

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

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

---

## Financial Memorandum

### Introduction

1. As required under Rule 9.3.2 of the Parliament’s Standing Orders, this Financial Memorandum is published to accompany the European Charter of Local Self-Government (Incorporation) (Scotland) Bill, introduced in the Scottish Parliament on 5 May 2020. They have been prepared by the Parliament’s Non-Government Bills Unit on behalf of Andy Wightman MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 70–LC);
- Explanatory Notes (SP Bill 70–EN);
- a Policy Memorandum (SP Bill 70–PM).

### Background

3. The European Charter of Local Self-Government (“the Charter”)<sup>1</sup> was drawn up by the Council of Europe and opened to signature by the member

---

<sup>1</sup> European Charter of Local Self-Government, Council of Europe, 1984. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122>. Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

states of the Council of Europe in October 1985. It was signed by the UK Government in June 1997, ratified by the UK in April 1998 and entered into force in respect of the UK on 1 August 1998. The Charter is made up of multiple articles, intended to enshrine a series of legal rights for local government.

4. The Charter has not been incorporated into domestic law in the UK. As the UK has a dualist legal system, domestic and international law are distinct and separate from one another. To give it the same legal authority as domestic law, international law, generally speaking, must be incorporated into domestic law.

5. With this Bill, the Member aims to strengthen the status and standing of local government by incorporating the Charter into Scots law and making it possible to challenge in the Scottish courts any executive action by Scottish Ministers within devolved competence, or any legislation that is within the legislative competence of the Scottish Parliament and is believed to be incompatible with the Charter Articles.

6. There are relatively few specific costs placed on any party as a direct result of the Bill's enactment. The only direct costs are to the Scottish Government. The Bill places a duty on Scottish Ministers to act compatibly with the Charter, and to promote local self-government in Scotland. This involves a requirement to keep under consideration whether there are any steps which they could take which would or might safeguard and reinforce local self-government and increase the autonomy of local authorities. There is also a requirement that the Scottish Government produce and publish a report at least once every five years.

7. Otherwise, the Bill provides a basis on which action can be taken in courts; costs will be incurred only if and when a decision is taken to do this.

8. As Scotland is generally considered already to be broadly compliant with the Charter's provisions, it can be presumed that the circumstances in which it will be deemed necessary to bring forward a legal challenge will be limited.

9. In addition, the Bill contains a number of provisions that should help ensure that Charter Articles are actively taken into account when policy and

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

legislation is being developed. For example, the duty to promote local self-government, and a requirement that a person introducing a Bill in the Parliament make a statement about the extent to which, in their view, the Bill is compatible with the Charter Articles. As a result, it is less likely that any litigation would be required once the Charter has been incorporated into Scots law.

10. Nevertheless, while the Bill does not make legal challenges inevitable or even likely, it does provide a basis on which action can be taken in the courts. For that reason, some consideration must be given to the financial implications should an organisation or individual choose to take such action.

## **Judicial review**

11. The Bill enables legislation that is within the legislative competence of the Scottish Parliament and executive actions by Scottish Ministers within devolved competence to be challenged in the courts on grounds of incompatibility with the Charter, which is not currently possible. However, it does not introduce any new means by which to do so, relying instead on the well-established mechanism of judicial review – “the process by which a court reviews a decision, act or failure to act by a public body or other official decision maker.”<sup>2</sup> Judicial review is only available where other remedies have been exhausted and where there is a recognised ground for challenge. In addition, in order to raise a judicial review in Scotland, the party bringing the action (“the petitioner”) must have a ‘sufficient interest’<sup>3</sup> in the outcome of the case and a reasonable prospect of success.

---

<sup>2</sup> Judicial Review, Briefing by the Scottish Parliament Information Centre (SPICe), No. 16/62, July 2016. Available at : [http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_16-62\\_Judicial\\_Review.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-62_Judicial_Review.pdf). Accessed on 10 February 2020.

<sup>3</sup> Section 27B of the Court of Session Act 1988 as amended by the Courts Reform (Scotland) Act 2014. Available at: <http://www.legislation.gov.uk/ukpga/1988/36/section/27B>. Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

12. In Scotland, actions for judicial review can only be raised in the Outer House of the Court of Session in Edinburgh. It can be appealed to the Inner House of the Court of Session and thereafter to the UK Supreme Court.

