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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 1**



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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.



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# Committee Membership



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# Introduction

1. At its meetings on 6 October and 24 November 2020, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (“the Bill”) at Stage 1.<sup>i</sup>
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

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<sup>i</sup> The Bill as introduced is available [here](#)

## Overview of the Bill

3. This Member's Bill was introduced by Andy Wightman MSP on 5 May 2020. The lead committee is the Local Government and Communities Committee.
4. 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.
5. Among other things, 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.

# Delegated Powers

6. The Bill confers two powers to make subordinate legislation on the Scottish Ministers. The Member in Charge has prepared a Delegated Powers Memorandum which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.<sup>ii</sup>
7. When the Committee considered the Bill on 6 October 2020, it was content with the delegated power in section 1(3), which allows the Scottish Ministers by regulations to amend the Bill as enacted to reflect amending or additional protocols to the Charter that have been signed by the United Kingdom.
8. It did, however, agree to write to the Member in relation to the power in section 6(1) conferred on Scottish Ministers by regulations to take remedial action in consequence of a declaration of incompatibility by the court under section 5.
9. More specifically, the Committee asked the Member questions in relation to the regulation-making power in section 6(1) of the Bill allowing Scottish Ministers to take remedial action.
10. A copy of the correspondence to the Member is included in the **Annex**.
11. On receipt of the response from the Member, the Committee reconsidered the power on section 6(1) at its meeting on 24 November 2020. The Member's response can also be found in the **Annex**.
12. The issues considered by the Committee in relation to this power, together with its recommendations, are set out below.

## **Section 6(1) – power to take remedial action**

### **Power conferred on: the Scottish Ministers**

### **Power exercisable by: regulations made by Scottish statutory instrument**

### **Parliamentary procedure: affirmative**

#### *Provision*

13. 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.
14. 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.
15. Regulations made under the power in section 6(1) are subject to the affirmative

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<sup>ii</sup> The Delegated Powers Memorandum is available [here](#)

procedure (section 9(2)).

16. In relation to this power, the Committee asked the Member three questions.

### *Compelling reasons*

17. Firstly, the Committee asked whether the power should be subject to a similar requirement to section 12(2) of the Convention Rights (Compliance) (Scotland) Act 2001 (the “2001 Act”). In other words, should there be a requirement that Scottish Ministers are of the opinion that there are compelling reasons for exercising the power as distinct from taking any other action.
18. In his response, the Member distinguished between the power to take remedial action in section 12 of the 2001 Act, compared to the similar power in section 10 of the Human Rights Act 1998 (the “HRA”). He added that the former applies where legislation is or may be incompatible with Convention rights, whereas the latter applies where a provision of legislation has been declared incompatible by a court. The response suggested that this may explain the need for a wider range of safeguards for the power in the 2001 Act.
19. The Member also pointed out that the subject matter of the HRA and the 2001 Act are quite different from the Bill. He noted that a potential risk of restricting the power to situations where there are compelling reasons is that it could dissuade Ministers from making use of the power, which might lead to delays if primary legislation is required instead.
20. The Member confirmed he will reflect further on this point once he has had an opportunity to see what evidence arises during Stage 1.

- 21. The Committee welcomes the Member's response that he will reflect further on this point once he has had an opportunity to see what evidence arises during Stage 1.**
- 22. The Committee recognises that the subject matter of the HRA and the 2001 Act, on the one hand, and the Bill, on the other, are different. While the former relates to the rights of individuals in wide-ranging areas, the latter relates to principles for protecting the status of local government.**
- 23. Nevertheless, given how widely expressed the provisions of the Charter are, the Committee considers that the Parliament might wish to be reassured that remedial action is only being taken via subordinate legislation where there are compelling reasons for doing so rather than through primary legislation.**

### *Criminal Offences*

24. Secondly, the Committee asked whether the power is capable of creating criminal offences and, if so, why that is considered appropriate. It also asked whether the power should clarify in what circumstances regulations made under the power can create criminal offences.
25. The Member's response stated that he did not believe that section 6 of the Bill

should be capable of creating criminal offences. It also indicated that it was difficult to envisage a scenario where the creation of a criminal offence would be considered necessary or expedient as a consequence of a provision in legislation being declared incompatible with the Charter.

