This document summarises and analyses the responses to a consultation exercise carried out on the above proposal.

The background to the proposal is set out in section 1, while section 2 gives an overview of the results. A detailed analysis of the responses to the consultation questions is given in section 3. These three sections have been prepared by the Scottish Parliament’s Non-Government Bills Unit (NGBU). Section 4 has been prepared by Andy Wightman MSP and includes his commentary on the results of the consultation.

Where respondents have requested that certain information be treated as “not for publication”, or that the response remain anonymous, these requests have been respected in this summary.

In some places, the summary includes quantitative data about responses, including numbers and proportions of respondents who have indicated support for, or opposition to, the proposal (or particular aspects of it). In interpreting this data, it should be borne in mind that respondents are self-selecting and it should not be assumed that their individual or collective views are representative of wider stakeholder or public opinion. The principal aim of the document is to identify the main points made by respondents, giving weight in particular to those supported by arguments and evidence and those from respondents with relevant experience and expertise. A consultation is not an opinion poll, and the best arguments may not be those that obtain majority support.

Copies of the individual responses are available on the following website http://europeancharter.scot/consultation-responses/. Responses have been numbered for ease of reference, and the relevant number is included in brackets after the name of the respondent.

A list of respondents is set out in the Annexe.
SECTION 1: INTRODUCTION AND BACKGROUND

Andy Wightman’s draft proposal, lodged on 28 June 2018, is for a Bill to incorporate the European Charter of Local Self-Government into law in Scotland.

The proposal was accompanied by a consultation document, prepared with the assistance of NGBU. This document was published on the Parliament’s website, from where it remains accessible: http://www.parliament.scot/parliamentarybusiness/Bills/12419.aspx

The consultation period ran from 29 June to 21 September 2018.

The following organisations and individuals were sent copies of the consultation document or links to it:

- All 32 Scottish local authorities
- Commissioner for Ethical Standards in Public Life
- Professor Colin Copus, Professor of Local Politics and Director of the Local Governance Research Unit in the Department of Politics and Public Policy, De Montfort University
- Crown Office and Procurator Fiscal Service (COPFS)
- David Eiser, Research Fellow, Fraser of Allander Institute
- Electoral Reform Society
- Professor Chris Himsworth, Emeritus Professor of Administrative Law at the University of Edinburgh
- Improvement Service
- Professor Richard Kerley, Professor of Management, Queen Margaret University
- Law Society of Scotland
- Local Government Information Unit
- Professor Nicola McEwen, Professor of Territorial Politics and Co-Director of the Centre of Constitutional Change, University of Edinburgh
- Professor Aileen McHarg, Professor of Public Law, University of Strathclyde
- Professor James Mitchell, Chair of Public Policy, School of Social and Political Science, University of Edinburgh
- Reform Scotland
- Royal Society of Edinburgh
- Scottish Council of Voluntary Organisations (SCVO)
- Scottish Public Services Ombudsman
- Society of Local Authority Chief Executives (SOLACE)
- Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh
- Unison
A news release was issued on 29 June 2018. A video clip was prepared by the Scottish Parliament and this, together with the website www.europeancharter.scot, were shared regularly on social media during the three-month consultation period from Andy Wightman’s Twitter and Facebook accounts.

The consultation exercise was run by Andy Wightman’s parliamentary office.

The consultation process is part of the procedure that MSPs must follow in order to obtain the right to introduce a Member’s Bill. Further information about the procedure can be found in the Parliament’s standing orders (see Rule 9.14) and in the Guidance on Public Bills, both of which are available on the Parliament’s website:

- Standing orders (Chapter 9):
  http://www.scottish.parliament.uk/parliamentarybusiness/26514.aspx
- Guidance (Part 3):
  http://www.scottish.parliament.uk/parliamentarybusiness/Bills/25690.aspx
SECTION 2: OVERVIEW OF RESPONSES

In total, 44 responses were received.

