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**APPENDIX 1**

**Response by the Society of Local Authority Lawyers and**

**Administrators in Scotland (SOLAR)**

**Incorporating the Charter of Local Self Government into law**

1. **Introduction**
	1. Incorporation of the Charter would deliver a number of benefits. In particular, while it would introduce for the first time the possibility of legal checks and balances in support of local democratic choices and control, the significant practical advantages of incorporation lie in the positive impact that doing so would have on everyday culture and practice. This is because 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.
	2. In other words, a key success measure of incorporation would be that there is not routine recourse to the potential for legal challenge it would ultimately create; much like legislation on equalities, public smoking and seat belts, the law would provide a legal back stop, but in doing so deliver its most significant impact in creating and embedding a partnership approach to policy making, political culture and working practices. Indeed, international experience suggests where these rights are set out then many of the debates that have taken place in Scotland about how power is used do not take place; national and local government simply get on with the job of using good democratic governance to focus on improving outcomes.
	3. Another key point is that this is a Treaty of the Council of Europe, adopted in full by the UK in 1998. The norm is that all such treaties are brought into force in national law. 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. If there is an issue with this Charter, the onus is on Government to demonstrate why it should not be adopted. Scotland now has the opportunity to take the lead through legislation.
	4. Throughout the last 40 years we have occasionally seen Central Governments adopt a ‘command and control’ approach to local government, seeing local authorities as the delivery arm of central government. The climate has now changed. There is a greater acceptance of the need for communities to be empowered, to work in partnership with communities and of subsidiarity, that power should be delegated to the lowest effective level. Recognising the essential role of local authorities in this process through adoption of the Charter is an important step on this journey.
	5. Incorporating the Charter of Local Self Government into law in Scotland will strengthen Scotland’s overall system of democracy and create the foundations for an enduring and progressive partnership between national government, local government and communities. It is key to building on local and national government’s joint commitment to improve outcomes and renew democratic participation across Scotland.
	6. Currently Scotland and the UK is also highly unusual because its basic powers and rights are not set out in law in the way that is commonplace internationally. Instead, it is the Scottish Parliament and Ministers that have sole power to set the shape, size, powers and functions of local decision making.
	7. There are a number of reasons why we believe that the European Charter of Local Self- Government should be incorporated into law in Scotland:
* Firstly, doing so would strengthen local and national government’s ability to work jointly to improve outcomes in communities across Scotland.
* Secondly, it would strengthen Scotland’s democracy by ensuring that communities enjoy the same local democratic rights that are already commonplace across Europe and beyond.
* Thirdly, it would deliver the unfinished business of the Scottish Parliament by ensuring that for the first time this partnership between national and local government is built into Scotland’s system of democratic governance, and reflected in its day to day culture and practice.
* Fourthly, it would ensure that Scotland fully complies with international treaty obligations, and addresses outstanding issues that have previously been identified. It would also provide a springboard for the UK Government to similarly comply with its obligations. Failure to bring this into effect sends out the opposite message, that the Government never had any intention to comply the Charter.
	1. These points are explored below.
1. **Improving Outcomes**
	1. National elected government has a clear mandate to set outcomes for the nation and protect in law all of our rights as citizens. However, we believe that to successfully deliver these outcomes, local government and communities need to work in ways that suit local circumstances and priorities.
	2. There is a 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.
	3. So too is there consensus that ‘one size fits all’ ways of doing things no longer fit Scotland today, and that working from the top down cannot deliver the outcomes our communities need. What works best in small rural communities does not always fit Scotland’s cities, just as the challenges and opportunities in our towns are not the same as on our islands.
	4. In other words, it is now accepted that the challenges and opportunities Scotland faces require a more local approach to decision making and public services. Change is already taking place, for example in relation to communities being able to participate in decision making and budgeting. The Community Empowerment (Scotland) Act 2016, for example, gives life to an annex to the Council of Europe Charter on Local Self-Governance, requiring municipalities to make arrangements to engage with their local citizens. Legal rights to participate, the community right to buy, citizen’s panels and participatory budgeting all have their legal basis here.
	5. With broad consensus now achieved, incorporation of the Charter into law is therefore the next step on Scotland’s progressive democratic journey, and provides an ideal mechanism to create a new relationship between national and local government which recognises the diversity of our communities, and which galvanises and strengthens a more progressive, participative and effective approach to delivering outcomes.
2. **Strengthening Communities’ Democratic Rights**
	1. The Charter of Local Self Government is the benchmark international treaty which sets standards for protecting the rights of local authorities and the right of local people to participate in their decisions. Its purpose is therefore to bring power closer to local people and set out the basic local democratic powers and freedoms they should enjoy.
	2. The principles laid down in the Charter have already been universally recognised in the domestic legal systems of each of the other 46 members of the Council of Europe. In many of these countries and beyond, the principle of local self-government is also written into national Constitutions. As the sole member yet to do so, we are therefore significantly out of step with most other European countries.
	3. Similar principles are also common around the world; in 2005, for example, the “Aberdeen Agenda” established standards for local democracy and good governance which were formally incorporated into the new Commonwealth Charter by Heads of Government in 2013.
	4. Incorporating the Charter into law would allow Scotland to join this international democratic family and for the first-time guarantee Scotland’s local communities the kind of local choices and democratic controls that are already taken for granted elsewhere. In these countries, local democracy is not something to be debated; it is simply part of the governance of the country.
3. **Deepening and Strengthening Partnership between Scotland’s Spheres of Government**
	1. Despite the establishment of the Scottish Parliament 19 years ago, strengthening local democracy is widely acknowledged to be the unfinished business of devolution. There is currently no overall framework in Scotland or the UK setting out the standard ‘rules’ by which national and local government should work together to understand their shared responsibilities for improving outcomes across the country. Instead, the system in Scotland remains solely directed by, and dependent on the Scottish Parliament.
	2. That is not to say that good partnerships do not exist at the moment, or that the Scottish Government does not often choose to empower local decision making. However, the key point is that this partnership does still depends on the goodwill and assent of the national government of the day, rather than being entrenched in how we ‘do’ democracy in Scotland.
	3. At the same time the role and functions of the Scottish Parliament and Scottish Government have developed significantly, and there is a strong and growing approach to local engagement and community decision making. The role of local government in this democratic evolution now needs to be similarly strengthened.

