

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

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by Scottish Parliament officials in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill provides for the incorporation of the European Charter of Local Self-Government into Scots law, thereby giving effect to the Charter. It allows the courts to consider alleged instances of incompatibility with the Charter Articles and the Bill sets out what can be done in the event of the Scottish Ministers not complying with their duties under the Bill, or where a court determines that provisions of relevant legislation are incompatible with the Charter Articles.

3. The Bill extends to 11 sections and a schedule. The structure and content of the Bill in outline is as follows:

- Section 1 identifies the articles of the Charter which are to be incorporated, these then being set out in the schedule
- Section 2 obliges the Scottish Ministers to act compatibly with the Charter in carrying out their functions

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- Section 3 requires the Scottish Ministers to promote local self-government, and sets out reporting obligations in that regard
- Section 4 provides that, so far as it is possible to do so, legislation is to be read and given effect in a way which is compatible with the Charter Articles
- Remedies under the Act are dealt with at sections 5 to 7. This includes power for the court to make a declaration of incompatibility, or to remove or limit the retrospective effect of decisions. The Scottish Ministers can also, by regulations, take remedial action to address a declaration of incompatibility
- Section 8 requires an MSP introducing a Public Bill to make a statement about the Charter-compatibility of the Bill concerned
- Sections 9 to 11 cover regulation-making powers, commencement arrangements, and the Bill's short title.

Rationale for subordinate legislation

4. The Bill contains two delegated powers provisions, which are described below. The Bill is of a 'stand-alone' nature. That is to say, it does not amend existing legislation, and the powers contained in the Bill are new – no existing powers are being amended or repealed.

5. In providing for these delegated powers, care has been taken to strike a balance between what can and should be set out on the face of the Bill, and what is appropriately for subordinate legislation.

Delegated Powers

Section 1(3) – power to amend Act to reflect amending or additional protocols to the Charter that have been signed by the United Kingdom

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

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Parliamentary procedure: affirmative

Provision

6. Section 1(3) enables the Scottish Ministers, by regulations, to amend the new Act (i.e. the Bill, if enacted) to take account of amending or additional protocols to the Charter that have been signed by the United Kingdom.

Reason for taking power

7. While incorporation of the Charter itself is the focus of the Bill, it may be desirable to be able to amend the new legislation at a later date so as to take account of additional protocols (so long as these have been signed by the United Kingdom). It may also be desirable to allow the schedule to be updated in future if amending protocols make changes to the wording of existing Charter Articles. This power provides the Scottish Ministers with the power and flexibility to do so. It could be viewed as being in the nature of a 'future-proofing' provision, enabling account to be taken of amending or additional protocols, for which it would not be possible to set out detailed provision on the face of the Bill itself.

Choice of procedure

8. As noted above, the inclusion of a power which would enable the Scottish Ministers to amend the new legislation to reflect amending or additional protocols is considered to be valuable. At the same time, it is recognised that the power is also a significant one. It is therefore appropriate that any exercise of it should be subject to a higher level of Parliamentary scrutiny, as afforded by the application of the affirmative procedure. That is provided for under the Bill (per section 9(2)).

Delegated Powers

Section 6(1) – power to take remedial action

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

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Parliamentary procedure: affirmative

Provision

9. Under section 5 of the Bill, the court can, if satisfied that a provision contained in an Act or in a defined category of subordinate legislation is incompatible with the Charter Articles, make a declaration of that incompatibility. Such a declaration does not, by itself, affect the validity, continuing operation or enforcement of the provision concerned (section 5(6)). The power which is conferred by section 6 enables the Scottish Ministers to take remedial action. By regulations, they can make such provision as they consider necessary in consequence of a declaration of incompatibility. In furtherance of that power, such regulations can modify any enactment (excepting the new legislation itself).

Reason for taking power

10. An essential element of the Bill is the facility, provided for at section 6, for the Scottish Ministers to respond to a declaration of incompatibility without needing to resort to primary legislation. (Ministers may, in some cases, already have delegated powers that could be used to address an incompatibility, but this is unlikely to be so in the majority of cases.) A regulation-making power is a more proportionate and efficient means for responding to section 5 declarations than a Bill.

Choice of procedure

11. The power to take remedial action, as provided for at section 6, while an important element of the Bill is also a significant one, given the potential action facilitated by it, which includes the power to modify other enactments. It is appropriate therefore that the exercise of it should be subject to a suitable level of scrutiny. That has been provided for within the Bill, in terms of the application of the affirmative procedure to the use of this power (per section 9(2)).

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