Charter.</p> <p>Declarations to an international treaty are interpretative statements by the State of what it considers the treaty, or particular provision of it, to mean and how it will apply in that State. Interpretative declarations do not purport to modify or exclude the treaty’s scope or meaning and they do not alter the treaty commitments assumed by the State.</p> <p>The effect of amendment 1 is to ensure that incorporation exactly mirrors the UK’s international obligations in relation to the Charter by accurately reflecting the UK’s ratification of the Charter, in particular the two Declarations in the UK’s Reservations and Declarations for Treaty No.122 - European Charter of Local Self-Government.</p>

Amendment 3

<p>Text of amendment(s)</p>	<p>Section 2 Aileen Campbell Supported by: Andy Wightman</p> <p>3 In section 2, page 1, line 19, leave out from <, introduction> to end of line and insert <or introduction of, or the exercise of other functions in relation to, a Bill for an Act of the Scottish Parliament></p>
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<p>Purpose & Effect</p>	<p>Amendment 3 amends the exclusion from the section 2(1) duty (to act compatibly with the Charter Articles) so that the exclusion applies to the preparation or introduction of, or the exercise of other functions in relation to, Bills.</p> <p>Amendment 3 has been prepared on the basis that the term “promotion” in section 2(2) of the Bill is intended to refer to any other matter or supporting activity in relation to Bills that are not preparation and introduction. “Promotion” is not a term that is usually used in relation to the progress of a Bill through Parliament and it may not cover some of the Scottish Ministers’ Bill functions. For example, the function of lodging a motion to withdraw a Bill (rule 9.13 of the Parliament’s standing orders) would not be “promotion” of the Bill.</p> <p>Functions that the Scottish Ministers exercise will include parliamentary functions as Bills progress but may also include non-parliamentary functions which the Scottish Ministers will exercise while a Bill progresses through Parliament, such as working with stakeholders and MSPs.</p> <p>Amendment 3 also clarifies the meaning of ‘primary legislation’ in section 2.</p> <p>The effect of amendment 3 is to provide that the exclusion in section 2(2) applies only to Bills.</p>
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Amendment 5

<p>Text of amendment(s)</p>	<p>Section 3</p> <p>Aileen Campbell Supported by: Andy Wightman</p> <p>5 In section 3, page 2, line 14, leave out <persons with an interest in local government in Scotland> and insert <— (a) such persons appearing to them to be representative of the interests of local authorities, and (b) such other persons as they consider appropriate></p>
<p>Purpose & Effect</p>	<p>The purpose of amendment 5 is to clarify the scope of the consultation duty in section 3(4). It amends section 3(4) so as to specifically require the Scottish Ministers, in complying with their duties under section 3(1) and (2), to consult “such persons appearing to them to be representative of the interests of local authorities”.</p> <p>This covers consultation with COSLA, any similar representative body and local authorities. In particular, it refers to the interests of “local authorities”, rather than “local government”. The latter is not a defined term, whereas “local authority” is defined as a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39)</p>

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	<p>(schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010).</p> <p>The amendment also requires the Scottish Ministers to consult “such other persons as they consider appropriate”. This would cover any other persons whom the Scottish Ministers consider to have a particular interest in local self-government and the autonomy of local authorities, including academics with relevant expertise in relation to those matters.</p>
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Amendments 6, 7, 8

Text of amendment(s)	<p>Section 4</p> <p>Aileen Campbell Supported by: Andy Wightman 6 In section 4, page 2, line 16, leave out from <(whether> to <Parliament> in line 18 and insert <mentioned in subsection (1A)></p> <p>Aileen Campbell Supported by: Andy Wightman 7 In section 4, page 2, line 19, at end insert— <p style="padding-left: 40px;"><(1A) That legislation is an Act or subordinate legislation (whenever enacted) to the extent that its provisions are within the legislative competence of the Scottish Parliament.></p> <p>Aileen Campbell Supported by: Andy Wightman 8 In section 4, page 2, leave out line 21</p> </p>
Purpose & Effect	<p>Amendments 6, 7 and 8 are technical amendments.</p> <p>Section 4(1) of the Bill provides that, so far as it is possible to do so, legislation (whether an Act or subordinate legislation) to the extent that its provisions are within the legislative competence of the Scottish Parliament must be read and given effect in a way which is compatible with the Charter Articles.</p> <p>Section 4(2)(a) of the Bill provides that the section 4 duty “applies to legislation whenever enacted”.</p> <p>Amendments 6, 7 and 8 have been lodged on the basis that the interpretation duty in section 4 of the Bill is to apply only to Acts and subordinate legislation, to the extent that their provisions are within the legislative competence of the Scottish Parliament. That is to say, the section 4 duty is not to apply to other types of legislation, such as retained direct EU legislation (as defined in section 20 of the European Union (Withdrawal) Act 2018).</p> <p>The effect of amendments 6, 7 and 8 is to make clear that section 4 of the Bill applies to legislation that is within the legislative competence of</p>

