

Natural Environment (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Natural Environment (Scotland) Bill ("the Bill") following Stage 2. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced, amended or removed from the Bill at Stage 2.

2. This supplementary memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Provisions conferring power to make subordinate legislation removed at Stage 2

Part 2: Power to modify or restate environmental impact assessment legislation and habitats regulations

3. At Stage 2, the Bill was amended to leave out all of the sections comprising Part 2. The sections removed, which conferred subordinate-legislation making powers that were discussed in the Delegated Powers Memorandum (DPM) published to accompany the Bill on introduction, were as follows:

- Section 2: conferred a power on the Scottish Ministers to modify or restate all or any of the relevant legislation making up Scotland's EIA regime (as defined in section 4(a)), and the 1994 Habitats Regulations through secondary legislation for a limited set of purposes.
- Section 3: purposes for modification or restatement of EIA legislation or habitats regulations, which set out the purposes for which the power set out in section 2 could be used.
- Section 4: interpretation in part, which identified the legislation that could be modified or restated under the power in section 2.

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4. Amendment 115 was agreed to at Stage 2 and currently exists in Part 1 of the Bill as section 1B. Section 1B does not confer any powers itself. The intention was for this provision to apply to Part 2 so that those exercising the powers contained therein would be constrained by a requirement to do so in a way that would not reduce the overall standards of environmental protection which were in effect at the time of the exercise of the power.

5. Inadvertently, however, this requirement now applies to powers contained in Part 1 of the Bill, but since Part 1 does not directly confer powers (it creates powers through modifications to existing legislation), section 1B of the Bill does not apply to any power and as such has no practical effect. A government amendment will be brought forward at Stage 3 to remove it.

Delegated powers

Part 1: Targets for improving biodiversity

Section 1: Targets for improving biodiversity - inserted section 2C: duty to set targets

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

6. Section 1 of the Bill inserts section 2C(1) into the Nature Conservation (Scotland) Act 2004 (“the 2004 Act”) and places a duty upon the Scottish Ministers to set targets for the purpose of supporting and measuring progress being made in respect of the implementation of the Scottish Biodiversity Strategy and the duty under section 1 of the 2004 Act to further the conservation of biodiversity.

7. The power states that Scottish Ministers may, by regulations, make provisions for and in connection with targets in relation to the following three topics:

- The condition or extent of any habitat;
- The status of threatened species; and
- The environmental conditions for nature regeneration.

8. At Stage 2 inserted section 2C was amended so that the second target topic is now described as “The status of any species (including in particular those which are or may become threatened)”.

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9. A new section 2CA was also included at Stage 2 to make it a requirement that when exercising the power to set targets under this section, the Scottish Ministers must prepare a statement setting out:

- the approach the Scottish Ministers intend to take to ensure that the targets are met;
- the cost of the approach set out;
- anticipated timeline of the approach set out;
- the organisations, or types of organisations, with which the Scottish Ministers intend to work to ensure that the targets are met;
- how the targets support or have regard to other relevant Scottish Government policies or strategies;
- how the Scottish Ministers intend to monitor and evaluate progress towards meeting the targets through measures or indicators identified in inserted section 2C(2)(b);
- the potential implications and consequences if the targets are not met; and
- the actions the Scottish Ministers intend to take if the targets are not met.

Reason for taking power

10. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

11. The reasons for using this parliamentary procedure applying to this power remain as set out in the DPM.

Section 1: Targets for improving biodiversity – inserted section 2F: process for setting or amending targets or adjusting topics

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

12. Section 2C (as inserted into the 2004 Act by section 1 of the Bill) enables Scottish Ministers to set targets for specific listed topics. Inserted section 2E(5) enables the Scottish Ministers to adjust the topics in inserted section 2C so as to add or amend the topics under which Scottish Ministers must set targets.

13. Inserted section 2F sets out a number of conditions and procedural steps that apply to the adjusting of target topics (section 2E(5)), initial setting of targets and any subsequent amendments to them (section 2C(1)).

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14. At Stage 2 inserted section 2F(1) was amended to provide that, before making regulations under inserted section 2C(1) or 2E(5), the Scottish Ministers must consult with such persons as they consider likely to be interested in or affected by the regulations.