13. The number of judicial review cases which take place in Scotland are relatively low. In 2017-18, 357 judicial review actions were initiated, making up 15% of cases heard in the Court of Session (which in turn considers only 3% of the civil cases heard in all the Scottish courts).<sup>4</sup>

## Costs on the Scottish Administration

### Costs related to judicial review action

#### Cost implications for Scottish Government in defending a judicial action

14. As previously stated, the Bill allows for any executive action of the Scottish Ministers within devolved competence, or any legislation that is within the legislative competence of the Scottish Parliament, to be judicially challenged. Should such a legal challenge be made, costs would be incurred by the Scottish Government in defending the case.<sup>5</sup>

15. The Scottish Government already has its own in-house solicitors but also instructs advocates and solicitor advocates to undertake the work involved in defending applications for judicial review. Internal costs and the fees for external representation would have to be paid, as they would for any action and the cost of doing so would vary on a case-by-case basis,

---

<sup>4</sup> Civil Law Statistics in Scotland 2017-18. Available at: <https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/TrendCivil>. Accessed on 10 February 2020.

In 2017-18 there were 81,200 civil cases, around 2279 took place in the court of session.

<sup>5</sup> By convention, the Lord Advocate defends any legal challenge to Acts of the Scottish Parliament in the public interest. The Scottish Ministers defend subordinate legislation made by the Scottish Ministers even where made by a previous administration.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

depending on factors such as the number of meetings held, briefings prepared, and court hearings required.

16. Although the legal expenses which would be incurred in any given case are difficult to predict, it is clear that the cost of instructing an advocate can be substantial. The Scottish Legal Aid Board's list of fees payable for legal counsel<sup>6</sup> cites examples (in relation to the work of a QC) including fees of £437.75 - £515.00 to draft a petition, of £309.00-£566.50 for the preparation of a consultation and of £1,390.50 per day in court in the Outer House of the Court of Session. It is also likely that both senior and junior counsel would work on a judicial review case, and both require fees. Equivalent fees payable to junior counsel would be £360.50 for drafting a petition for judicial review, between £103 and £309 for preparing a consultation (with a QC) and £669.50 for attending a hearing with a QC.

17. In addition to the costs of legal representation, the Scottish Government would also have to pay court fees<sup>7</sup> and, should it lose the case, would normally be required to pay the winning party's legal expenses, as well as its own. On the other hand, should it win, the petitioner would normally be required to pay the Scottish Government's expenses, as well as its own.<sup>8</sup>

18. Information on the legal expenses incurred in specific judicial review cases is not readily available in the public domain. However, some figures relating to payments made can be found.

19. One such example, albeit involving the payment of out-of-court settlements rather than court-imposed expenses, relates to the judicial

---

<sup>6</sup> Scottish Legal Aid Board, legal aid fees information available at: <https://www.slab.org.uk/solicitors/legal-assistance-fees/#>. Accessed on 26 February 2020.

<sup>7</sup> Court of Session etc. Fees Order 2018. Available at: <http://www.legislation.gov.uk/ssi/2018/83/made>. Accessed on 10 February 2020.

<sup>8</sup> In some cases, the court may make a "protective expenses order" setting a limit on the amount of expenses the petitioner would have to pay if it lost; in that event, the Scottish Government would have to pay its own expenses above that limit, even if it won. (See paragraphs 59-61 for detail of PEOs)

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

review raised in the Outer House of the Court of Session by the John Muir Trust against Scottish and Southern Energy and the Scottish Ministers. In 2015, the John Muir Trust won an initial judicial review appealing the decision to construct the Stronelairg development, consisting of 67 wind turbines. However, the Scottish Government and Scottish and Southern Energy subsequently appealed the decision to the Inner House of the Court of Session which overturned the initial decision by the Outer House. The John Muir Trust then ended its legal action on the matter.