The responses can be categorised as follows—

- 3 (7%) from representative organisations (Society of Local Authority Lawyers and Administrators in Scotland (SOLAR), COSLA and UNISON Scotland);
- 7 (16%) from local authorities (Argyll and Bute; West Lothian; North Ayrshire; Inverclyde; Shetland Islands; Orkney Islands and East Renfrewshire councils);
- 1 from a third sector organisation (which asked to remain anonymous); and
- 33 (75%) from members of the public

Of the 44—

- 8 (18%) respondents asked to be anonymous; and
- 5 (11%) respondents requested their submissions be treated as “not for publication”.

It should be noted that three responses (those from North Ayrshire Council (ID:25), the SOLAR (ID:26) and COSLA (ID:41) are almost identical.

The key themes which emerged through the responses were—

- Strong support for the incorporation of the Charter into Scots law. There was majority support for incorporation in the manner set out in the consultation document but several alternative methods were also suggested.
- Just over half of respondents supported complaints being made to a commissioner in the first instance with recourse to the courts on appeal.
- In terms of the judicial remedy available where an executive action is found to be in breach of the Charter, there was overwhelming support for the court having the power to overturn the action (although the supporters were split about whether the court should also have the power to punish the public authority).
- In terms of the judicial remedy available where legislation is found to be in breach of the Charter, there was clear support in favour of the courts having the power to strike down the legislation over the suggestion the court could declare the legislation incompatible but be unable to strike it down.
SECTION 3: RESPONSES TO CONSULTATION QUESTIONS

This section sets out an overview of responses to each question in the consultation document.

Respondents were asked—

**Question 1**

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

Forty-three respondents answered this question. Of these, a significant majority (39, 89%) agreed with the statement (36 fully agreed and three partially agreed). One (2%) disagreed, while three (7%) were neutral or unsure.

The response from East Renfrewshire Council (ID:44) did not answer the consultation questions and has not, therefore, been included in the figures indicating support for this statement (set out in the preceding paragraph). The content of its response, however, suggested it did support the general aims of the Bill.

The respondent who disagreed with the statement, and who asked to remain anonymous (ID:04) argued that local authorities’ decision-making processes would not be improved by incorporation. Andrew Fraser (ID:28), who indicated he was neutral, and the anonymous respondent (ID:35) who indicated they were unsure questioned the practical difference incorporation of the Charter would make.
One respondent, Chris Himsworth (ID:10) partially agreed with the proposed Bill on the basis that “it depends what is meant by ‘incorporation’”.¹

The main reasons given for agreeing with incorporation were—

**Meeting Scotland’s international treaty obligations**

A number of responses argued that, given that the UK ratified the Charter in 1998, it should be brought into force via national law to enable Scotland to meet its international treaty obligations.

North Ayrshire Council (ID:25), the SOLAR (ID:26) and COSLA (ID:41) argued that “the fact this treaty has not been brought into law in 20 years and is currently unenforceable is, at best, unusual and, at worst, unbecoming for a country which prides itself on taking its international obligations seriously”.

An important element of this for some respondents was that it would provide a route to challenge any perceived violations or breaches of the Charter.

In their responses, North Ayrshire Council (ID:25), the SOLAR (ID:26) and COSLA (ID:41) highlighted that Scotland has been found to be broadly compliant with most of its articles which suggests that “legal incorporation would not, therefore, entail significant change to the current landscape but, crucially, would ensure that local democracy is fundamentally built into Scotland’s system of democratic governance in a way which is not possible at the moment”.

One anonymous respondent (ID:27) argued that enabling local authorities to have recourse to the courts in order to protect their rights will be particularly important following the UK’s exit from the EU.

**Protection of local government powers and autonomy**

A number of respondents argued that local government powers have been eroded and that incorporation of the Charter would provide protection against further erosion.

Argyll and Bute Council (ID:21) argued “local government is one of the main foundations of a democratic society and, as such, its ‘right to exist’ should be codified and enshrined in law”.

David Sutton (ID:09) argued that incorporation was necessary because “we are increasingly seeing the UK Government and Scottish Government getting involved at a local community level to undermine local decisions and the decision-making process”. An anonymous respondent (ID:37) argued—

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“Currently, local government has little to guarantee its independence from the Scottish Parliament; essentially, it is too often treated as an agency of the Scottish Government. And councils have very circumscribed tax powers and next to no leverage when pressure is put on them – as per the council tax freeze. This would hopefully provide at least a partial remedy for that.”

