

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

[As Amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by Scottish Parliament officials in accordance with Rule 9.7.10 of the Parliament's Standing Orders, in relation to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (as amended at Stage 2). It describes the purpose of each of the subordinate legislation provisions in the Bill that were amended or added at Stage 2 and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Revised Explanatory Notes and the 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.

3. Amendments to the Bill at Stage 2 include the following:

- manner in which the Charter Articles are to be read (new section 1(2A))
- clarificatory adjustments and revised layout of: section 2 (duty to act compatibly with Charter Articles); section 4 (interpretation of legislation); section 7 (power to remove or limit retrospective effect of decisions etc.)

- revised consultation requirement relating to duty to promote local self-government (section 3(4))
- clarification of reference to Supreme Court (section 5(5)).

4. The Bill as introduced contained two powers to make subordinate legislation (at section 1(3) and 6(1)). The first of these remains unchanged. An adjustment has been made to the section 6 power (to take remedial action). New section 6A provides for enhanced scrutiny of regulations under section 6(1). Finally, a new power is added to the Bill at section 9A, to provide for the making of ancillary provision. These changes to the delegated powers contained in the Bill are commented on below.

Delegated Powers

Section 6(1) – Power to take remedial action (read with section 6A – Enhanced scrutiny of regulations under section 6(1))

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

5. 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 or expedient in consequence of a declaration of incompatibility. In furtherance of that power, such regulations can modify any enactment (excepting the new legislation itself).

6. The section 6(3) amendment, and new section 6A, respond to observations made by the DPLRC following its consideration of the delegated powers in the Bill at Stage 1. They take account also of further

consideration given to the Bill by the Member, and the Scottish Government, at Stages 1 and 2.

Reason for clarifying the power under section 6(1) – new section 6(3)

7. Section 6(1) enables the Scottish Ministers by regulations to make ‘such provision as they consider necessary or expedient in consequence of a declaration of incompatibility’.

8. The DPLRC recommended that the section 6 power be amended to prevent it being used to create criminal offences. It also asked that the amendment include provision to prevent the power being used to widen the scope of an existing offence or to increase the punishment for such an offence. It has never been the member’s intention that the section 6 power would be used, or be capable of being used, in that way. To make the position absolutely plain, he lodged and moved at Stage 2 the amendment that added what is now section 6(3), which provides that regulations under section 6(1) “may not create, widen the scope of, or increase the penalty for, a criminal offence”.

Reason for providing for enhanced scrutiny of regulations under section 6(1), by means of a ‘super-affirmative’ procedure (new section 6A)

9. The power to take remedial action, as provided for at section 6, is an important element of the Bill. It is also a significant power, enabling the Scottish Ministers to make such provision as they consider necessary or expedient in consequence of a declaration of incompatibility, and in doing so to modify other enactments. The member’s policy has always been that the exercise of it should be subject to an appropriate level of scrutiny. The Bill as introduced provided for the application of the affirmative procedure.

10. The DPLRC, in considering the Bill, queried whether the section 6(1) power should only be used where there are ‘compelling reasons’ to do so rather than through primary legislation; and whether the power should be subject to a form of super-affirmative procedure.

11. Having reflected on that matter, and acknowledging the need for additional checks and balances, the member concluded that the addition of what is sometimes described as a “super-affirmative” procedure would be

the most appropriate way to deal with the issue. The member therefore brought forward an amendment to add section 6A. This takes account of the DPLRC's observations and provides for enhanced scrutiny.

12. Under section 6A, the Scottish Ministers must first lay before the Parliament a draft of any regulations under section 6(1), along with an explanatory statement. That statement is to explain various specified matters, such as the nature of the incompatibility to which the draft regulations relate, and how the draft regulations address the incompatibility. It should also include an explanation as to why the Scottish Ministers are proposing to use the power under section 6(1) as opposed to taking other action. Section 6A(3) also requires there to be a 60-day interval between the laying of the draft regulations and the laying of the draft instrument for approval.

13. Subsections (5) and (6) were added to section 6A by an amendment lodged and moved by the Cabinet Secretary. They make provision to facilitate an expedited process, which would enable the 60-day requirement to be breached, so that regulations could then be approved and made more quickly. In these circumstances, the Scottish Ministers would be obliged under section 6A(6) to explain to the Presiding Officer why the 60 day requirement has been breached, a draft of the regulations and an explanatory statement would still need to be laid and the draft SSI would still be subject to the affirmative procedure.

Section 9A – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

14. Section 9A adds a new power to the Bill, to enable the making of ancillary provision. The power can be exercised by the Scottish Ministers for the purpose of, in connection with or for giving full effect to the new Act or any provision made under it.

Reason for taking power

15. Such a power was not included within the Bill as introduced, as the member did not consider that there was a compelling case for doing so.

16. The ancillary provision now added, by a Scottish Government amendment at Stage 2, is understood to be in fairly standard terms, often found in other primary legislation. The aim is to provide additional flexibility should there be a need to make minor adjustments to other legislation, or to the Act itself, to ensure that the Act functions as intended – and to do so through regulations, without the need (which might otherwise arise) for primary legislation.

Choice of procedure

17. Exercise of this power is subject to the affirmative procedure. The power can be exercised to modify any enactment, including the Act itself. Use of it is limited to making incidental etc. provision of the nature outlined above, as distinct from being exercisable for some wider purpose. It is nonetheless of some importance. Accordingly, to ensure appropriate scrutiny of its use, any regulations made under it are subject to the affirmative procedure.

This document relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) as amended at Stage 2

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