

# **Correspondence from the Cabinet Secretary for Finance and Local Government, 17 February 2026**

Dear Ariane

## **Reconsideration of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill**

In my letter to Mark Ruskell MSP on 15 January 2025, which the Local Government, Housing and Planning Committee was copied into, I shared the amendments that the Scottish Government deems necessary to address the Supreme Court judgement, ensure that the Bill is able to progress to Reconsideration Stage within this Parliament and minimise the possibility of a further referral of the Bill to the Supreme Court in future. Following the passing of Mr Ruskell's motion to move the Bill to Reconsideration Stage on 4 February, the Scottish Government amendments accompanying my letter were lodged the following day. These include amendments to:

### **Section 2 (duty to act compatibly with Charter Articles)**

Restricting the duty on the Scottish Ministers to exercise functions compatibly with the Charter Articles only when those functions have been conferred by Acts of the Scottish Parliament (ASPs), Scottish Statutory Instruments (SSIs) made under Acts of the Scottish Parliament powers, or common law powers. The duty will still apply to UK Act amendments made to ASPs unless the relevant UK legislation expressly requires or permits Ministers to act incompatibly with the Charter Articles. Whilst we do not consider these amendments are necessary to bring the Bill within competence, we do consider they are necessary to reduce the risk of further legal challenge and to provide the best opportunity to complete reconsideration within this Parliament – a priority shared with both Mr Ruskell and the Bill's key stakeholder COSLA, as the local government representative organisation in Scotland.

### **Section 4 (interpretative duty) and section 5 (declaration of incompatibility)**

Restricting the interpretative duty and the power to issue declarations of incompatibility so that they apply only to ASPs and SSIs made under ASP powers.

### **Section 7 (power to remove or limit retrospective effect of decisions)**

Mirroring the revised scope of sections 4 and 5, ensuring it applies only to ASPs and SSIs made under ASP powers.

To support the Local Government, Housing and Planning Committee's scrutiny of the Scottish Government's draft amendments, I am pleased to now share more detailed explanatory notes similar to those produced for the equivalent Scottish Government amendments for reconsideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (now 2024 Act).

Should you have any questions about the amendments, my officials will be happy to provide further clarification.

Yours sincerely,

**Shona Robison**

## **Annexe European Charter of Local Self-Government (Incorporation) (Scotland) Bill – explanatory material to accompany sections 2, 4 and 5 as proposed to be amended by Scottish Government Reconsideration Stage amendments (17 February 2026)**

### **Introduction**

1. This explanatory material has been prepared by the Scottish Government in order to assist those reading the Reconsideration Stage amendments to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (“the Bill”) published in the Business Bulletin on 6 February 2026 and to help inform debate on the amendments. See also the “as proposed to be amended” version of sections 2, 4, 5 and 7 (also including new sections 5A and 5B) included in [the letter sent by the Cabinet Secretary for Finance and Local Government to Mark Ruskell MSP on 15 January 2026](#). This material will not form part of the Bill (should the Parliament agree to the amendments) and has not been endorsed by the Parliament.
2. This material should be read in conjunction with the Reconsideration Stage amendments and the “as proposed to be amended” version of sections 2, 4, 5 and 7 (also including new sections 5A and 5B) mentioned above. The material is not, and is not meant to be, a fully comprehensive description of the amendments. So where a provision does not seem to require any explanation or comment, or is not changed by the list of draft Reconsideration Stage amendments, none is given.

### **Overview**

3. The need for Reconsideration Stage arises from the Supreme Court judgment in [Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill and Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill \[2021\] UKSC 42](#).
4. The proposed amendments to the Bill address the Supreme Court’s findings in relation to sections 4 and 5 of the Bill.<sup>1</sup> In summary:
  - the amendments to section 4 provide that the duty to (so far as possible) read and give effect to legislation compatibly with the Charter Articles (as

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<sup>1</sup> See paragraphs 81 to 89 of the judgment.

defined in section 1 of the Bill) applies only in relation to legislation originating from the Scottish Parliament. The duty no longer applies to legislation originating from the UK Parliament.