Unison Scotland (ID:42) argued incorporation would—

“offer the basis for rules that would maintain a strong relationship between local and national government which respects the mandate of both now and in the future. Most importantly, it will strengthen local democracy and empower local authorities to work alongside their local communities to improve lives.”

Orkney Islands Council (ID:43) argued that incorporation would protect its legal status as “we do not wish to become part of some larger authority and wish formal legal protection against this. Currently, there is no legislative guarantee that the islands authorities can’t be amalgamated.”

A localised approach to decision-making and more effective partnership between central and local government

Many respondents stressed the importance of effective partnership working between central and local government to deliver public services and suggested incorporation of the Charter would assist this partnership working. East Renfrewshire Council (ID:44) argued that incorporation would “send a clear message about the importance of working across the difference ‘spheres’ of government and with our communities to improve outcomes for our residents”.

In their responses, North Ayrshire Council (ID:25), the SOLAR (ID:26) and COSLA (ID:41) argued that—

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

They suggested a more localised approach to decision making and delivering public services would be more effective—

“The effect of incorporation of the Charter would be to rebalance the relationship and pave the way for a stronger, longer term and more equal partnership between local and national government, with all the benefits associated with this for outcomes and democratic vibrancy. It would also clarify and strengthen the relationship between community
Many submissions thought that incorporation would support community empowerment and there was support from many respondents for more decision-making at local/community level. Elizabeth Meenagh (ID:18) believed “local decisions offer best value to the community in every sense; only local people know what their priorities are and, with community backing, projects are more likely to be successful”.

**The extent to which incorporation would change the landscape**

Some respondents commented on whether, or not, incorporation would result in considerable and visible changes in local government. In their responses, North Ayrshire Council (ID:25), the SOLAR (ID:26) and COSLA (ID:41) argued that incorporation “would not alter the structures of local government in Scotland, unilaterally change specific policies or laws or make any other changes that are rightly a matter for democratic debate or discussion”. Shetland Islands Council (ID:39), thought that incorporation would represent “the formal devolution of meaningful powers to the local level”.

**Question 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?

Forty-three respondents answered this question. Of these, 38 (88%) thought incorporation should be in the manner outlined in the consultation document; four (9%) thought incorporation should be done in another way, and the remaining respondent didn’t support incorporation at all.
Reasons given for incorporation in the manner outlined in the consultation document

A number of respondents who chose this option commented that they were not sure which method of incorporation would be best but trusted that the most appropriate method of incorporation would be identified via the consultation.

COSLA (ID:41) stated it agreed in “broad terms” that the Charter should be incorporated in the manner outlined in the consultation document but was “also amenable to a degree of flexibility in how it is delivered or translated into legislation, particularly where this might improve precision and fit with the Scottish system”. In addition, it noted that “some provisions of the Charter are heavily qualified, meaning that these may need to be made more prescriptive to give them greater effect”.

COSLA also argued that, because “the Charter is deliberately drafted to suit a variety of international context and systems, with the consequence that aspects of its language are necessarily imprecise … some redrafting … may be practical for these to be as straightforward as possible to interpret in law in Scotland”. COSLA argued “the Charter provisions have generally been subject to a similar process of translation elsewhere”.

COSLA said it was “very open to exploring other potential options [for incorporation] too”. It suggested other options may be a statutory enforceable ‘code’ on local governance or duty on Scottish Ministers to ‘comply with and promote the provisions of the Charter in the exercise of their powers and functions’.”
Reasons given for incorporation but not in the manner outlined in the consultation document

Of the four respondents choosing this option, two (North Ayrshire Council (ID:25) and the SOLAR (ID:26)) said that they agreed with “either option one or two as there are a range of legal options associated with the precise manner by which incorporation can best be achieved and which can be developed further as the prospect of a member’s bill takes further shape”. The rest of their responses were substantively similar to that provided by COSLA (ID:41). All three pointed out that the UK did not ratify the additional protocol on participation which was added in 2009 – and argued that incorporation should be extended to cover this additional protocol.

