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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

European Charter of Local Self- Government (Incorporation) (Scotland) Bill: Stage 2



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Public Information on:
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Email: sp.info@parliament.scot

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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Bill Bowman
Scottish Conservative
and Unionist Party



Mary Fee
Scottish Labour



Gil Paterson
Scottish National Party



Michelle Ballantyne
Reform UK



Joe FitzPatrick
Scottish National Party

Introduction

1. At its meeting on 9 March 2021, the Delegated Powers and Law Reform Committee considered the delegated powers in the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ('the Bill') as amended at Stage 2.ⁱ
2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
3. The Bill completed Stage 2 on 24 February 2021.

ⁱ The Bill as amended at Stage 2 is available [here](#)

Overview of the Bill

4. This Member's Bill was introduced by Andy Wightman MSP on 5 May 2020. The lead committee is the Local Government and Communities Committee.
5. 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. Paragraph 5 of the Bill's Policy Memorandumⁱⁱ states that:
 - ” ...this should enhance local government's status in law and provide legal guarantees of the status, powers and finances of local government. It should also provide for a check on the powers of the Scottish Government and the Scottish Parliament in so far as these interact with the terms of the Charter.
6. The Bill allows the courts to consider alleged instances of incompatibility with the Charter Articles. It 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.

ii [European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill Policy Memorandum](#)

Delegated Powers

7. The Committee considered the delegated powers in the Bill at Stage 1 at its meetings on 6 October and 24 November 2020. It made a number of suggestions in relation to the delegated powers provisions contained in the Bill and published its Stage 1 Report on the Bill on 4 December 2020ⁱⁱⁱ.
8. The Member has produced a Supplementary Delegated Powers Memorandum ('SDPM') covering the powers in the Bill as amended at Stage 2.^{iv} Paragraph 4 of the SDPM indicates that there is an amendment to the scope of an existing power, and the procedure that applies to it, and one new power.
9. The Committee considered the delegated powers in the Bill as amended at Stage 2 at its meeting on 9 March 2021 and reports on each in turn.

Section 6(1) – Power to take remedial action (read with new 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: form of super-affirmative

10. Section 5 of the Bill allows the court to make a declaration of incompatibility if it is satisfied that a provision contained in an Act, or certain categories of subordinate legislation, is incompatible with the Charter Articles. Section 5(6) provides that such a declaration does not by itself affect the validity, continuing operation or enforcement of the provision concerned.
11. The delegated power in section 6(1) of the Bill allows the Scottish Ministers by regulations to make such provision as they consider necessary or expedient in consequence of a declaration of incompatibility by the court. Such regulations may modify any enactment other than the Bill as enacted.
12. The Committee made a number of points relating to this power in its Stage 1 report. These are listed below along with how the Bill was amended at Stage 2.

Compelling reasons

13. The Committee concluded that given how widely expressed the provisions of the Charter are, the Parliament might wish to be reassured that remedial action is only to be taken via subordinate legislation where there are compelling reasons for doing so rather than through primary legislation.
14. The power was not amended at Stage 2 to insert a requirement for compelling reasons. However, the explanatory statement to be laid in the 60-day consultation period under the form of super-affirmative procedure provided for in new section 6A

ⁱⁱⁱ [Delegated Powers and Law Reform Committee, 72nd Report 2020 \(Session 5\): European Charter of Local Self-Government \(Incorporation\) \(Scotland\) Bill: Stage 1](#)

^{iv} [Supplementary Delegated Powers Memorandum](#)

(see below) is to explain whether the draft regulations include provision that goes beyond what is necessary to address the incompatibility and, if so, why that provision is included. It must also set out why the Scottish Ministers are proposing to use the power under section 6(1) as opposed to taking other action.

Criminal offences

15. In its Stage 1 report the Committee welcomed the willingness of the Member to clarify that the power in section 6 does not include the power to create new criminal offences. The Committee recommended that an amendment be lodged at Stage 2 to achieve this. In addition, the Committee recommended that the Member includes in any such amendment that the power also does not permit widening the scope of existing criminal offences, or increasing the punishment for existing offences.
16. The Bill was amended at Stage 2 to clarify that regulations made under the power in section 6 of the Bill may not create, widen the scope of, or increase the penalty for, a criminal offence.

Form of super-affirmative procedure

17. At Stage 1, regulations made under the power in section 6 of the Bill were subject to the affirmative procedure.
18. In its Stage 1 report, the Committee welcomed the commitment from the Member to consider the application of a form of super-affirmative procedure to the power in section 6. It also recognised that there may be less need for a form of super-affirmative procedure if there is a requirement that Ministers consider that there are compelling reasons for using the power. It therefore suggested that provision for urgent cases, akin to the procedure in section 14 of the Convention Rights (Compliance) (Scotland) Act 2001 (the “2001 Act”), may be more relevant in the context of ensuring compliance with human rights than in relation to the Charter.
19. The Bill as amended at Stage 2 provides for a form of super-affirmative procedure. The key features of this new procedure in section 6A of the Bill are as follows:
 - Before laying the regulations under the affirmative procedure, Ministers must lay before Parliament a draft of the regulations and an explanatory statement for a period of 60 days.
 - The explanatory statement must explain the nature of the incompatibility with the Charter Articles, how the draft regulations address the incompatibility, whether they include provision that goes beyond what is necessary to address the incompatibility and, if so, why that provision is included. It must also explain why Ministers are proposing to use the power under section 6(1) as opposed to taking other action.
 - Section 6A(5) and (6) provide that a failure to comply with the 60-day period requirement does not prevent the regulations contained in the draft instrument from being approved and made, although Ministers must explain to the Presiding Officer why the requirement has been breached.

20. The Committee welcomes the amendment agreed at Stage 2 inserting new

section 6(3) of the Bill in relation to criminal offences and notes the terms of the form of super-affirmative procedure set out in new section 6A.

Section 9A – Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

21. New section 9A of the Bill agreed at Stage 2 provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill as enacted or any provision made under it. Regulations made under this section may modify any enactment, including the Bill as enacted.
22. In considering this new provision, the Committee notes that a power to make ancillary provision by regulations is fairly common in most modern bills, although the Committee will always consider whether it is necessary and appropriate in the context of each bill.
23. This particular power allows regulations to amend provisions of the Bill as enacted. It was not clear to the Committee whether the power is necessary in circumstances where section 1 includes a power to amend the Act to reflect amending or additional protocols to the Charter signed by the UK. Scottish Ministers are also given the power in section 6 to make such provision in regulations as they consider necessary or expedient in consequence of a declaration of incompatibility.
24. The Committee notes that neither the Human Rights Act 1998, nor the 2001 Act, which have a number of parallels with the Bill, include a standalone power to make ancillary provision in regulations.
25. In addition, it is standard practice for ancillary powers to be subject to the affirmative procedure if they amend primary legislation and otherwise subject to the negative procedure. While the application of the affirmative procedure to the ancillary power under new section 9A in all circumstances is unusual, the Committee is content that regulations made under the power would afford the opportunity for enhanced scrutiny.

26. **The Committee therefore welcomes the amendment agreed at Stage 2 inserting new section 6(3) of the Bill in relation to criminal offences and notes the terms of the form of super-affirmative procedure set out in new section 6A.**