- the amendments to section 5 similarly provide that the power to declare legislation incompatible applies only in relation to legislation originating from the Scottish Parliament. Legislation originating from the UK Parliament cannot be declared incompatible on the grounds that it is incompatible with the Charter Articles.
5. Consequential changes are also made to section 7 as a result of the amendments to sections 4 and 5.
  6. The published list of amendments also includes amendments to section 2, which requires the Scottish Ministers to act compatibly with the Charter Articles. This is despite section 2 not being discussed in the Supreme Court's judgment. The Scottish Government remains of the view that section 2 of the Bill, as it appeared in the "Bill as Passed", is within the Scottish Parliament's legislative competence. Section 2 does, however, have certain similarities with section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, as it appeared in that "Bill as Passed", and which was found by the Supreme Court to be outside the legislative competence of the Scottish Parliament. The amendments to section 2 have been lodged in order to minimise the possibility of the Bill being referred back to the Supreme Court if it is approved at Reconsideration Stage.
  7. The amendments to section 2 exclude from the duty to act compatibly with the Charter Articles functions which (while within devolved competence) are conferred by legislation originating from the UK Parliament rather than the Scottish Parliament. In addition, the amendments provide that, even where a function is conferred by legislation originating from the Scottish Parliament, the Scottish Ministers do not breach section 2 by acting incompatibly if they were required or entitled to do so by legislation originating from the UK Parliament.

## **An overarching point of information**

8. Legislation may amend other enactments. Where this happens, text inserted into one enactment by another enactment is, for most legal purposes, considered to form part of the enactment into which it is inserted rather than being considered to be part of the enactment which inserted the text. This is the basis on which the Bill, as proposed to be amended, proceeds.
9. A consequence of this is that sections 2, 4, 5 and 7 do not apply to text inserted by Acts of the Scottish Parliament (or subordinate legislation made under such Acts) into other enactments (such as Acts of Parliament or subordinate legislation made under such Acts). Similarly, text inserted into Acts of the Scottish Parliament (or subordinate legislation made under such Acts) by other enactments (such as Acts of Parliament or subordinate legislation made under such Acts) is considered to be part of the enactment into which it is inserted. In principle, therefore, sections 2, 4, 5 and 7 would apply to such text. However, the draft amendments include provision to restrict the application of these sections to

such text – further detail on these restrictions is provided in the discussion of each section.

## **Section 2: Duty to act compatibly with the Charter Articles**

10. As in the Bill as passed, subsection (1) imposes a duty on the Scottish Ministers to ensure that their actions are compatible with the Charter Articles (as defined in section 1 of the Bill). But the actions covered are now more limited than was the case in the Bill as passed. Specifically, it is only actions taken in exercise of a “relevant function” that now require to be compatible with the Charter Articles.
11. Subsection (2) defines “relevant function”. It sets out two tests, both of which need to be satisfied in order for a function to be a “relevant function”.
12. The first test is that the function is within devolved competence (within the meaning of section 54 of the Scotland Act 1998) (subsection (2)(a)).
13. The second test is that the function needs to be conferred by the common law (subsection (2)(aa)(iv)) or, if (more usually) it is conferred by an enactment, that enactment must be of a type listed in subsection (2)(aa)(i) to (iii).
14. Essentially, the types of enactment listed in sub-paragraphs (i) to (iii) are those enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation – so Acts of the Scottish Parliament, Scottish statutory instruments made entirely under a power conferred by an Act of the Scottish Parliament, and Scottish statutory instruments made partly under a power conferred by an Act of the Scottish Parliament and partly under a power conferred by an Act of Parliament. In the latter case, only functions conferred by provisions in the instrument which were enacted solely by virtue of the power conferred by the Act of the Scottish Parliament, plus provisions subsequently inserted directly into the instrument by an Act of the Scottish Parliament (or other subordinate legislation made under a power conferred by an Act of the Scottish Parliament), are subject to the subsection (1) duty.
15. This means that functions conferred by Acts of Parliament, statutory instruments made under powers conferred by Acts of Parliament and provisions of Scottish statutory instruments made under a power conferred by an Act of Parliament are not subject to the subsection (1) duty. As functions in reserved areas are already excluded by subsection (2)(a), subsection (2)(aa)(i) to (iii) mainly serves, in practice, to exclude devolved functions created by or under the authority of the UK Parliament.
16. It is not the case, however, that every incompatible action taken in exercise of a relevant function will involve a breach of subsection (1). Subsection (2B) sets out circumstances in which an incompatible action will not be such a breach. The circumstances are:
  - where the Scottish Ministers are required or entitled to act in the way they did (that is, incompatibly) by words which are contained in an enactment of a type not listed in subsection (2)(aa)(i) to (iii) – that is, as noted above,

enactments made by or under the authority of the UK Parliament rather than the Scottish Parliament (subsection (2B)(a)), and