4.4 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 of the benefits associated with this for outcomes and democratic vibrancy. It would also clarify and strengthen the relationship between community empowerment and participation, democratic local government decision making, and the roles of the Scottish Parliament and Scottish Government; something that is not always readily understood at the moment.

4.5 With the publication of Scotland’s revised National Performance Framework, there has never been a better time to make this change. Both national and local government have committed to build momentum and strengthen partnership working between national and local government; the Charter offers a ready-made, internationally recognised vehicle for doing so.

**5. International Treaty Obligations**

5.1 Incorporation would of course also enable Scotland to fulfil outstanding international treaty obligations in relation to the Charter. In this regard it is important to bear in mind that the UK Government signed the Charter in June 1997, and ratified it in 1998. Whilst the Scotland Act 1998 provides that international relations are reserved matters, it does not reserve observing and implementing these international obligations. For 20 years, therefore, governments in Scotland have technically been subject to its requirements and able to legislate in pursuit of these.

5.2 However, despite this there is no practical means of enforcing the Charter. Anyone who believes that its provisions are being violated does not have a route through which they can challenge this. Over that time, the UK and Scottish Governments have been willing to translate other treaty obligations to protect the environment, promote consumer safety and give people ‘data rights’; the precedent has been established, and there is no reason why rights to local self-governance should be treated any differently.

5.3 This does not suggest that the provisions of the Charter have been significantly contravened in that time. Indeed, as rapporteur visits have confirmed, Scotland has been broadly compliant with most of its articles. 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 of the benefits of incorporation is not to create the conditions for conflict or judicial review, but rather to ease relationships between the different spheres through early stage joint working on areas of shared competencies.

5.4 It is for this reason that the Scottish Parliament should now take steps to address this gap by legislating in pursuit of the rights set out in the Charter.

5.5 In summary, the incorporation of the Charter is not an end in itself, but a huge opportunity to improve outcomes, empower citizens, and reduce inequalities for the whole of Scotland.

5.6 Doing so 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 and discussion. Nor would it undermine the clear democratic mandate of national politicians to set outcomes and rights for the whole of Scotland.

5.7 However, it would ensure improved parity across all spheres of government that work together with the communities they serve to deliver outcomes and improve lives in ways that work best for those communities, deliver the kind of democracy first envisaged in the founding days of the Parliament, and introduce rights which are already commonplace across Europe and beyond.