20. According to reports<sup>9</sup>, the Scottish Government then pursued legal costs of £189,000 from the John Muir Trust, whilst Scottish and Southern Energy sought £350,000 in legal costs. The John Muir Trust subsequently entered into negotiations with both parties before agreeing settlements of £75,000 and £50,000 with the Scottish Government and Scottish and Southern Energy respectively. It can be assumed that the John Muir Trust would also have had to cover its own legal costs.

21. Given the differing circumstances involved in each judicial review, the above case should be regarded only as an example of the costs which may be involved should a case be raised following this Bill's enactment. However, it is not unreasonable to suggest that the Scottish Government would face similar costs, should it lose a judicial review for failing to comply with the Charter articles.

22. As noted, a judicial review can be appealed to the Inner House of the Court of Session and thereafter to the UK Supreme Court. In such cases, fees and costs of representation are likely to be higher, particularly for the party which subsequently loses and would therefore in most cases be liable for the expenses of the winning party. Again, the Scottish Government could be subject to such costs, or, should it win the appeal, the costs would usually be met by the other party.

---

<sup>9</sup> Information available at: <https://www.thirdsector.co.uk/scottish-conservation-charity-pays-125k-settle-wind-farm-case/governance/article/1433534>. Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

## **Cost implications for Scottish Government of losing a case**

23. Should the Scottish Government lose a judicial review case, it may incur costs additional to those highlighted above. Depending on the circumstances, the Bill provides for the courts to make a declaration of incompatibility if it finds that legislation cannot be read in a way that is compatible with the Charter. In the case of executive actions by Scottish Ministers (and secondary legislation where primary legislation does not prevent removal of any incompatibility) courts may issue a reduction, effectively striking down the action or legislation, the result being as if it had never happened. In these cases, the Bill also provides courts with the power to defer the effect of the reduction and/or to remove or limit the retrospective effect of the decision, if there is a reasonable case to be made for doing so.

24. In the case of a declaration of incompatibility, it would be for Scottish Ministers to decide whether it wished to make “such provision as they consider necessary or expedient in consequence.” The Bill provides them with the power to do so by regulations, in the event that they do not have other means available to them.

25. Whilst the details of such provision would be dependent on the individual circumstances of each case, there may be some costs for the Government. For example, if it decides to repeal a piece of legislation, there could be costs associated with making the necessary adjustments to policies and procedures. In some cases, a new Bill may be needed, or extra provision in a Bill that is already planned. The main costs associated with any such action by the Scottish Ministers would be staff costs of policy officials, solicitors and drafters. The scale of the cost will depend entirely on the detail of each individual case and could vary considerably. It is therefore not considered helpful to attempt to estimate such costs.

26. In the case of a reduction and depending on the nature of the secondary legislation or executive action in question, there will likely be cost implications of addressing the consequences of an action, or piece of secondary legislation, having been quashed. The scale of the cost will depend entirely on the detail of each individual case and could vary considerably. It is therefore not considered helpful to attempt to estimate such costs.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

## **Damages and compensation**

27. It is not expected that a breach of a duty imposed on Scottish Ministers by this Bill would give rise to liability to pay damages. Where no express provision is made for damages in legislation (which is the case for this Bill), then it falls to the courts to determine whether they should be available as a remedy, taking the terms of the statute into account.

28. It is more likely that an entitlement will arise in cases where the duty would benefit an identifiable individual or class of individuals and where it is possible to quantify the loss suffered by that person or persons (following a breach of the duty) according to ordinary legal principles (for example in relation to physical or psychiatric injury).

29. Therefore, as the duties imposed in this Bill do not appear specifically to benefit any individuals or class of individuals, the Bill is unlikely to confer on any individuals or class of person an entitlement to damages as a result of any breach of those duties.

## **Cost implications for the Scottish Courts and Tribunals Service**

30. Should a judicial review action be raised, there would be some cost implications for the Scottish Courts and Tribunals Service (SCTS). However, those costs would be difficult to determine as factors such as the number of, and length of, court hearings vary from case to case – there is no typical judicial review.

31. If, as a result of the Bill, there is a small increase in the number of cases heard in the Court of Session, this is unlikely to equate to an increase in the overall workload of the courts. The courts routinely deal with a fluctuating volume of cases, and there is some elasticity in the system; beyond that, additional new cases will increase delays for all cases waiting to be heard.



