



The Scottish Parliament

Subordinate Legislation Committee

35th Report, 2009 (Session 3)

Climate Change (Scotland) Bill as amended at Stage 2

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Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

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; and

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

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Jackson Carlaw
Malcolm Chisholm
Bob Doris
Helen Eadie
Tom McCabe
Ian McKee (Deputy Convener)
Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee

Shelagh McKinlay

Assistant Clerk

Jake Thomas



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Subordinate Legislation Committee

35th Report, 2009 (Session 3)

Climate Change (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 23 June the Subordinate Legislation Committee considered the delegated powers provisions in the Climate Change (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill (“the supplementary DPM”)¹.

Delegated Powers Provisions

3. The Committee considered all of the powers as set out in the supplementary DPM and is content with sections: 4, 6, 7, 7A, 12, 14, 18A, 18B, 18C, 23(3A) and (4), 24(2), 38, 46, 50A, 51E, 52, 53, 54, 55, 56, 57, 58 and 59.

Section 2A(1) – Modifying the interim target

4. Section 2(1) provides that Ministers must ensure that the net Scottish emissions account for 2020 is at least 34% lower than the baseline figure. This is the “interim target” figure. The new power in section 2A(1) enables the Scottish Ministers to increase the interim target figure by way of an affirmative order. This power may be exercised at any time, or on a number of occasions.
5. **The Committee is content with the delegated power in section 2A of the Bill in principle, which is subject to affirmative resolution procedure.**
6. The remainder of this section requires the Scottish Ministers to make an order substituting a higher figure of least 42%, if an appropriate Community instrument is made. However, there is no explanation as to the connection between the sort of Community instrument that triggers section 2A(2) and the 42% figure, nor why the Bill is not simply modified if these circumstances arise.

¹ [Supplementary Delegated Powers Memorandum](#)

7. **The Committee accordingly draws to the attention of the Parliament that no explanation has been given in the supplementary DPM for the relationship between the sort of Community instrument which triggers section 2A(2), and the 42% figure in this section.**

Section 36 – Duties of public bodies relating to climate change

8. At Stage 1, the Committee reported that the power under section 36(1) to impose climate change duties on public bodies is extremely wide in its scope, as neither the public bodies which may be subject to climate change duties, nor the duties themselves were defined in the Bill as introduced.

9. The Committee also recommended that this could be mitigated to some extent by provision of a list of public bodies to whom the power is to apply, along with a power to add to the list, subject to affirmative procedure.

10. Section 36 has been amended at Stage 2. It imposes general duties on public bodies relating to climate change (rather than by order), but retaining the power of Scottish Ministers, if they consider it appropriate, to make *further* provision relating to the imposition on public bodies of duties relating to climate change by affirmative order. Specific duties are imposed by new subsection (A1). Public bodies must exercise their functions in the way best calculated to contribute to the delivery of (a) the targets set in or under Part 1 of the Bill and (b) any programme for adaptation to climate change laid under section 45. Functions are also to be exercised in the manner that bodies consider most sustainable. The power to impose further duties is retained.

11. The Committee's recommendation in relation to providing a definition of the bodies who will be subject to the duties has been taken on board by the new section 36(A2). This defines a "public body" for the purposes of this Part 4 of the Bill as a Scottish public authority within the meaning of section 3(1)(a) of the Freedom of Information (Scotland) Act 2002.

12. The Committee welcomes this development (that is, more definition of the term "public body" in the Bill). The Committee also notes that in relation to subsection (A2), the Government has lodged an amendment at Stage 3 that would substitute a new definition of "relevant public body" in (7). This would define a "relevant public body" as either a local authority, or a devolved public body within the meaning of section 28(1) and schedule 3 to the Ethical Standards in Public Life etc. (S) Act 2000.

13. As to the concerns which the Committee raised in its Stage 1 Report in relation to the potential width of the powers to impose further duties on bodies, the Government stated in its response to the Committee at Stage 1 that it was never the intention to define "climate change duties" more specifically elsewhere in the Bill. The supplementary DPM, in relation to reasons for taking the powers, offers the further comment that "section 36 allows for flexibility in the future to help ensure bodies with functions of a public nature take action on climate change, including reducing emissions or adapting to the effects of climate change."

14. The position in the Bill after Stage 2 in relation to the width of the powers has therefore not altered in substance.

15. The Committee accordingly reports that the power in section 36(1) remains potentially extremely wide in scope, in particular as the further climate change duties which may be imposed by order are not clearly defined, but welcomes the provision of a definition of “public body”.