West Lothian Council (ID:23) in its response (to question 7 but set out in detail in this section) suggested a number of additional or alternative methods of incorporation which could be explored. These included—

- A “certificate” could be provided as an accompanying document to any Bill introduced to the Scottish Parliament stating that the Bill is compliant with the Charter (similar to the statement of legislative competence which is already required);
- A pre-legislative stage could be introduced in which a Scottish Parliament committee would consider a Bill’s compatibility with the Charter, with an obligation on the Scottish Government to “have regard to its opinion”;
- Measures equivalent to those recently created under the Islands Act, but for local government – thus requiring the Scottish Government to prepare a plan and report on it annually, requiring various public bodies to “have regard” to the needs of local government, and requiring the Government and other bodies to carry out assessments of the likely impact on local government of their policies, strategies and services; and
- A requirement to formally consult with COSLA and local authorities as part of the pre-legislative process.

Reasons given for not incorporating the Charter into Scots law

The only (anonymous) respondent who didn’t support incorporating the Charter into Scots law argued that “until the policing of accounts and truthfulness of articles and statements are sorted, councils are not honourable enough to handle such a move”.

Question 3

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

Thirty-seven respondents answered this question.
Advantages

The following advantages of incorporating the Charter into Scots law were suggested—

*Incorporation could provide a statutory basis for the status and autonomy of local government in Scotland*

North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) referred to this as a “legal back stop” to protect local authorities’ powers and functions.

Orkney Islands Council (ID:43) argued—

“The main advantage would be to cement parity of esteem between local and national government. It is considered that the protection of the status and rights of local government is fundamental to local democracy.”

Chris Himsworth argued the Charter was an effective way to achieve this goal as—

“Rather than devise a new catalogue of local government standards, those in the Charter already exist; have withstood the test of time; and already form the basis (as an international treaty) of obligations on all UK government institutions ... This would be a trail-blazing constitutional enterprise.”

*Incorporation could create a statutory right to challenge decisions by the Scottish Government, or Scottish Parliament legislation, considered to breach the Charter*

Louise McCafferty (ID:07) argued an advantage of the proposed Bill would be that it would “mean the public have recourse if they believe it [the Charter] is not being upheld”. North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) made a similar point.

There were differing views about whether the right would extend to individuals. West Lothian Council (ID:23) stated that, under the terms of the Charter, citizens were not able to make a complaint about an alleged breach.

*Incorporation could protect the rights of local communities and enable local solutions to local problems*

North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) argued that “improving the potential to design and deliver flexible services that are more sensitive to the circumstances and needs of different communities locally, with associated benefits for improving their impact, efficiency and effectiveness”.

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Incorporation could increase participation in local government elections

As Iain Nicol (ID:38) thought, “empowering local authorities is probably necessary to increase voter turnout for local elections [as], currently, there is a sentiment that local elections are unimportant”.

Incorporation could encourage greater partnership working between central and local government

North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) argued that—

“by clarifying the competencies of national and local government in the ways set out in the Charter, both spheres would need to commit to a new level of consensus and partnership working on shared issues, with an associated impact on the outcomes that national and local government can deliver together. [Incorporation would] deliver its most significant impact in creating and embedding a partnership approach to policy making, political culture and working practices.”

Incorporation could improve the level of debate and, thus, better inform the decision-making process

West Lothian Council (ID:23) argued that—

“Providing a domestic remedy and rights enforceable close to home will improve public debate and the processes and formulating, enacting and implementing legislation. … Incorporation [of the European Convention on Human Rights] through the Human Rights Act 1998 has raised the profile of the Convention and has concentrated the minds of policy-makers, legislators, public bodies, decision-makers and citizens. The same effects are likely if this Charter is incorporated in a similar way.”

Disadvantages

The following disadvantages of incorporating the Charter into Scots law were suggested—

Incorporation could damage the decision-making process

Argyll and Bute Council (ID:21) argued that Scottish Ministers might become reluctant or overly cautious for fear of the “negative reputational consequences” of a challenge.

