

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

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are 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);
 - a Financial Memorandum (SP Bill 70–FM);
 - a Policy Memorandum (SP Bill 70–PM).
3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

4. The aim of the Bill is to strengthen the status and standing of local government by incorporating the European Charter of Local Self-

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Government (“the Charter”) into Scots law. It seeks to do this through a range of measures relating to the Scottish Ministers, the courts and the Parliament.

5. The Bill:

- places a duty on the Scottish Ministers to act compatibly with the Charter Articles;
- places a duty on the Scottish Ministers to promote local self-government;
- requires the courts to read and give effect to legislation, where possible, in a way that is compatible with the Charter Articles;
- enables the courts to declare legislative provisions to be incompatible with the Charter Articles, and enables the Scottish Ministers to take remedial action, by regulations, in response to such declarations;
- allows the courts to suspend the effect of a decision that the Scottish Ministers breached a duty imposed on them by the Bill, or remove or limit the retrospective effect of such a decision;
- requires each person introducing a Public Bill in the Parliament to make a statement about the extent to which, in their view, the Bill is compatible with the Charter Articles.

6. The Bill consists of 11 sections and one schedule.

7. The schedule sets out Articles 2 to 11 of the European Charter of Local Self-Government, which are the Charter Articles incorporated by the Bill into Scots law.

Commentary on sections

8. Section 1 defines “the Charter Articles” to mean Articles 2-11 of the European Charter of Local Self-Government. These are the substantive Articles of the Charter that are incorporated by the Bill (and reproduced in the schedule). The remaining Articles, not incorporated by the Bill, set out the procedures for member states to sign and ratify the Charter.

9. Section 1(3) of the Bill gives the Scottish Ministers the power, by regulations, to amend the Act (i.e. the Act that the Bill would, if passed,

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become) to reflect amending or additional protocols to the Charter that have been, or are in future, signed by the United Kingdom.

10. Section 2 places a duty on the Scottish Ministers to act compatibly with the Charter Articles in the exercise of certain of their functions. The functions in question are defined in subsection (2) as functions within “devolved competence” (as defined in section 54 of the Scotland Act 1998) and as including the making of subordinate legislation but excluding the preparation, introduction and promotion of primary legislation (i.e. Bills). As a result, the section 2 duty does not apply to anything Scottish Ministers do (including making subordinate legislation) in the exercise of functions they have in reserved areas (that is, on matters outside the Parliament’s legislative competence). Nor does the section 2 duty apply to anything Scottish Ministers do in relation to the introduction of a Government Bill in the Parliament (in which connection, they are subject instead to the section 8 requirement to make a statement about the Bill’s compatibility with the Charter Articles). Subsection (2) also makes clear that a failure to act, including a failure to make subordinate legislation, could constitute a breach of Ministers’ statutory duty to act compatibly with the Charter Articles.

11. Section 3 places a duty on Scottish Ministers to keep under consideration steps they could take to safeguard and reinforce local self-government and increase the autonomy of local authorities, and to take such steps where appropriate. This duty reflects the wording used in the Preamble to the Charter. At least once every five years, the Scottish Ministers must lay before the Parliament and publish a report on the steps they have taken (since section 3 came into force, or since the previous report was published) to safeguard and reinforce local self-government and increase the autonomy of local authorities, as well as plans to do so during the next reporting period.

12. Section 4 imposes an interpretative obligation on the courts in relation to any legislation, whether an Act (of the UK or Scottish Parliament) or subordinate legislation (whether made by UK or Scottish Ministers), the provisions of which are within the legislative competence of the Scottish Parliament. This applies to such legislation whenever it is or was enacted (i.e. given Royal Assent, in the case of an Act, or made, in the case of subordinate legislation). Under subsection (1), the courts must read and give effect to such legislation in a way which is compatible with the Charter

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Articles, so far as that is possible. This means that where a provision can be read in a way that is incompatible with the Charter Articles, and also in a way that is compatible with the Charter Articles, the court is obliged to choose the latter interpretation (that is, to give the legislation the “benefit of the doubt”). This ensures that legislation is only declared incompatible (under section 5) by a court that has already attempted to interpret it compatibly and found it impossible to do so.

13. Section 4(2)(b) applies where a court decides that subordinate legislation cannot be read in a way that is compatible with the Charter Articles, and where primary legislation prevents removal of the incompatibility. In such a case, the validity, continuing operation and enforcement of the incompatible subordinate legislation is not affected; the subordinate legislation would continue to be law, but the court could make a declaration of incompatibility (under section 5 of the Bill) in relation to it.

14. Situations may also arise in which a court decides that subordinate legislation made by the Scottish Ministers after the Bill comes into force cannot be read in a way that is compatible with the Charter Articles, and where there is no provision in primary legislation preventing removal of the incompatibility. That decision could amount to a finding that the Scottish Ministers had acted in breach of their statutory duty (to act compatibly with the Charter, under section 2). Depending on the circumstances the court may be able to reduce, or quash, the subordinate legislation and it would cease to have effect immediately, unless the court made an order under section 7 suspending the effect of the decision. (Such an order may also remove or limit the retrospective effect of the decision, for example to protect from legal challenge things already done under the quashed subordinate legislation.)

15. Section 5 applies to provisions of an Act or subordinate legislation in so far as the provisions are within the legislative competence of the Scottish Parliament. It enables a court to declare such a provision of an Act incompatible with the Charter Articles. It also enables a court to declare such a provision of subordinate legislation incompatible with the Charter Articles, but only if (in the court’s view) primary legislation prevents removal of the incompatibility.