This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

32. It should also be noted that the petitioner would be charged court fees<sup>10</sup>, which would offset any costs to the SCTS. SCTS annual accounts over the period of 2015-2019 show that, on average, 78% of costs were recovered by gross fees raised.<sup>11</sup> However, the figures, as set out in the table below, relate to the overall fees generated each year across all Scottish courts. The cost recovery percentages quoted are therefore not specific to the Court of Session, where judicial reviews would be raised.

Year	Gross Fees Raised	Net Recoverable Costs	% Cost Recovery
2015-16	£29,188,000	£35,787,000	82%
2016-17	£31,486,000	£36,235,000	87%
2017-18	£35,579,000	£41,007,000	87%
2018-19	£29,971,000	£49,122,000	61%

33. The costs to SCTS which were not recovered by fees would be met by the SCTS annual budget and thus incur a cost to the Scottish administration, which provides funding to the SCTS.

34. As previously stated, it may be the case that no judicial reviews are raised as a direct result of the Bill. At most, it is anticipated that there will be only a small increase in the number of judicial review actions and that this will have a correspondingly small impact, if any, on the overall running

<sup>10</sup> In some cases, petitioner’s will be exempted from court fees. Information on SCTS court fees are available at: <https://www.scotcourts.gov.uk/taking-action/court-fees>. Accessed on 10 February 2020.

<sup>11</sup> SCTS 2016-17 Annual Report and Accounts, p.46, available at: <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/scts-annual-report-accounts-2016-17.pdf?sfvrsn=2> and SCTS 2018-19 Annual Report and Accounts, p.49, available at: <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/publications/scts-annual-report-accounts-2018-19.pdf?sfvrsn=2>. Accessed on 10 February 2020.

Gross fees raised for each year divided by net recoverable costs for each year.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

costs of the Court of Session. This, combined with the recovery of a proportion of costs via court fees, means that anticipated costs on the SCTS will be relatively low and therefore could be accommodated within its existing budget rather than requiring the allocation of additional funds by the Scottish Government.

## **Duty on Scottish Ministers to promote local self-government in Scotland**

35. The Bill places a duty on the Scottish Government to promote local self-government in Scotland. This involves a requirement to keep under consideration whether there are any steps that they could take, which would or might safeguard and reinforce local self-government and increase the autonomy of local authorities.

36. It may be necessary to consider costs that may be incurred by authorities in familiarising themselves with the European Charter and the implications for their areas of work of the duty to safeguard and reinforce local self-government and increase the autonomy of local authorities, in keeping with the spirit of the Charter Preamble.

37. The Financial Memorandum (FM) to the Islands (Scotland) Bill<sup>12</sup> sets out the costing of the duties in relation to island communities. This includes a duty on Scottish Ministers (and other relevant public bodies) to have regard to island communities in exercising their functions. The duty also applies for Scottish Ministers to the development of legislation. Overall, this could be seen as broadly similar to the duty in this Bill. However, whereas the Islands (Scotland) Bill includes the requirement to prepare an island communities impact assessment, this Bill does not impose any equivalent requirement.

38. The Islands (Scotland) Bill FM<sup>13</sup> differentiates between the cost to authorities of familiarising themselves with the new requirements, and of

---

<sup>12</sup> Islands (Scotland) Bill, Financial Memorandum, June 2017. Available at [https://www.parliament.scot/S5\\_Bills/Islands%20\(Scotland\)%20Bill/SPBill15FMS052017.pdf](https://www.parliament.scot/S5_Bills/Islands%20(Scotland)%20Bill/SPBill15FMS052017.pdf). Accessed on 13 November 2019.

<sup>13</sup> Islands (Scotland) Bill, Financial Memorandum, June 2017. Paragraphs 14-15. Available at

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

integrating the new approach into policy processes. The FM assumes that for those authorities already taking the impact of their policies on island communities into account, the new duty would have minimal additional impact. Beyond this, the approach was to become 'good practice' and so costs over and above familiarisation with and integration of the new legislation was judged to be 'business as usual' and therefore not costed.