Disadvantages of relying on legal challenges as a means to uphold the Charter

Some respondents recognised that incorporation could create a statutory right to challenge decisions by the Scottish Government or Scottish Parliament
legislation, but felt that the significant costs involved would substantially limit the number of organisations (and individuals, if the right to challenge was so extended) who would be able to raise a challenge. Unison Scotland (ID:42) was concerned that—

“without proper support to ensure access to justice for all, this [proposal] risks further empowering those who are already powerful in Scottish public life. ... As we know from our work, many fundamental rights are remote and inaccessible to ordinary people, particularly people living with poverty and economic disadvantage. Scotland needs to empower excluded communities, not add extra disadvantage. Exclusion from justice isn’t just about having the financial resources to fund a legal challenge but also the knowledge of your rights and where to find support to make a challenge.”

Argyll and Bute Council (ID:21) argued that a legal challenge could become “a time-consuming detour concerned only with technical matters of procedure that merely serve to delay the original decision”. It also argued that “the entry of unelected and unaccountable courts to the realm of ‘political’ decision-making could threaten parliamentary sovereignty”.

Shetland Islands Council (ID:39) argued any challenges would “create an additional burden for an already heavily committed legal system”.

Other views

One anonymous respondent (ID:04) argued that the proposal would not tackle what they felt to be the substantive problem that some local authorities don’t operate effectively: “councils already misbehaving would see this as carte blanche to continue their unfortunate way of handling matters”.

A significant number of respondents argued that there were no disadvantages to incorporation. Gavin McColl (ID:33) argued “there are no disadvantages for those who have a genuine respect and commitment to local democracy in incorporating the Charter into Scots law”.

Question 4

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

- through the courts
- through a commissioner created for the purpose
- through a commissioner in the first instance, with a right of appeal to the courts
- through a different mechanism, not the courts or a commissioner
- the Bill should not provide for any complaints mechanism?

In total 43 respondents answered this question. Eighteen (42%) were of the view that any complaint or breach of the Charter should be dealt with through
the courts. Two (5%) preferred complaints Charter to be dealt with through a commissioner, while 23 (53%) felt that complaints would be best dealt with through a commissioner in the first instance, with a right of appeal to the courts. There was no support for the other options.

Complaints about a breach of the Charter should be made through the courts

Chris Himsworth (ID: 10) felt that taking action through the courts lent credibility to the Charter and would ensure any breach was taken seriously. He argued that–

“Although Charter “incorporation” could make a wider contribution, the most significant consequence should be the justiciability in the courts of Scotland of its terms. The desirability of this is implied in the Charter’s own terms but would also be important to the ‘constitutionalisation’ of the Charter’s standards. The device of a new commissioner sounds potentially cumbersome. Of course, monitoring by the Congress of Local and Regional Authorities (on which the Scottish Parliament is represented) would continue.”

Elizabeth Meenagh (ID: 18) felt the complaints procedure must be seen to be transparent and that “the court system would offer the best chance of transparency and avoid the temptation and opportunity to cover up any issues”.

West Lothian Council (ID: 23) argued it would be more appropriate for breaches to be dealt with through the courts rather than expecting a
commissioner to be able to rule on such matters of law. The Council argued that—

“Complaints to a commissioner are unlikely to prove to be an effective remedy on its own. A commissioner may be established to have an advisory role, including giving opinions and issuing guidance (e.g. the Children and Young People’s Commissioner Scotland). It would not be practicable to confer powers on a commissioner to rule on issues of law and legal rights. It would not be appropriate even for a commissioner appointed by the Scottish Parliament to be given powers in relation to legislation by that Parliament or executive action by the Scottish Government or other public bodies”.

Complaints about a breach of the Charter should be made through a commissioner created for the purpose

An anonymous respondent (ID: 35) thought that—

“Avoiding courts is desirable wherever possible, as it is expensive and therefore not really available. So long as a commissioner truly has no unfair direct or indirect benefit that could influence their decision making, a commissioner is the best option”.

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

Argyll and Bute Council (ID:21) preferred this option on the basis that it addressed issues of accessibility whilst ensuring the status of the incorporated Charter. It argued that—

“The limitation of recourse to the courts could be perceived as excessive and inaccessible which, as a consequence, may serve to inhibit citizens from highlighting a perceived breach while the sole use of a commissioner may give the impression that the Charter is not being taken seriously. It would, therefore, be preferable that, in the first instance, an alleged breach is reported to a commissioner. The resulting arbitration may prove to be successful and, as often the case with arbitration, result in improved relationships. In the event that arbitration fails, the complainant would have the opportunity to appeal to a Scottish court”.

