The Scottish Parliament
Pàrlamaid na h-Alba

James Dornan MSP
Convener
Local Government and Communities Committee
c/o Clerk to the Committee

By email: LocalGovernmentandCommunities@parliament.scot

cc. Aileen Campbell MSP, Cabinet Secretary for Communities and Local Government

19 February 2021

Dear James,

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

I am writing to the Local Government and Communities Committee in advance of Stage 2 of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill to provide the Committee with a brief explanation of the amendments that I have lodged.

I would like to take the opportunity to record my thanks to the Cabinet Secretary for her willingness to work collaboratively with me, in advance of Stage 2, and also to thank her team for the very helpful liaison with my own team.

In recognition of the collaborative approach I have added my name in support to all but three of the amendments the Cabinet Secretary has lodged. I am pleased that the Cabinet Secretary has indicated her support for all of my Stage 2 amendments.

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Duty to act compatibly with the Charter Articles

Amendments 2 and 4

2 In section 2, page 1, line 12, leave out subsection (1) and insert—

<(1) The Scottish Ministers must ensure that any action they take in the exercise of their functions is compatible with the Charter Articles.>

4 In section 2, page 1, leave out line 20 and insert—

<( ) For the purposes of subsection (1), a failure to act (including a failure to make subordinate legislation) is to be treated as the taking of action.>

Amendments 2 and 4 are technical amendments to address an ambiguity in language in s.2(2) of the Bill that was pointed out in written evidence to the Committee by Professor Chris Himsworth. This relates to the how the definition of 'act' as including 'failure to act' in subsection (2) interacts with subsection (1).

The effect of amendments 2 and 4 is that the section 2(1) duty on Scottish Ministers is now expressed as relating to any 'action' that Scottish Ministers take in the exercise of their functions. The consistency is achieved by creating a new subsection explaining that a failure to act (including a failure to make subordinate legislation) is to be understood as the *taking of action* for the purpose of subsection (1).

The formulation proposed by the amendments is clearer and more effective in making both acts and failures to act challengeable in court if they appear to be incompatible with the Charter Articles.

Section 5 - Declaration of incompatibility

Amendment 9

9 In section 5, page 2, line 38, after <Court> insert <of the United Kingdom>

Amendment 9 also responds to a point raised by Professor Himsworth in his written evidence to the Committee. It is a technical amendment to ensure clarity that the court referred to in subsection (5)(a) is the Supreme Court of the United Kingdom. The Court is only referred to once in the Bill, so there is no need for a separate definition. This amendment ensures it is given its full name as a formal institution when it is referred to in section 5(5).

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Amendments 10 and 11

10 In section 5, page 3, line 4, leave out <only>

11 In section 5, page 3, line 5, after <legislation)> insert <only>

Amendments 10 and 11 are technical amendments adjusting the positioning of the word 'only' in subsection (7). The new formulation clarifies the fact that subsection (7) ensures that a declaration of incompatibility can be made in respect of a provision 'only' if the provision is within the legislative competence of the Scottish Parliament.

Section 6 - Power to take remedial action

Amendment 19

19 In section 6, page 3, line 10, at end insert–

<( ) Regulations made under subsection (1) may not create, widen the scope of, or increase the penalty for, a criminal offence.>

Amendment 19 addresses an issue raised by the DPLR Committee in a letter to me on 9 October 2020. The Committee wished to clarify whether the powers delegated to the Scottish Ministers by section 6 of the Bill would include the power to create new criminal offences. In my response to the Committee from 30 October 2020 I explained that it was not my intention that this power be used to create new criminal offences and that I would be content to lodge an amendment to the Bill at Stage 2 to make that clear. In its subsequent report on the Bill at Stage 1 from 4 December 2020 the DPLR Committee also recommended that any such amendment should specify that the power should not permit widening the scope of existing criminal offences or increasing the punishment for existing offences.

Amendment 19 will therefore have the effect of ensuring that the section 6 delegated power cannot be used to create a new criminal offence, to widen the scope of an existing criminal offence or to increase the penalty for a criminal offence.