Section 47 – Power to modify functions of Forestry Commissioners

16. Section 47 confers on the Scottish Ministers the power to modify the functions of the Forestry Commissioners in or as regards Scotland. Subsection (2) provides that this power may be exercised by the Scottish Ministers only where they consider it to be necessary or expedient to do so to comply with their duties under sections 1, 2 or 3(1)(b) of the Bill, or otherwise in relation to climate change. Subsection (3) provides that an order under this section could enable the Forestry Commissioners to form or participate in corporate bodies or trusts. At introduction subsection (4) contained provisions that would have allowed the Forestry Commissioners to delegate their functions to other persons. However, this was deleted at stage 2. The order is subject to affirmative procedure.

17. In its stage 1 report, the Committee drew attention to the fact that the power to modify the functions of the Forestry Commissioners in or as regards Scotland was very broad in scope and that there was no limitation beyond that it must deliver a climate change purpose.

18. This has not altered – although the Bill does not now permit the delegation of Forestry Commission functions to other bodies. This may have addressed an area of some political controversy as regards future management of the forestry estate on a day to day basis.

19. The terms of the committee’s stage 1 report remain relevant. The Committee therefore draws the Parliament’s attention to the width of this power to modify the functions of the Forestry Commissioners as regards Scotland in relation to climate change purposes while noting that there is no longer power to permit the delegation of functions to other bodies.

Section 50 – Non-domestic buildings: assessment of energy performance and emissions

20. At introduction this section allowed the Scottish Ministers to make regulations relating to the assessment of the energy performance of and the emission of greenhouse gases from non-domestic buildings. Subsection (1) as amended at Stage 2 now places a duty on the Scottish Ministers to make regulations under this section.

21. In addition the section has been amended to place a duty on Ministers to make regulations, requiring owners of non-domestic buildings to take steps to improve the energy performance of such buildings and to reduce emissions of greenhouse gases.

22. **The Committee draws the Parliament's attention to there now being a duty to make regulations under section 50(1) rather than there being simply a power available to Ministers to do so. The Committee draws to Parliament's attention that there is also a duty to make regulations requiring owners to take steps to improve energy performance of non-domestic buildings and reduce emissions from such buildings. The Committee is otherwise content that all of the powers under section 50 are, now, to be exercisable by affirmative procedure. The Committee notes that given the element of discretion afforded to Ministers as to what is provided there may arise a tension as between Ministers duties under the section, and the need for such regulations to be approved by the Parliament before they can be made.**

Section 50B - Council tax reductions to promote energy efficiency

23. Section 50B was inserted into the Bill at Stage 2. The supplementary DPM explains that the policy intention is to promote "incentivisation schemes" for energy efficiency improvements through the council tax regime. The Committee considers that it is not clear from the supplementary DPM why it is appropriate to make this provision through a power to make subordinate legislation rather than making direct provision for such schemes.

24. This section places a duty on the Scottish Ministers to make regulations that would facilitate local authorities to reduce the amount of council tax a person is liable to pay in the following financial year if that person makes an energy efficiency improvement or installs technologies reliant on renewable energy or heat in a domestic dwelling in the current financial year.

25. This is a significant new provision. It sets out a duty on Minister to **make** regulations but as the exercise of the power is subject to affirmative procedure Ministers the Committee observes that Ministers would not be able to fulfil that duty if the Parliament does not approve the Regulations. The exercise of the powers would require council tax reductions, raising significant attendant implications in relation to local authority funding. As this is a policy matter the Committee does not comment on the substance of the power but draws its subject matter to the Parliament's attention.

26. **The Committee draws Parliament's attention to the new regulation making provision at section 50B and that no justification has been provided in the supplementary DPM as to why it is appropriate to make this provision through subordinate legislation. The Committee notes that Ministers are placed under an obligation to make Regulations but can be prevented from so doing if Parliament does not approve what is laid before it. Given the impact of the power if Parliament considers it acceptable then the Committee considers that the power should be exercisable subject to affirmative procedure.**

Section 50D - Review of provisions made by virtue of or under sections 50C and (Amounts of reductions in non-domestic rates)

27. Section 50D was inserted at stage 2 and requires annual reports to be made by the Scottish Ministers regarding the effectiveness of specific financial incentives towards promoting energy efficiency improvements and technologies reliant on renewable sources of energy or heat set out in sections 50B and 50C. Subsections (2) and (3) provide powers to vary these amounts, and alter the criteria involved.

28. Such regulations would enable Ministers to increase, or vary, amounts of reductions in council tax, by significant amounts. This may have significant implications for local authority budgets. The subject matter is a policy matter and as such not for the Committee to review but the Committee considers it should address whether proper justification for the need for subordinate legislation has been provided. It appears from the supplementary DPM that flexibility is required to react to the reports produced so as to ensure that the scheme works effectively as an incentive to promote energy efficiency measures.

29. The Committee draws Parliament's attention to the new powers in section 50D, with particular reference to the potential financial impact on local authority budgets. Given the significance of the power, the Committee considers that it should be exercisable subject to affirmative procedure.