39. For familiarisation and integration of the new duties under the Islands (Scotland) Bill, the Scottish Government estimated<sup>14</sup> familiarisation would take a senior official (or equivalent) one day to familiarise themselves with the duty and a further three days to integrate 'island proofing' into the policy process within their organisation (where it was not already the case) and then one day's work each year on an ongoing basis. As the duty would have an impact across the Scottish Government, the costing was applied to all 36 Directorates and eight Executive agencies. It was acknowledged that policies would differ in their potential impact on island communities, but the approach was applied equally to all for the purpose of estimating potential costs.

40. Whilst a useful model for costing, it is important to note that, in the case of this Bill there are a number of points of difference that make it a less extensive approach, and so would be costed at a lower level.

41. Policy Memorandums for Public Bills already include a reference to any expected impact on local government. It is expected that consideration is already given to this in the development of most relevant policy. Furthermore, it seems to be generally accepted that Scotland is broadly compliant with the Charter Articles, and it is not expected that any significant changes in current working practices will be required. Nevertheless, it may be necessary for officials to familiarise themselves with the provisions of the European Charter of Local Self-Government.

---

[https://www.parliament.scot/S5\\_Bills/Islands%20\(Scotland\)%20Bill/SPBill15FMS052017.pdf](https://www.parliament.scot/S5_Bills/Islands%20(Scotland)%20Bill/SPBill15FMS052017.pdf). Accessed on 10 February 2020.

<sup>14</sup> Islands (Scotland) Bill, Financial Memorandum, June 2017. Paragraph 14. Available at

[https://www.parliament.scot/S5\\_Bills/Islands%20\(Scotland\)%20Bill/SPBill15FMS052017.pdf](https://www.parliament.scot/S5_Bills/Islands%20(Scotland)%20Bill/SPBill15FMS052017.pdf). Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

42. As already mentioned, this Bill does not require impact assessments to be routinely carried out. For this reason, it is assumed that a lower level of resource will be required to integrate the Bill's new approach into policy processes.

43. For the purposes of this Bill therefore, the estimate is 2.5 days (compared to 4 days in the case of the Islands (Scotland) Bill). The total number of directorates and agencies has been used, although it is very unlikely that the same level of awareness and familiarisation would be required for all. With figures adjusted to reflect changes in staff costs and in the number of directorates, this would mean:

(Number of days) x (senior official daily cost) = Cost per Directorate/Agency

2.5 days x £330<sup>15</sup> = £825

(Cost per Directorate/Agency) x (number of Directorates/Agencies) = Total Cost

£825 x 51<sup>16</sup> = £42,075.

## **Duty on Scottish Ministers to publish a report**

44. The Bill places a duty on the Scottish Government to produce a report at least once every five years, detailing what it has done in order to promote local self-government. The report should be laid before the Scottish Parliament and published.

---

<sup>15</sup> Based on a mid-point Deputy Director SCS 1A salary of £99,450 with a 21% uplift for non-labour costs, (which would include pension contributions and employer NICs). Information based on this FOI response: <https://www.gov.scot/publications/foi-19-02083/>. Accessed on 10 February 2020.

<sup>16</sup> The number of Scottish Government directorates has increased from 36 to 43 since the Islands (Scotland) Bill was under consideration. The number of executive agencies remains the same. Information available at: <https://www.gov.scot/about/how-government-is-run/directorates/ and https://www.gov.scot/publications/national-public-bodies-directory/pages/executive-agencies/#>. Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

45. Again, a similar duty was placed on the Scottish Government by the Islands (Scotland) Act, which requires Ministers to prepare and publish an annual update on the progress towards achieving improved outcomes for island communities. In the Financial Memorandum<sup>17</sup> which accompanied that Bill, the Scottish Government estimated that this would incur staffing costs of approximately £3,400 with publication costs of approximately £5,000 per year. The Government was of the view that such costs could be subsumed within current governmental budgets.

46. Although the circumstances and subject matter are different in the case of this Bill, it is reasonable to assume that the duty would incur similar costs once every reporting period (i.e. at least once every five years) and that such costs could be incorporated into the Scottish Government's existing budget.