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Amendment 13 – Enhanced scrutiny of regulations under section 6(1)

Amendment 13 addresses another issue raised by the DPLR Committee in its Stage 1 scrutiny of the Bill and provides for enhanced scrutiny of regulations that are laid by the Scottish Ministers under section 6(1) of the Bill. The Law Society of Scotland had also commented on the breadth of this power, in its written evidence to the Committee at Stage 1.

The delegated powers under section 6(1), although broad, are only available to the Scottish Ministers in the event that a court makes a declaration of incompatibility in respect of a provision, either of an Act of or subordinate legislation, and if they consider it 'necessary or expedient' to use them in consequence of such a declaration. Nevertheless, having considered the Stage 1 evidence, I have decided that additional checks and balances are required and have concluded that the addition of a super-affirmative procedure would be the most appropriate way to deal with the issue.

The effect of this amendment therefore is to introduce a super-affirmative procedure – and as such enhanced scrutiny – for any regulations made by the Scottish Ministers under section 6(1).

Before laying a draft instrument for approval, Ministers will be required to lay a draft of the proposed regulations, accompanied by a statement. The statement should explain the nature of the incompatibility that the draft regulations relate to; how they 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; and finally why Ministers are proposing to use the power under 6(1) as opposed to remedying the incompatibility by other action (for example by introducing primary legislation). Ministers will then have to wait at least 60 days before laying the draft regulations for approval. This should provide the Scottish Parliament sufficient time for adequate scrutiny of the draft regulations.

The Cabinet Secretary's amendment 13A is an amendment to my amendment 13 and would introduce the possibility to expedite the process by providing for the additional 60-day pre-laying period to be dispensed with. I have reflected on this and decided not to support this amendment. My view is that, as a declaration of incompatibility will not affect the validity or continuing operation of a provision, then

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the law will not need to be changed immediately as a consequence of a declaration. I believe it is unlikely that issues related to this Bill – e.g. local government law – would require such an expedited process, in the same way that, for example, human rights legislation may. And if a case did arise then it would always remain possible for the Scottish Government to seek to introduce an emergency Bill.

Section 7 - Power to remove or limit retrospective effect of decisions etc.

Amendments 14 and 15

14 In section 7, page 3, line 15, after <where> insert <a court decides that>

15 In section 7, page 3, line 16, leave out <a court decides that>

These amendments provide a slight restructuring of 7(1)(b) to make it clear that the test set out in sub-paragraph (ii), like that in sub-paragraph (i), is something that requires the court to reach a view, and not just a matter of fact.

Amendment 16

16 In section 7, page 3, line 17, leave out <this Act> and insert <section 2>

Section 7(1) sets out two circumstances in which the power to remove or limit the retrospective effect of a court decision, or suspend its effect, is to be available to a court. One of those (in paragraph (b)) is where it is pre-existing subordinate legislation that is found to be incompatible. At present, this is defined by reference to when "the Act" comes into force. But this does not give a definitive answer, as there is no single date on which the whole Act comes into force (see section 10). This amendment therefore changes the test to whether section 2 is in force. This is relevant since, as soon as section 2 is in force, Ministers are under a duty to ensure anything they do, including making subordinate legislation, is Charter-compatible – so the making of any Charter-incompatible subordinate legislation after that date

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would constitute a breach of section 2 (and the section 7 powers would already be available by virtue of section 7(1)(a)).

Amendment 17

17 In section 7, page 3, leave out lines 18 and 19 and insert—

<(ii) (disregarding any possibility of revocation) primary legislation does not prevent removal of the incompatibility.>

Amendment 17 seeks to make it clear that what determines the availability to a court of the s.7 powers is the nature of the legislation (i.e. subordinate legislation where primary legislation does not prevent the removal of the incompatible subordinate legislation) and not which court it is. I realised that in the Bill as introduced there was a risk that section 7(1)(b)(ii) could be interpreted as follows: the powers would be available to a court if the reason why the court was not in a position to make a declaration of incompatibility under s.5(4) was that it was not the Supreme Court or the Court of Session. This is not the intention. The s.7 powers should be available to any court in the event that they decide to quash pre-existing subordinate legislation, where primary legislation does not prevent removal of the incompatibility. Amendment 17 removes the risk of the provision being misinterpreted by re-wording it as the converse of the condition in section 5(4)(b).

Best wishes

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