26. The Member confirmed he would be content to see the Bill amended to exclude this possibility to put the matter beyond doubt.

**27. The Committee welcomes the willingness of the Member to clarify that the power in section 6 does not include the power to create new criminal offences, and therefore recommends that he lodges an amendment to the Bill to achieve this.**

**28. In addition, the Committee asks 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.**

#### *Form of super-affirmative procedure*

29. Finally, the Committee asked the Member whether the power should be subject to a form of super-affirmative procedure in similar terms to sections 13 and 14 of the 2001 Act. In summary, under section 13, the draft remedial order must be laid for a period of 60 days together with certain explanatory information. Under section 14, which applies to urgent cases, it must be laid after it is made with the required information and must be approved within 120 days in order to continue to have effect.

30. In his response, the Member reiterated his position that while there are similarities between the power in section 6 of the Bill and the powers in both section 12 of the 2001 Act and section 10 of the HRA, there are also important differences. He went on to state that the need for an urgent procedure in the case of the 2001 Act may come down to the distinct nature of the “rights” protected by the ECHR, in comparison to the principles enshrined in the European Charter of Local Self-Government.

31. The Member indicated that he will reflect further on this point once he has had an opportunity to see what evidence arises during Stage 1.

**32. The Committee welcomes the Member's response that he will consider the application of a form of super-affirmative procedure to the power in section 6 in light of further evidence taken at Stage 1.**

**33. However, the Committee also recognises 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 suggests that provision for urgent cases, akin to the procedure in section 14 of the 2001 Act, may be more relevant in the context of ensuring compliance with human rights than in relation to the Charter.**

# Annex

## **9 October 2020 - Correspondence from the Delegated Powers and Law Reform Committee to the Member in Charge**

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on Tuesday 6 October and would be grateful for an explanation of the following matters:

### **Section 6(1) – power to take remedial action**

#### **Power conferred on: the Scottish Ministers**

#### **Power exercisable by: regulations made by Scottish statutory instrument**

#### **Parliamentary procedure: affirmative**

The Delegated Powers Memorandum (“the DPM”) considers that a regulation-making power is a more proportionate and efficient means for responding to a declaration of incompatibility made by the courts under section 5 than requiring primary legislation to address the issue. It adds that the affirmative procedure is appropriate given that the power is significant and can be used to modify other enactments.

The Committee noted that the declaration of incompatibility mechanism in the Bill is similar to that contained in the Human Rights Act 1998 (“HRA”). There is a similar power in section 10 of the HRA conferred on UK Ministers to make provision by order to rectify a provision of legislation that has been declared by a court to be incompatible with a Convention right under section 4 of the HRA. However, that power can only be exercised where there is a compelling reason for using it (e.g., rather than primary legislation). Furthermore, only such amendments as are considered necessary may be made.

The power in section 10 of the HRA is subject to a form of super-affirmative procedure. The draft order must be laid for a period of 60 days and accompanied by an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and a statement of the reasons for proceeding under section 10 and for making an order in those terms (the “required information”). If representations are made during the 60-day period, the draft order must be accompanied by a statement containing a summary of those representations and details of any changes made in light of the representations. If the order is urgent, it must be laid after it is made with the required information and must be approved within 120 days in order to continue to have effect.

Similarly, under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 (the “2001 Act”), the Scottish Ministers may by order make such provision as they consider necessary or expedient in consequence of any legislation which is or may be incompatible with any of the Convention rights. However, this power can only be exercised where the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order as distinct from taking any other action (e.g., proceeding by way of primary legislation).

Section 13 of the 2001 Act applies a similar super-affirmative procedure to that which applies to an order made under section 10 of the HRA, including similar provision for

urgent cases (section 14).