- where the Scottish Ministers are required or entitled to act incompatibly by words which, despite being contained in an enactment that is made by or under the authority of the Scottish Parliament, were inserted by an enactment made by or under the authority of the UK Parliament (subsection (2B)(b)).
17. Any case in which the Scottish Ministers act incompatibly by virtue of a requirement or entitlement which emanates from the UK Parliament will therefore not involve a breach of subsection (1). It does not matter for this purpose whether the requirement or entitlement is inserted directly into (for example) an Act of the Scottish Parliament or whether the requirement or entitlement is given effect via an Act of Parliament (for example) making a non-textual modification (or “gloss”) of the Act of the Scottish Parliament.
18. Note that this does not mean that subsection (1) can never be breached in relation to a function conferred by (for example) an Act of the Scottish Parliament which includes words inserted by (for example) an Act of Parliament. The requirement or entitlement to act incompatibly must flow from the inserted words in order for subsection (1) not to have been breached. To illustrate, take a case where an Act of the Scottish Parliament requires the Scottish Ministers do something which is not in itself incompatible with the Charter Articles. If, in doing that thing, the Scottish Ministers act incompatibly, they will be in breach of their subsection (1) duty. Suppose that the Act of the Scottish Parliament is then amended by an Act of Parliament in some way. The amendment must create a requirement or entitlement to act incompatibly in order for any subsequent doing of the thing to not be a breach of subsection (2) – the mere fact of the Act of the Scottish Parliament having been amended by an Act of Parliament is not by itself sufficient to mean that no breach has occurred.

## **Section 4: Interpretation of legislation**

19. As in the “Bill as Passed”, subsection (1) requires certain legislation to be read and given effect (so far as it is possible to do so) in a way that is compatible with the Charter Articles. But the legislation in relation to which that duty applies has changed. Paragraphs (a) and (b) now set out that the legislation in relation to which the duty applies are words in an Act of the Scottish Parliament to which section 5A applies and words in subordinate legislation to which section 5B applies.
20. The words to which section 5A applies are words in an Act of the Scottish Parliament. But to ensure that words put there by an Act of Parliament, or subordinate legislation made under such an Act, are not affected by sections 4 or 5, section 5A applies only to words that are in an Act of the Scottish Parliament because:
- they are the Act’s original words, that is they were not inserted later, they were in the Bill for the Act when it was passed by the Scottish Parliament,

- they are words inserted into the Act by another Act of the Scottish Parliament, or
  - they are words inserted into the Act by subordinate legislation made under a power conferred by a provision which does not derive from an Act of Parliament (essentially, therefore, words inserted by subordinate legislation made under a power conferred by the Scottish Parliament).
21. The effect of this is that words inserted into an Act of the Scottish Parliament by an Act of Parliament or by subordinate legislation made (including by the Scottish Ministers) under a power conferred by an Act of Parliament do not require to be read and given effect in a way which is compatible with the Charter Articles under subsection (1).
22. Section 5B does for words in subordinate legislation what section 5A does for words in Acts. That is, for section 5B to apply to them, words must be contained in a Scottish statutory instrument originally made wholly or partly under a power conferred by a provision which does not derive from an Act of Parliament (essentially, therefore, an instrument made wholly or partly under a power conferred by the Scottish Parliament). In addition, the words must be contained in the instrument:
- as a result of the exercise of a power conferred by the Scottish Parliament – although it does not matter whether the words were contained in the instrument as originally made or subsequently inserted into the instrument by a subsequent exercise of the same or a different power conferred by the Scottish Parliament, or
  - as a result of being inserted into the instrument by words to which section 5A applies (so words inserted into the instrument by words which, although contained in an Act of the Scottish Parliament, were inserted into that Act by an Act of Parliament would not count as words to which section 5B applies).
23. The effect of this is that words contained in a Scottish statutory instrument by virtue of the exercise of a power conferred by the UK Parliament (including where that power is exercised by the Scottish Ministers) or by virtue of being directly inserted by an Act of Parliament do not require to be read and given effect in a way which is compatible with the Charter Articles.
24. Overall, therefore, subsection (1) of section 4, as read with sections 5A and 5B, now essentially provides that only words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation, require (so far as it is possible to do so) to be read and given effect in a way that is compatible with the Charter Articles.
25. Subsection (1A) is superseded by the new subsection (1) and so is removed.
26. Subsection (2) is adjusted to reflect the changes in the legislation to which subsection (1) applies, but its broad effect is unchanged: it continues to clarify that the requirement to (so far as possible) read and give effect to legislation in a way that is compatible with the Charter Articles has no effect on the validity,