Bill Fraser (ID: 22) also felt that recourse to a commissioner in the first instance was preferable—

“A commissioner, with adequate powers and independent of government and the law, can act as a filter and provide resources for complainants who may lack funding and capacity. Right of appeal ensures complainants have access to the court system if a dispute cannot be resolved.”
Question 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)?

A total of 43 respondents answered this question. Eighteen (42%) were of the view that the Court should be able to overturn the action and punish the public authority. Twenty-one (49%) were of the view that the Court should be able to overturn the action (but not punish the authority). Three respondents (7%) felt that the Court should be able to declare the action unlawful (but not overturn it or punish the authority). One respondent (2%) believed that the court should have no power to declare the action unlawful (or to overturn it or punish the authority).

The court should be able to overturn the action and punish the public authority

Gearóid Mac a’ Ghobhainn (ID: 11) felt that such a process could help to ensure the accountability of public office—
“If, after negotiations and arbitration by a commissioner who has taken both legal and expert advice, the public authority continues with its executive action then the courts should be allowed the punish the public authority or even the officer(s) concerned. There needs to be an accountability for misconduct in public office especially when it is shown to be illegal.”

Liz Albert (ID: 19) thought the courts would need to be given the power to punish public authorities otherwise the Charter would be “toothless and ineffective”.

The court should be able to overturn the action (but not punish the authority)

A number of respondents expressed unease with the use of the term ‘punishment’. Elizabeth Meenagh (ID:18) argued that “‘punishment’ would be a waste of public resources” and thought that overturning the action should be enough to safeguard the integrity of the Charter and offer a learning opportunity for the local authority. Argyll and Bute Council (ID:21) argued—

“Punishing a breach of the Charter would be counterproductive as both Scottish ministers and Local Government share the same goal, to improve the lives of Scotland’s citizens. In the event that resolution cannot be reached by way of the Commissioner and the complaint reaches Court, remedial action should be limited to declaring the action unlawful and referring it back to the original decision-making body for reconsideration.”

An anonymous respondent (ID:35) argued that—

“so long as local authorities are starved of funds it would, in the greater scheme, be counterproductive to impose a financial penalty. Any punishment should be for a second or subsequent similar breach.”

The court should be able to declare the action unlawful (but not overturn it or punish the authority)

Simon Brooke (ID:30) thought that—

“The Courts provide a dispute resolution mechanism, but in a democracy they should not make law. My preference would be that the courts should have the power to reject a settlement proposed by a public authority (by declaring it unlawful) and to punish the authority if the authority does not produce a lawful alternative within reasonable time. But the court should not have the power to dictate what that alternative should be.”
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)?

Forty-three respondents answered this question. A large majority of respondents (32, 74%) thought the court should be able to strike down legislation found to be incompatible with the Charter. Ten respondents (23%) thought the court should be able to declare the legislation incompatible with the Charter (but not strike it down). One respondent, who asked for their response not to be published, felt the court should have no power declare the legislation incompatible with the Charter (or strike it down).

The court should be able to strike down the legislation

Many who supported this option argued that, without it, the proposed Bill would be ineffective. Bill Fraser (ID: 22) argued that, “if courts do not have this power, they cannot act effectively on behalf of local authorities, individuals or community groups”. Argyll and Bute Council (ID: 21) argued that—

“The basis of the Charter is to deepen and strengthen our system of local governance; therefore, the courts should have the authority to strike down the legislation as incompatible with the Charter. If the courts do not have the authority [to strike down incompatible legislation], the Charter becomes unenforceable and, by association, redundant leaving it susceptible to exploitation.”
Shetland Islands Council (ID:39) stated that—

“The ability of a court to strike down a parliamentary decision is already part of the law in Scotland. It is a small step to declare legislation incompatible with the Charter”.

The court should be able to declare the legislation incompatible with the Charter (but not strike it down)

One anonymous respondent (ID:04) expressed concern that this option might blur the line between law-makers and law-enforcers. The respondent was—

“hesitant to have our courts start meddling with policies. That would be going against the division of legislators and judges and that would give the courts too much power – exactly the reason the council should not have the power to self-govern themselves.”