## Costs on local authorities

### Cost of raising a judicial review action

47. The Bill imposes no costs directly on local authorities, with costs only incurred if they choose to raise an action for judicial review against the Scottish Government. In its response to the member's consultation on the proposed bill, COSLA expressed the view that minimal costs would be incurred by local authorities because of the Bill and that it may lead to efficiencies—

“We accept that 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. We would also anticipate that any such costs are likely to be incurred during the early period following incorporation. Going forward, it is anticipated that once any historic elements are

---

<sup>17</sup> Islands (Scotland) Bill Financial Memorandum. Available at: [https://www.parliament.scot/S5\\_Bills/Islands%20\(Scotland\)%20Bill/SPBill15FMS052017.pdf](https://www.parliament.scot/S5_Bills/Islands%20(Scotland)%20Bill/SPBill15FMS052017.pdf). Accessed on 10 February 2020.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

addressed then the policy making and scrutiny process would not require additional resourcing.”<sup>18</sup>

48. In considering whether to take legal action, the local authority would have to take into account the costs to which it would be subject, including associated court and legal fees. In addition, if the local authority were to lose the action, it would normally be expected to pay the legal expenses of the Scottish Government, as well as its own.

49. Whilst local authorities are likely to have in-house solicitors, they would still be likely to have to pay for legal representation in court. Where the issues in dispute are novel or complex, the case may involve a QC as well as, or instead of, a junior.

50. As previously stated, any costs incurred will be dependent on the facts and circumstances of each individual case, making it difficult to predict how much a local authority would be liable to pay should it raise a judicial review action. It should again be noted, however, that cases held in the Court of Session, and judicial review cases specifically, normally incur relatively high legal costs.

51. Following the outcome of the Local Government Boundary Commission for Scotland’s fifth review of electoral arrangements for local elections in all Scottish local authorities in 2016, and the subsequent Scottish Government decision to adopt the majority of its recommendations, a number of Scottish local authorities were considering whether to seek judicial review of the decision. Minutes from a meeting of East Lothian Council on 25 October 2016 noted the difficulty of ascertaining the costs of a judicial review, indicating an estimate in the region of £30,000 to £155,000.<sup>19</sup> This can only serve as an illustration, but further exemplifies the point that it is very difficult to predict the likely costs of

---

<sup>18</sup> COSLA response to public consultation on the Bill. [Available at https://drive.google.com/file/d/15egW9UQd479mh81TTJG196PUCIhZ0JGC/view](https://drive.google.com/file/d/15egW9UQd479mh81TTJG196PUCIhZ0JGC/view). Accessed on 9 October 2019.

<sup>19</sup> Minutes of the Meeting of East Lothian Council, Tuesday, 25 October 2016. Available at [https://www.eastlothian.gov.uk/download/meetings/id/18383/public\\_east\\_lothian\\_council\\_minute\\_25\\_10\\_16](https://www.eastlothian.gov.uk/download/meetings/id/18383/public_east_lothian_council_minute_25_10_16). Accessed on 13 November 2019.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

pursuing judicial review. It is therefore not considered helpful to attempt to estimate such costs any further.

## Costs on other bodies, individuals and businesses

### Cost of raising a judicial review action

52. As previously stated, if judicial action is taken following the Bill's enactment, it is more likely to be by local authorities. However, other bodies and individuals may choose to do so, if certain tests are met. In such cases, the cost of obtaining legal advice and representation could be significant, particularly given the action would take place in the Court of Session. In addition, as previously stated, should they lose the action, the petitioner would normally be expected to pay the legal expenses of the Scottish Government (unless they had obtained a protective expenses order, limiting their exposure to those costs).

53. In judicial review cases, legal aid up to the value of £7,000 (in the Outer House), or £20,000 (in the Inner House, should the case be appealed) may be available should the person applying meet eligibility criteria. The amount of legal aid given will be dependent on the amount and type of legal representation required, and on whether the individual can afford to contribute personally towards the cost.