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	<p>the Scottish Parliament, provided that legislation is—</p> <ul style="list-style-type: none"> • an Act (defined in the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) to mean an Act of Parliament or an Act of the Scottish Parliament), or • subordinate legislation (defined in ILRA to mean “an instrument made or to be made by virtue of an Act of Parliament or an Act of the Scottish Parliament”).
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Amendment 13A

Text of amendment(s)	<p>After Section 6</p> <p>Aileen Campbell</p> <p>13A As an amendment to amendment 13, line 23, at end insert—</p> <p><() Failure to comply with the requirement in subsection (3) in relation to a draft Scottish statutory instrument does not prevent the regulations contained in the draft instrument from being approved and made.</p> <p>() Where a draft Scottish statutory instrument is laid before the Scottish Parliament for approval in breach of the requirement in subsection (3), the Scottish Ministers must explain to the Presiding Officer why the requirement has been breached.></p>
Purpose & Effect	<p>Section 6 of the Bill allows the Scottish Ministers to make such provision (in regulations) as they consider necessary or expedient in consequence of a declaration of incompatibility, including provision to amend any enactment (other than the Act resulting from this Bill).</p> <p>The remedial power under section 6 is an additional tool that may be used to respond to a court ruling and might be exercised, in particular, where other options are unavailable or considered unsuitable.</p> <p>Amendment 13 lodged by Andy Wightman, and supported by the Government, puts in place a form of super-affirmative procedure as was recommended by the Delegated Powers and Law Reform Committee at Stage 1. Amendment 13 requires the Scottish Ministers to lay an explanatory statement and draft regulations before the Scottish Parliament, after which a 60 day period must expire before the Scottish Ministers can lay a draft SSI containing the regulations for approval before the Scottish Parliament.</p> <p>The purpose of Amendment 13A is to provide for a degree of flexibility within the procedure put in place by amendment 13 to deal with more urgent cases that may arise.</p> <p>As highlighted by the Committee’s Stage 1 Report the Bill introduces a degree of uncertainty in terms of its effect and impact. There may be circumstances in future where it is necessary for the Government to act more quickly than is provided for within amendment 13.</p>

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	<p>The Government believes that to help mitigate any risks that arise from the Bill it is important to provide for flexibility within legislation, especially when there is uncertainty as to when it will be needed and in what circumstances. Amendment 13A does not change the requirement for the Scottish Ministers to lay before Parliament an explanatory statement and a draft of the regulations before laying a draft SSI containing the regulations for approval. In addition amendment 13A requires the Scottish Ministers to explain to the Presiding Officer why the 60 day requirement has been breached. The draft SSI will also still be subject to affirmative procedure allowing for effective Parliamentary scrutiny.</p> <p>The effect of amendment 13A would allow for a draft SSI to be put before Parliament before the expiry of the 60 day requirement put forward in Amendment 13. The Scottish Ministers would need to explain why the 60 day requirement was not being met.</p>
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Amendment 18

Text of amendment(s)	<p>Aileen Campbell 18 After section 9, insert— <Ancillary provision (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it. (2) Regulations under this section may modify any enactment (including this Act).></p>
Purpose & Effect	<p>The purpose of amendment 18 is to insert a new section (after section 9) that confers power on the Scottish Ministers to make ancillary provision.</p> <p>As with any new body of law, the Act resulting from this Bill (“the Act”) may give rise to a need for a range of ancillary provision. For example, consequential provision may be required to make necessary changes to related legislation. Incidental or supplementary provision may be required to address any oversight or unforeseen situation. Transitional, transitory or saving provision may also be required to deal with any legislative changes made by virtue of the Act, in particular by regulations under section 6(1), to tailor their application and effect in relation to circumstances existing before the new law comes into force.</p> <p>Given the potential need for incidental, supplementary or consequential provision, the power expressly enables the modification of any enactment. That includes the Act itself. For instance, should there be a need to make incidental or supplementary provision that complements any of the Act’s provisions, it may be more appropriate for that</p>

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provision to sit within the Act itself rather than in a separate SSI. Use of the power under section 1(3) may also require ancillary provision to be made that modifies the Act.

The purpose of conferring this new power on the Scottish Ministers is to allow for greater flexibility and efficiency in giving full effect to the Act or any provision made under it. Without the power to make ancillary provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intention of the original Bill for the Act.

The new power therefore enables the Scottish Ministers to make (by regulations) any ancillary provision they consider appropriate for the purposes of, in connection with or for giving full effect to—

- the Act itself, or
- any regulations made under section 1(3) or 6(1).

The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for giving full effect to any provision made by, or by virtue of, the Act. It would be outwith the scope of the power to use it to subvert the substantive effect of any of the Act's provisions. It could not, therefore, be used to make provision that is contrary to the Act's purposes or provisions.

Any regulations made under the proposed new section would be subject to the affirmative procedure by virtue of section 9(2) of the Bill and, as such, would require the Parliament's approval.