continuing operation or enforcement of any incompatible subordinate legislation made by virtue of an Act of the Scottish Parliament, provided that removal of the incompatibility is prevented by provision in that Act or in a UK enactment.

## **Section 5: Declaration of incompatibility**

27. As in the “Bill as Passed”, section 5 allows certain legislation to be declared incompatible with the Charter Articles. But, as with section 4, the legislation which may be declared incompatible has changed. The legislation which can now be declared incompatible is described in paragraphs (a) and (b) of subsection (1): to be susceptible to declaration of incompatibility, words must be words to which section 5A or section 5B applies (see discussion of those sections in paragraphs 20 to 23 above).
28. Overall, therefore, the effect of the adjusted subsections (1) and (2), as read with sections 5A and 5B, is that only words enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation, can be declared incompatible. Words enacted by the UK Parliament, or by virtue of that Parliament delegating its power to make legislation, cannot be declared incompatible.
29. Subsection (3A) sets out conditions as to when incompatible subordinate legislation may or may not be declared incompatible. A broadly similar condition to that set out in subsection (3A)(a) was previously contained in subsection (4). The effect of subsection (3A)(a) is that a declaration of incompatibility may only be made in relation to incompatible words in subordinate legislation if the Act of the Scottish Parliament by virtue of which the subordinate legislation is made prevents removal of the incompatibility. Subsection (3A)(b) adds a second restriction on the ability to make an incompatibility declaration in relation to incompatible subordinate legislation, the effect of which is that an incompatibility in subordinate legislation cannot be subject to a declaration of incompatibility if the incompatibility requires to be included in order to ensure that provision in a UK enactment is given effect.
30. The overall effect is that a declaration of incompatibility can be made in relation to subordinate legislation only if there is a requirement to include the incompatibility deriving from the Act of the Scottish Parliament by virtue of which the subordinate legislation is made.
31. Subsections (3) and (7) are superseded by the new subsections (1) and (2), while subsection (4) is superseded by subsections (1), (2) and (3A). All of these subsections are therefore removed.

## **Section 7: Power to remove or limit retrospective effect of decisions etc.**

32. Subsection (1) sets out the circumstances in which a court may exercise the powers set out in subsection (2) (that is, power to remove or limit any retrospective effect of a decision or to suspend the effect of a decision in order to allow an incompatibility to be addressed). Subsection (1)(b) relates to incompatibilities in subordinate legislation enacted before section 2 comes into

force. (After section 2 comes into force, the Scottish Ministers will breach section 2 by making incompatible subordinate legislation in exercise of a relevant function, a circumstance caught by subsection (1)(a)). As a result of the changes made elsewhere in the Bill, the powers conferred by subsection (2) no longer need to be available in relation to incompatible words contained in subordinate legislation to which section 5B does not apply or in relation to cases where removal of an incompatibility is prevented by a UK enactment.

33. Sub-paragraph (i) of subsection (1)(b) is therefore adjusted to match sections 4 and 5, that is, so that it applies only in relation to words in subordinate legislation to which section 5B applies. Sub-paragraph (ii) of subsection (1)(b) is similarly adjusted so that it reflects the new circumstances in which a declaration of incompatibility may or may not be made (see section 5(4A)) and in which the validity, continuing operation or enforcement of incompatible words in subordinate legislation is not affected by section 4 (see section 4(2)).