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

[As amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the European Charter of Local Self-Government (Incorporation) (Scotland) Bill, as amended at Stage 2. They have been prepared by the Parliament's Non-Government Bills Unit on behalf of Andy Wightman MSP, the member who introduced the Bill. Text has been added to or deleted from the version accompanying the Bill As Introduced to reflect Stage 2 amendments and to make other improvements, and these changes are indicated by side-lining in the right margin.

2. The Revised Explanatory Notes are intended to assist the reader of the "as amended" 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 "as amended" 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

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

4. The Bill:

- places a duty on the Scottish Ministers to ensure that any action they take in the exercise of their functions is compatible 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 Court of Session or UK Supreme Court 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 certain decisions about Charter compatibility, or remove or limit the retrospective effect of such decisions;
- 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.

5. The Bill consists of 13 sections and one schedule.

6. 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

7. 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). By virtue of section 1(2A), the Charter Articles are to be read subject to any reservations, objections or interpretative declarations in force at the relevant time (which would include the interpretative declarations lodged with the Council of Europe at the time the UK signed the Charter). The remaining Articles, not incorporated by the Bill, set out the procedures for member states to sign and ratify the Charter.

8. 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,

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

9. Section 2 places a duty on the Scottish Ministers to ensure any actions they take in the exercise of certain functions they have are compatible with the Charter Articles. 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 (as defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA)) but excluding functions in relation to Scottish Parliament 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 Ministers do in relation to the preparation or 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), or during the Bill's passage. Subsection (3) also makes clear that a failure to act, including a failure to make subordinate legislation, could constitute a breach of Ministers' statutory duty to ensure that the actions they take are compatible with the Charter Articles.

10. 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. In doing these things, Ministers are required to consult persons they consider representative of the interests of local authorities (such as COSLA and local authorities themselves) and such other persons as they consider appropriate.

11. Section 4 imposes an interpretative obligation on the courts in relation to an Act (defined in schedule 1 of ILRA to mean an Act of the UK or Scottish Parliament) or subordinate legislation (including instruments made by UK or Scottish Ministers), to the extent that its provisions 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 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.

12. Section 4(2) 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.

13. Situations may also arise in which a court decides that subordinate legislation 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.

14. If the subordinate legislation is made by the Scottish Ministers after section 2 of the Bill comes into force, the court's decision could amount to a finding that the Scottish Ministers had acted in breach of their statutory duty under that section (to ensure their actions are compatible with the Charter). Depending on the circumstances, the court may be able to "reduce" (that is, 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. If the subordinate legislation was made prior to section 2 coming into force, the process would be different, but it could still be possible for it to result in a finding that the section 2 duty had been breached, depending on the facts and circumstances of each case. For example, if a local authority

believed a provision in extant subordinate legislation was incompatible with the Charter, it would most likely raise this in pre-action correspondence, and invite the Scottish Ministers to rectify the alleged incompatibility. If they declined to do so, and matters proceeded to court, the judicial review petition could then include arguments that Ministers' failure to address the incompatibility amounted to a breach of their section 2 duty (which includes a failure to act). If the court agreed, it could again "reduce" (quash) the instrument and/or order Ministers to rectify this failure (by making correcting subordinate legislation).

16. These are powers that are already available to the Court of Session when disposing of a petition for judicial review.

17. Section 5 applies to a provision of an Act or subordinate legislation in so far as the provision is 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.

18. 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 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.

19. 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.

20. 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.

21. 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 consider 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.

22. Section 6(2) enables regulations made under 6(1) to modify any enactment (as defined in schedule 1 of ILRA, which includes Acts of Parliament, Acts of the Scottish Parliament, statutory instruments and Scottish statutory instruments) 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 scope of the Act the Charter Article with which the legislation was found to be incompatible.

23. Section 6A ensures that any exercise of the section 6 regulation-making power is subject to a form of super-affirmative procedure. Accordingly, at least 60 days before the final regulations are laid (in the form of a draft statutory instrument) for approval by resolution, a draft of the regulations must be laid, together with an explanatory statement. Subsections (5) and (6) allow the 60-day requirement to be dispensed with, but only if an explanation is provided to the Presiding Officer of the Parliament.

24. 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.

25. 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.

26. Section 7(1)(b) ensures the power also applies to the case where pre-commencement subordinate legislation is found to be incompatible, as 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(1A) which defines the interpretative obligation on courts as applying to Acts or subordinate legislation whenever enacted, and so also covers extant subordinate legislation.

27. 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.

28. Section 9 stipulates that any regulations made under the Bill (under section 1(3), 6(1) or 9A(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. (As already noted, regulations under section 6(1) are subject to enhanced scrutiny requirements by virtue of section 6A.)

29. Section 9A enables the Scottish Ministers by regulations to make ancillary provision for the purposes of, in connection with or in order to give full effect to the Act or any provision made under it. Such regulations can modify any enactment, including the Act itself, and are subject to the affirmative procedure.

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

31. 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 (through an amending protocol), the schedule could be updated in consequence using the power delegated to the Scottish Ministers by section 1(3).

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