

Submission from Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill. The Sub-committee has the following comments to put forward for consideration.

Introductory Comments

The Law Society of Scotland notes that this bill will incorporate into domestic law in Scotland the European Charter of Local Self Government. As the Explanatory Notes point out the UK has a dualist legal system and domestic and international law are distinct and separate from one another. We agree with the assessment in the explanatory notes that to give public international law the same legal authority as domestic law it must be incorporated into domestic law.

The explanatory notes detail that the charter has been signed by the United Kingdom Government, ratified by the UK in April 1998 and entered into force in respect of the UK on 1 August 1998.

We note the intention of Andy Wightman MSP to achieve incorporation of the charter into domestic law in Scotland, give it legal effect and allow compliance with the Charter to be enforced in the Scottish courts.

Consideration of the bill takes place in the context of the applicable law contained in the Scotland Act 1998, schedule 5, paragraph 7 which provides that: –

“1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(2) Sub-paragraph (1) does not reserve—
(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law...”

It is not the Society’s role to comment upon the policy behind the bill, but we believe that the Committee will have ample opportunity to explore that aspect in the Stage 1 evidence gathering process.

Section 1 The Charter Articles

Section 1 of the Bill introduces the schedule to the bill which includes articles 2–11 of the European Charter of local self-government.

The Policy Memorandum confirms at paragraph 61 that the Bill proposes the direct incorporation of the Charter of Local Self-Government, by reproducing the precise wording of the relevant Charter Articles, in the schedule.

Our comment

This is an effective approach to incorporation and as such reflects the Human Rights Act (HRA)1998 section 1.

Section 2 Duty to act compatibly with the Charter Articles

Section 2 imposes a duty on Scottish Ministers, in exercising their functions to act in a way that is compatible with the Charter Articles. Section 2 define “functions” as “devolved functions” and that the actions of Scottish Ministers are restricted to the making of subordinate legislation such as regulations and do not involve “introduction or promotion” of any bill.

This provision is necessary in order to avoid issues of legislative competence which would be engaged if the bill purported to provide that it could constrain the legislative competence of the Parliament and contravene the Scotland Act 1998. The Scotland Act 1998 is protected legislation under Schedule 4 of that Act which means that the Scottish Parliament cannot, unless given specific powers, amend the Scotland Act.

Our comment

We have no comment to make.

Section 3 Duty to promote local self-government

Section 3 of the Bill imposes on Scottish Ministers a duty to promote local government in Scotland. The provisions of section 3 are not particularly onerous. Scottish Ministers are placed under a duty to keep under consideration steps they could take to safeguard and reinforce local self-government and improve the autonomy of local authorities.

Scottish Ministers are also required to report to the Scottish Parliament at least once every five years on the steps they have taken under this provision.

Our comment

The issues covered in section 3 are in the political sphere rather than the legal. However, we note that a reporting cycle of once in every 5 years may be too long to provide proper scrutiny of ministerial action.

Section 4 Interpretation of legislation

Section 4 imposes an obligation on the courts to read and give effect to any legislation including Acts of the UK or Scottish Parliament or subordinate legislation made by UK or Scottish Ministers in a way which is compatible with the Charter. This applies to such legislation irrespective of when it was made law. Providing in statute for an obligation to interpret an act or regulation in a way which is compatible with the charter means that the courts will only be able to declare legislation incompatible in terms of section 5 once they have attempted to interpret the legislation and found it impossible to read the legislation in a way which is compatible with the charter.

Our comment

We agree with the approach taken in the Bill. It is compatible with other rights legislation.

Section 5 Declaration of incompatibility

Section 5 applies to provisions of an Act or subordinate legislation which are within the legislative competence of the Scottish Parliament. It enables the UK Supreme Court or the Court of Session to declare such a provision of an Act incompatible with the Charter. It also enables a court to declare such a provision of subordinate legislation incompatible with the Charter.

Our comment

The UK Supreme Court and the Court of Session are accustomed to dealing with declarations of incompatibility under the HRA. The scheme followed by the bill is similar to but not the same as the HRA provisions. However, we take the view that it is likely that challenges by judicial review of the actions of Scottish Ministers in relation to the Charter will be considered by the courts in a way which is consistent with the approach taken under the HRA.

It is difficult for us to predict the extent to which the bill, if passed will be used in litigation. Many factors determine whether litigation will ensue including the risk-appetite of the parties to go to court, significantly the financing of cases, and the basis of the claim as well as the political and policy priorities for any Local Authority at the time. However, Article 11 of the Charter states:

Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.

Articles 8 (Administrative supervision of local authorities' activities), 9 (Financial resources of local authorities) and 10 (Local authorities' right to associate) identify rights or entitlements for local authorities. We note that the Financial Memorandum (paragraphs 14-34) on the bill provides helpful information on the potential costs on the Scottish Administration. There may be an impact on the budgeting of local authorities if finance is to be set aside in anticipation of raising petitions for judicial review. It will be a decision for each authority as to what provision should be made. However, rights which cannot be enforced for whatever reason (including lack of money) may be more illusory than real.

Section 6 Power to take remedial action

Section 6 empowers the Scottish Ministers to make regulations which they believe are necessary or expedient in consequence of the declaration of incompatibility, including provision to amend primary legislation (other than the Act resulting from this Bill).

Our comment

Ministers are not obliged to make regulations to take remedial action because there may be other ways to achieve resolution of the incompatibility. However, this section provides Scottish Ministers with wide powers (including the amendment of primary legislation) which they can exercise using affirmative procedure if they consider regulations "necessary or expedient".

This section differs considerably from the analogous provision in the HRA. Under the HRA section 10, a Minister of the Crown must consider that if there are "compelling

reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility". Schedule 2 of the HRA also applies to Scottish Ministers and provides a framework for dealing with remedial orders under the HRA. We question why the HRA process has not been adopted in this bill?

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

The explanatory notes at paragraph 22 explain the effect of section 7:

"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."

Our comment

We agree with this approach which will enable the court to reach a just decision in relation to those who may be affected by the retrospective application of a court decision that the Scottish Ministers have breached a duty under the bill or that subordinate legislation made prior to the coming into force of the Act is incompatible with the Charter and it would be impossible to make a declaration of incompatibility under section 5(4)).

Section 8 Statements about Charter-compatibility of Bills

Section 8 requires any MSP introducing a Public Bill in the Parliament 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.

MSP's view, the Bill is compatible with the Charter.

Our comment

This type of provision is typical of legislation including the HRA. We take the view that it is a useful provision which concentrates the mind of the member introducing the bill to make sure that the bill is compliant with the charter.

Section 9 Regulation-making powers

We have no comment to make.

Section 10 Commencement Section

Our comment

Section 10(2) provides that most of the Act will “come into force at the end of the period of 6 months beginning with the day of Royal Assent”. This may be too short a period for implementation of the legislation. Local Authorities and Scottish Ministers may have to review their practices, rules and regulations in order to adopt to the Charter’s implementation. There might be a need for training and development of staff and there are budgetary considerations which may be necessary. Local Authorities will be best placed to provide evidence on such matters.

11 Short title, Schedule—The Charter Articles

We have no comment to make.