54. In addition to legal fees and expenses, individuals would be subject to court fees. However, in some cases the individual may be exempted from these fees, for example when they are in receipt of civil legal aid.<sup>20</sup>

55. Protective expenses orders (PEOs) may also be available in some cases. A court may issue a PEO in cases where court proceedings are considered "prohibitively expensive" for the applicant.<sup>21</sup>

---

<sup>20</sup> SCTS, court fees. Available at: <https://www.scotcourts.gov.uk/taking-action/court-fees>. Accessed on 26 February 2020.

<sup>21</sup> Rules on Protective Expenses Order are set out in Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018. Available at:

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

56. A PEO will limit the applicant's liability for the defender's legal expenses to £5,000, or such other sum as may be justified on cause shown, should the applicants lose the case. In turn, the defender's liability for the applicant's legal expenses will usually be limited to £30,000, or such other sum as may be justified on cause shown, should the defenders lose.

57. It should be noted however that there appears to be a lack of clarity around the application of PEOs. While it appears to be open to the courts to issue these orders in any relevant judicial review case, in practice they seem to have thus far been limited to cases which relate to environmental issues. It is therefore unclear whether a petitioner raising a court action under this Bill could expect to be in receipt of a PEO.

### **Cost implications for the Scottish Legal Aid Board**

58. As stated above, should an individual take court action, they may be entitled to legal aid, incurring costs on the Scottish Legal Aid Board (SLAB).

59. SLAB places cost limits on the amount of legal aid available depending on the type of case an individual is involved in. As discussed, in relation to a judicial review against the Scottish Ministers, the limit in the Outer House of the Court of Session is £7,000, whilst for the Inner House (should the case be appealed) it is £20,000.<sup>22</sup>

60. However, in order to raise a judicial review, petitioners must demonstrate that they have 'sufficient interest' in the subject matter of the application and in the outcome of the case, and that they have a reasonable prospect of success. It may be difficult for an individual to successfully demonstrate such interest in the context of legislation or executive action alleged to be incompatible with the Charter.

61. The member believes it more likely that an individual who considered that legislation or an executive action was incompatible with the Charter

---

[http://www.legislation.gov.uk/ssi/2018/348/pdfs/ssi\\_20180348\\_en.pdf](http://www.legislation.gov.uk/ssi/2018/348/pdfs/ssi_20180348_en.pdf).

Accessed on 26 February 2020.

<sup>22</sup> Scottish Legal Aid Board, standard cost limit tool. Available at: <https://www.slab.org.uk/guidance/table-of-standard-cost-limits/>. Accessed on 10 February 2020.



This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

would make representations to their local authority, and that any resulting action would be brought by the local authority. It is therefore not expected that the Bill would result in any significant increase in cost for SLAB.

### Summary of projected direct costs associated with the Bill

62. The table below sets out the direct costs expected to be generated by the Bill, all of which will be placed upon the Scottish Administration.

63. It does not include any estimation of potential costs of any judicial review. As explained in the analysis above, judicial review cases may or may not arise as a result of the Bill. In the event that they do, a range of variables will affect the overall cost. These considerations are set out above, in particular in paragraphs 14-22 and 47-51. Given the limited information that is available to draw on, that each case would be very specific, and that, in the event that a case was brought, it would be impossible to predict whether all or some of the costs would fall in any one financial year, it is not considered helpful to attempt to estimate likely costs in any one financial year for the purpose of this summary of direct costs.

<b>Costs on Scottish Administration</b>	<b>Initial costs</b>	<b>Ongoing costs</b>
Familiarisation of officials in each Scottish Government Directorate/Agency with the provisions of the European Charter of Local Self-Government	£42,075 <sup>23</sup>	£0
Cost of producing and publishing report on the promotion of local self-government	£0	£8,400 (at least once every 5 years) <sup>24</sup>
<b>Total</b>	<b>£42,075</b>	<b>£8,400 (at least once every 5 years)</b>

<sup>23</sup> Based on information and figures provided in paragraphs 35-42

<sup>24</sup> Based on information and figures provided in paragraphs 44-46

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as introduced in the Scottish Parliament on 5 May 2020

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

## Financial Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -  
[www.parliament.scot](http://www.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:  
[www.parliament.scot/documents](http://www.parliament.scot/documents)