The Committee would therefore welcome a response on whether you consider that the power in section 6 of the Bill:

(a) should be subject to a similar requirement to section 12(2) of the 2001 Act that Scottish Ministers are of the opinion that there are compelling reasons for exercising the power as distinct from taking any other action;

(b) is capable of creating criminal offences and, if so, why that is considered appropriate and whether the power should clarify in what circumstances regulations made under the power can create criminal offences; and

(c) should be subject to a form of super-affirmative procedure in similar terms to sections 13 and 14 of the 2001 Act.

### **30 October 2020 – response from Member in Charge to the Delegated Powers and Law Reform Committee**

I would like to thank the Committee for its consideration of the delegated powers in the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. The Committee had the following questions on the delegated power contained in section 6 of my Bill, which I will seek to address in turn.

*The Committee would therefore welcome a response on whether you consider that the power in section 6 of the Bill:*

*(a) should be subject to a similar requirement to section 12(2) of the 2001 Act that Scottish Ministers are of the opinion that there are compelling reasons for exercising the power as distinct from taking any other action;*

This is an interesting point. In drafting my Bill, I was mindful of the need to include a regulation-making power that would be sufficiently broad as to enable Scottish Ministers to respond effectively to the manner in which the courts may express the incompatibility (paragraph 79, Policy Memorandum).

Section 10 of the Human Rights Act 1998 (the HRA) is perhaps a more suitable point of comparison for my Bill, as it applies once a provision of legislation has been declared incompatible by a court. Section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 (the 2001 Act) seems to have a potentially wider application from the outset, as it applies whenever a legislative provision “is or may be incompatible with the Convention rights”. This may also explain the need for a wider range of safeguards.

I agree there are certainly similarities in context, in so far as the examples the Committee gives, and my own Member’s Bill, relate to the potential incompatibility of legislation with international law. At the same time, however, the subject matter of the HRA and the 2001 Act are also quite different to my Bill.

I am conscious that a potential risk of restricting the power to situations where compelling reasons were needed is that it could dissuade Ministers from making use of the power. And if this led instead to having to address an incompatibility through primary legislation, it could lead to the kind of delay that the section 6 power seeks to avoid.

I would like to reflect further on this point and see what evidence arises during Stage 1

evidence.

*(b) is capable of creating criminal offences and, if so, why that is considered appropriate and whether the power should clarify in what circumstances regulations made under the power can create criminal offences; and*

For the sake of clarity, I do not believe that section 6 of my Bill should be capable of creating criminal offences.

Section 6 of my Bill states that “The Scottish Ministers may by regulations make such provisions as they consider necessary or expedient in consequence of a declaration of incompatibility”. I find it difficult to envisage a scenario where the creation of a criminal offence would be considered necessary or expedient as a consequence of a provision in legislation being declared incompatible with the European Charter of Local Self-Government.

Having said that, to put the matter beyond doubt, I would be content to see the Bill amended to exclude this possibility.

*(c) should be subject to a form of super-affirmative procedure in similar terms to sections 13 and 14 of the 2001 Act.*

Whilst I agree that there are similarities between the section 6 provision in my Bill and the remedial order provisions made in section 12 of the 2001 Act and section 10 of the Human Rights Act, for the reasons already explained in my response to (a) above, there are also important differences.

The scope of the powers to make remedial orders in the 2001 Act does seem to be wider, which again could account for the safeguards that are in place. And whilst both the 2001 Act and my Bill involve international treaties, the need for an urgent procedure in the case of the 2001 Act may come down to the distinct nature of the ‘rights’ protected by the ECHR, in comparison to the principles enshrined in the European Charter of Local Self-Government.

Nevertheless, I acknowledge that the Committee has asked an important and helpful question. Here again I would like to reflect further, with the benefit of additional consideration that may be given to the matter during Stage 1 evidence.

In the meantime, I would like to thank the Committee again for its valuable contribution. I hope the explanation provided is sufficient for the purpose of your consideration of the Bill at this stage. I look forward to exploring these issues further during Stage 1 evidence and I am confident that, should my Bill proceed to Stage 2, it will be possible to return to the points raised at that juncture if necessary.