Simon Brooke (ID:30) was also “wary of giving the courts effective power to dictate legislation” but thought that, “unless the court has the power to compel the public authority to think again, then a declaration of incompatibility is fairly toothless”.

**Question 7**

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

Twenty respondents answered this question.

Comments included the following points—

- Support for this within the broader context of decision-making powers being decentralised
- The need to ensure any costs associated with mounting a legal challenge could be capped and/or support with meeting those costs could be provided
- Clarity on a number of points was sought. West Lothian Council (ID:23) highlighted that the Charter does not expressly recognise a “citizen’s right to judicial remedy” and, thus, suggests that “restricting the right to enforce a judicial remedy to local authorities would seem to be a better option”
- Recognition that there is a level of public distrust of politicians and local authorities which may limit wider support for incorporation. Melissa Titus (ID:40) thought—

“The general public are usually quite critical and apprehensive of local councils. … I fear it will take a lot to convince the general
public that this [proposal] is a good thing. The idea of their local councils having more ‘power’ is very unappealing.”

- Chris Himsworth (ID:10) argued that—

“I do like the general approach adopted that, however "incorporation" is done, it should fully reflect existing constitutional practice represented in the devolution settlement and in the law and practice of the Human Rights Act 1998. This may point towards a solution which stops short of full statutory incorporation (just as the HRA does) and towards remedial outcomes such as declarations of incompatibility.”

**Question 8**

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

- Government and the public sector
- businesses
- individuals?

**Government and the public sector**

Forty-one respondents answered this part of the question. Eighteen (44%) thought incorporation would result in an increase in cost (of which only one thought the increase would be significant); 11 (27%) thought incorporation would have a broadly cost-neutral impact and five (12%) thought it would result in some decrease in cost. Seven respondents (17%) were unsure.
It was recognised that, if the post of a Commissioner was created to consider complaints about a breach of the Charter, there would be some set up costs. Views were mixed about how significant these would be.

It was also recognised that costs would fall to a local authority (or any other public authority) which sought to challenge an executive action or legislation. West Lothian Council (ID:23) argued that “liability for judicial costs would likely to be a chilling factor against the use of judicial remedies”.

Where a challenge was upheld, it was recognised that costs may fall to the Scottish Government to remedy the action which was found to be in breach of the Charter.

North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) argued that any short-term costs would be significantly outweighed by the longer-term savings achieved through more efficient and effective decision-making and the delivery of more localised services—

“There may be some costs associated with introducing or testing the application of the Charter in the rare circumstances that a breach is felt to have occurred. However, these are trivial compared to the wider efficiencies that are achievable by improving outcomes in this way. It is however anticipated that any such costs are likely to be incurred during the early period following incorporation. Once any historic elements are addressed then the policy making and scrutiny process would not require additional resourcing.”

**Businesses**

Forty-one respondents answered this part of the question. There was more consensus on this part of the question, with the majority (24, 60%) thinking that incorporation would have a broadly cost-neutral impact on businesses. Five respondents (13%) thought incorporation would result in some increase in cost and two respondents (5%) thought it would result in a reduction in costs. Nine respondents (23%) were unsure. There was little relevant discussion about the financial impact of the proposed Bill on business in the comments provided.

**Individuals**

Forty respondents answered this part of the question. Here, too, the majority (25, 63%) thought the proposed Bill would have a broadly cost-neutral impact on individuals. Six (15%) respondents thought it would lead to an increase in costs, three (8%) thought it would lead to some decrease in costs and six (15%) were unsure.

The issue of the potential cost of mounting a legal challenge – if the proposed Bill did extend this right to individuals – was highlighted.
Question 9

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

Nineteen respondents answered this question.

One, anonymous, respondent (ID:10) suggested “some quick and simple, low cost arbitration or mediation steps should be included prior to court or legal actions”.

West Lothian Council (ID:23) recommended that, “if a judicial remedy is to be given to citizens, a procedure should be introduced to limit liability to judicial costs of a case is unsuccessful. Such a procedure exists in relation to judicial review on environmental issues.”

Question 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?