16. By virtue of section 5(5), the only courts that can make a declaration of incompatibility are the UK Supreme Court or the Court of Session. As a

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result, a lower court (e.g. the sheriff court) would not be able to rule in this way on the compatibility or otherwise of legislation with the Charter Articles.

17. Where a declaration of incompatibility is made under section 5, it is likely that it will be in proceedings brought by way of judicial review, which involves the exercise of the supervisory jurisdiction of the Court of Session and (in the context of appeals) the UK Supreme Court.

18. Under section 5(6), legislative provisions subject to declarations of incompatibility continue to be law. The declaration of incompatibility does not affect their validity, continuing operation or enforcement.

19. In the event of a declaration of incompatibility, it would be for the Scottish Government, in the first instance, to decide whether and how to remedy that incompatibility. Accordingly, section 6 allows the Scottish Ministers to make such provision (in regulations) as they believe necessary or expedient in consequence of the declaration of incompatibility, including provision to amend primary legislation (other than the Act resulting from this Bill). This is a power (“may”) rather than a duty (“must”) in recognition of circumstances in which the incompatibility could be fixed in other ways. For example, with a declaration under section 5(2) that a provision of an Act is incompatible with the Charter Articles, Ministers may already have powers under that Act (or another existing Act) to amend the provision in question by regulations, without the need to make regulations under section 6 of the Bill. Another option in that scenario, or where the declaration is made under section 5(4) and relates to a provision of subordinate legislation, would be to make provision to remove the incompatibility in primary legislation (either by introducing a Bill in the Scottish Parliament or by amending a Bill already in progress), again without the need to make regulations under section 6 of the Bill. The remedial power under section 6 is therefore an additional tool that may be used to respond to a court ruling and might be exercised, in particular, where other options are unavailable or considered unsuitable.

20. Section 6(2) enables regulations made under 6(1) to modify any enactment (primary or subordinate legislation, whether passed by the UK or Scottish Parliament or made by UK or Scottish Ministers) other than the Act resulting from the Bill. This latter restriction is to ensure that the incompatibility cannot be resolved, for example, by removing from the

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scope of the Act the Charter Article with which the legislation was found to be incompatible.

21. Section 7 applies where a court decides that the Scottish Ministers have breached a statutory duty under the Bill. This could relate to an administrative act (or failure to act), or to subordinate legislation they have made (or a failure to make such legislation) which, in the court's view, was incompatible with the Charter Articles and in breach of their duty under section 2. Alternatively, it could relate to a failure to keep under consideration possible steps to safeguard or reinforce local self-government, or a failure to report on those steps at least once every five years, in contravention of section 3. Where the court's decision relates to an administrative act, a breach-of-statutory-duty finding would normally mean that, in law, the act would be 'reduced' and treated as void and of no effect (as if it had not been made). Where the court's decision relates to a failure to act (including a failure to make subordinate legislation, keep matters under consideration, or report to the Parliament), such a finding would normally amount to an order by the court to take that action. And where the court's decision relates to the making of subordinate legislation, such a finding would normally amount to the quashing of the legislation, meaning that nothing further could be done under it, and things already done under it could be legally challenged.

22. In any of these scenarios, these normal outcomes could cause legal or practical problems, including by having negative consequences for third parties (for example, people who have benefitted from decisions made, or who have acquired rights under subordinate legislation made). Accordingly, section 7(2)(a) allows the court to remove or limit the retrospective effect of the decision – for example, so that a decision to quash subordinate legislation does not jeopardise the interests of those affected by decisions already made under that legislation. Similarly, section 7(2)(b) allows the court to suspend the effect of its decision for a period, for example to give the Scottish Ministers time to consult on any new subordinate legislation they intend to make in order to address the breach or incompatibility. It also enables the court to set conditions on any such suspension – for example by requiring the party who brought the original legal challenge to be among those consulted.

23. Section 7(1)(b) ensures the power also applies to the case where pre-commencement subordinate legislation is found to be incompatible, as

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this would be subordinate legislation made before the Scottish Ministers were subject to the section 2 duty to act compatibly with the Charter articles. This reflects section 4(2)(a) which defines the interpretative obligation on courts as applying to legislation whenever enacted, and so also covers extant subordinate legislation.

24. Section 8 requires any MSP introducing a Public Bill in the Parliament (that is, a Government Bill, a Member's Bill or a Committee Bill) to make a statement, on or before introduction, about the extent to which, in the MSP's view, the Bill is compatible with the Charter Articles. In relevant circumstances, the required statement could just be that the MSP has been unable to reach a definite view on whether the Bill is compatible with the Charter Articles; or that, in the MSP's view, the Bill does not engage any of the Charter Articles, and hence that the issue of compatibility does not arise.

25. Section 9 stipulates that any regulations made under the Bill (either under section 1(3) or 6(1)) would be subject to the affirmative procedure – that is they must be laid in draft before the Scottish Parliament and made only if the Parliament approves the draft by resolution.

26. Section 10 covers commencement. This section and section 11 come into force on the day after Royal Assent. All other sections of the Bill will come into force 6 months after Royal Assent.

27. The schedule reproduces, verbatim, Articles 2-11 of the European Charter of Local Self-Government. Should the text of any of these Articles be changed in future, the schedule could be updated in consequence using the power delegated to the Scottish Ministers by section 1(3).

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