Section 51A – Air source heat pumps and micro wind turbines in domestic properties: permitted development rights

30. Section 51A was inserted at Stage 2. It places a duty on the Scottish Ministers to exercise powers to amend the General Permitted Development Order so as to specify in what circumstances there will be permitted development rights for the installation, alteration or replacement of air source heat pump and wind turbine microgeneration equipment in domestic properties. While the supplementary DPM explains the intended effect of the section, it does not however provide justification for the duty to exercise the relevant functions to achieve that being required.

31. Rather than providing a new power the committee considers that this places a duty on Ministers to exercise their existing powers. It does however modify that power by imposing new consultation requirements.

32. The Committee draws Parliament's attention to the duty placed on the Scottish Ministers to exercise their powers under section 30 of the Town and Country Planning (Scotland) Act 1997 to achieve the effect set out in section 51A(2). The Committee is content with the additional consultation requirement imposed by section 51A(4).

Section 51B – Microgeneration in non-domestic buildings: permitted development rights

33. Again, this is a new provision inserted into the Bill at Stage 2. Section 51B places a duty on the Scottish Ministers to exercise existing powers under the 1997

Act to prescribe the circumstances in which permitted development rights would be granted for the installation, alteration or replacement of microgeneration equipment in non-domestic buildings.

34. Orders made under section 30 of the Town and Country Planning (Scotland) Act 1997 are subject to negative resolution procedure.

35. Similar comments apply here to those made in relation to section 51A above. It is understood that there is an intention that the Scottish Ministers should be obliged to make an instrument of the nature set out and covering the matters to which reference is made. An explanation of the nature of the duty is provided in the supplementary DPM, but no analysis of the *need* for it is set out there

36. The Committee draws Parliament's attention to the duty placed on the Scottish Ministers to exercise their powers under sections 30 and 31 of the Town and Country Planning (Scotland) Act 1997 to achieve the effect set out in section 51B(2). The Committee is content with the additional consultation requirement imposed by section 51B(4).

Section 58A - Deposit and return schemes: designation of scheme administrator

37. This is a new section inserted at Stage 2. Any scheme administrator to which section 58(5) applies needs to be designated by the Scottish Ministers. Subsection (1) allows the Scottish Ministers to deal with the designation of a body or person as a 'scheme administrator' of a deposit and return scheme, by way of order. It may be either an existing or a new body. Subsection (2) also allows the Scottish Ministers, in making such an order, to confer on, remove or otherwise vary the scheme administrator's functions. Amongst these functions it mentions in particular, at subsection (3), borrowing and charging in respect of the exercise of its functions. It is stated in the supplementary DPM that this is necessary to ensure that the scheme administrator's costs can be covered.

38. The Committee notes that aside from being able to designate bodies or persons, provision is made to the effect that an order doing so can modify the functions of an existing body 'in so far as the Scottish Ministers consider it necessary or expedient to do so'. This power is potentially quite a wide one to the extent that, as indicated, it may be used to modify the functions of an existing body. It can also make provision about borrowing or charging by a body.

39. Given also that an order under section 58A would be setting out details in respect of the persons or bodies to whom the functions of a scheme administrator, and the details of those functions, it is considered that they should be subject to at least affirmative procedure.

40. The Committee draws the Parliament's attention to this power to the extent that it may be used to modify the functions of existing bodies. The Committee is otherwise satisfied that the process under new section 58A is currently subject to super-affirmative procedure.

Section 58B - Power to establish scheme administrator

41. This is a new section, inserted at Stage 2 which allows the Scottish Ministers to set up a new body to undertake the functions of a scheme administrator by order. The detail of Ministers' powers in respect of the administrator's status, constitution, members and employees, functions and accounting is set out in subsection (5).

42. The supplementary DPM indicates that this new power was considered necessary since it is not unlikely that a new body would have to be created to exercise the functions of a scheme administrator, since they are unlike those of any existing body. These detailed powers are necessary to create and establish parameters for a new body, and delineate its functions.

43. The Committee acknowledge that some level of need has been identified for this new power, to establish a scheme administrator of a deposit and return scheme established under section 58, although it notes from the supplementary DPM that there appears to have been an element of speculation as to the extent to which there is an absolute requirement for it.

44. The Committee considers that the powers which that body may have, and what can be provided for within an order under section 58B, are quite widely expressed. However, the requirement that such an order would be subject to super affirmative procedure provides some measure of reassurance in terms of Parliament thereby being fully involved in the process relating to such an order.

45. The Committee draws Parliament's attention to the breadth of this power, in particular so far as it enables a body established under it 'to do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the exercise of its functions in relation to a deposit and return scheme, or conducive to the exercise of those functions'. The Committee is otherwise satisfied that any order made under section 58B is to be made by super- affirmative procedure.

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