This question was answered by 42 respondents. Nearly half (20, 48%) thought there would be some positive impact, 15 (36%) thought the impact would be neutral, and two (5%) though there would be some negative impact; the remaining 5 (12%) were unsure.
The following comments were made—

“Gender imbalance is prevalent throughout decision making in Scotland; especially court and judiciary. Until this is eradicated, there will not be fairness, parity or equality” (Anonymous, ID:02);

“People with "protected characteristics" are more often victims of politicians/officials. This would help equalise this a little” (David Hansen, ID:06);

“I don't see how it directly impacts on the Equality Act 2010. The Charter is about decentralising political power and empowering democracy more locally” (Gearóid Mac a’ Ghobhainn, ID:11);

“Local debate, increasing understanding and sharing of local success stories can only help society become fairer and contribute to a more equal society” (Elizabeth Meenagh, ID:18);

“There might possibly be some positives if more power is devolved locally, as this could make it more realistic for people with disabilities who cannot travel far to take part in political life more easily” (Liz Albert, ID:19); and

Whilst not a protected characteristic, some respondents (including UNISON Scotland, ID:42) highlighted that people on a low income may be disadvantaged in fully accessing their rights.

Question 11

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

Twenty-five respondents made a comment in relation to this question.

Some argued that the proposed Bill would not have any negative impacts on equality groups. David Hansen (ID:06) thought “the negative impact would be on those who currently have power, politicians/officials. This would help equalise the imbalance”.

A few respondents who considered that there may be some negative impact provided some suggestions as to how these could be minimised. Louise McCafferty (ID:07) wanted better access to legal aid and Bill Fraser (ID:22) argued that “full involvement by communities at development stage will right the problem of the ‘three-legged stool of government’ possessing only two legs at the moment: Holyrood and COSLA”.

North Ayrshire Council, the SOLAR and COSLA (ID:25, 26 and 41) argued that incorporation may help create a more equal society—
“… in many countries, more localised systems of democracy are also often associated with greater social and economic equality because in those systems there is a strong emphasis on the value of local choice and difference within an over-riding framework of legally specified duties and rights which are mandated by national government. … local public services are highly empowered to deliver services that meet these rights in ways that meet local circumstances”.

**Question 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?

This question was answered by 41 respondents. Thirty-three (80%) believed that the proposed Bill could be delivered sustainably; two (5%) that it could not be delivered sustainably and six (15%) were unsure.

Gearóid Mac a' Ghobhainn (ID:11) thought “it is about a distribution of the resources available in a fair manner not about making demands that cannot be met” and West Lothian Council (ID:23) was of the view that, “if the principle of incorporation is the right one, then the likely effect will be to improve decision-making and policy-making”.

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SECTION 4: MEMBER’S COMMENTARY

Andy Wightman MSP has provided the following commentary on the results of the consultation, as summarised in sections 1-3 above.

I thank all those who have taken the time to respond to the consultation on my draft proposal to incorporate the European Charter of Local Self-Government into Scots law. I would also like to thank the Non-Government Bill Unit for its expert guidance through this process and to Gillian Mackay in my office for handling the consultation process so efficiently.

The responses are well thought through and considered and I am pleased to note a substantial majority of consultees (83%) fully agree with the central proposal for incorporation. This represents an excellent basis upon which to lodge a final proposal. A similar proportion (88%) agreed with the proposed method of incorporation.

Opinion was split about how any breaches of the Charter should be dealt with. Of those responding to the question, 42% agreed that breaches should be dealt with through the civil courts. A further 53% supported a complaints process handled by a Commissioner in the first instance with a right of appeal to the civil courts.

There was strong support for providing the courts with the power to overturn executive action found to be incompatible with the Charter, although respondents were split on whether this should involve any sanctions being applied. In relation to legislation found to be in breach of the Charter’s provisions, 74% of consultees agreed that the Courts should have the power to strike down any such legislation.

I am heartened by the strong support demonstrated for the key proposals outlined in the consultation responses. I will reflect further on the reasons why some disagreed and on the qualifications and further observations made in a number of responses.
### ANNEXE: List of respondents

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<tr>
<th>Response</th>
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<td>27</td>
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<td>28</td>
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