Reason for taking power

15. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

16. The reasons for using this parliamentary procedure applying to this power remain as set out in the DPM.

Section 1: Targets for improving biodiversity - inserted section 2G: Independent review

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

17. Section 1 inserts section 2G into the 2004 Act. Inserted section 2G(1) provides for Environmental Standards Scotland (“ESS”) to act as an independent review body with the following functions:

- review each report prepared by Scottish Ministers on monitoring progress towards meeting targets (3 yearly progress report);
- review each report prepared by the Scottish Ministers reviewing all targets and target topics (10 yearly full targets review);
- assess the manner in which Scottish Ministers seek and use independent advice in compliance with carrying out reviews for targets and target topics (both ad hoc and 10 yearly reviews); and
- prepare a report on the above matters and submit this to Scottish Ministers to then be laid in Parliament.

18. Section 2G(1) was amended at Stage 2 to add a duty on the Scottish Ministers to respond to the reports laid by ESS to the Scottish Parliament as soon as ‘reasonably practicable’ and for Ministers to ‘set out any actions in which they intend to take as a result of the report’. This requirement does not apply where a statement by Ministers under section 2E(4) (i.e. a report following a review in relation to targets by Ministers) already sets out what action Ministers intend to take as a result of the report by ESS.

19. Section 2G(2) was amended to require ESS to submit reports made under section 2G directly to Parliament rather than the Scottish Ministers.

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Reason for taking power

20. The reasons for taking this power remain as set out in the DPM. Requiring that the Scottish Ministers must lay a statement before the Scottish Parliament setting out any action they intend to take as a result of a report prepared under section 2G clarifies the process that should be followed once a report by ESS has been made.

21. As an independent body directly accountable to Parliament, it would be appropriate for ESS to lay any reports they make under Section 2G of the Bill directly to Parliament, rather than the Scottish Ministers.

Choice of procedure

22. The reasons for using this parliamentary procedure applying to this power remain as set out in the DPM.

Section 1A: Reports on compliance with biodiversity duty

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

23. Under Part 1, section 2A of the 2004 Act every public body in Scotland must prepare and publish a biodiversity report triennially.

24. At Stage 2, the Bill was amended to replace the existing section 2A with a new provision. The new section 2A requires that:

- Each specified public body or office holder must prepare and publish a biodiversity report in relation to each specified period; and
- A biodiversity report is a report on the actions taken by the specified public body or office holder in pursuance of its duty under section 1 during the period to which the report relates.

25. In addition, it confers upon the Scottish Ministers a new order making power which enables the Scottish Ministers by regulation to make provision about the biodiversity reports including, in particular, specifying:

- the public bodies and office holders which are required to prepare and publish a biodiversity report;
- the periods in relation to which reports are to relate; and
- particular information that must be included in a biodiversity report

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26. However, the new section 2A(5)(b) requires that a report is published by a specified public body or office holder at least once every 3 years.

Reason for taking power

27. The current reporting duty applies so widely it includes a number of smaller public bodies with functions which are entirely unrelated to environmental matters, and some who have no land or buildings (often just using Scottish Government offices and secretariat).

28. It is not necessarily proportionate, or a good use of public resources, to ask these bodies to produce a biodiversity duty report every three years. Taking a power to establish and amend the list of public bodies going forward will ensure that the duty is focused on those bodies which can meaningfully contribute to the process.

29. In addition to this, the climate duty reporting as set out in section 46(1) of the Climate Change Scotland Act 2009 (“the 2009 Act”) also specifies certain information which must be provided bi-annually by public bodies.

30. It is considered that in the future there could be benefits to both public bodies and the Scottish Government, in terms of both data analysis and efficiency, to have greater alignment between reporting on the biodiversity and climate change duties. A power to amend the reporting cycle will facilitate this.

Choice of procedure

31. By virtue of section 53(4) of the 2004 Act the negative procedure will apply to this amendment. Given any changes to the reporting duty will likely be relatively technical and relate to administrative matters it is considered appropriate to apply the negative procedure. Noting that similar powers in section 46(1) of the 2009 Act are also subject to the negative procedure.

Part 3: National parks

Section 9: Power to make regulations for the issuing of fixed penalty notices

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative unless subject to negative procedure

Revised or new power: Revised

Provision

32. Section 9(2) inserts section 26A into the National Parks (Scotland) Act 2000 (the “2000 Act”). Inserted section 26A confers a power on the Scottish Ministers to be able to make provision by regulations for, or in connection with, the issuing of fixed penalty

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notices (“FPNs”) by national park authorities in relation to certain national park byelaws made under paragraphs 8 and 9 of Schedule 2 of the 2000 Act.

33. Inserted section 26A(4) lists the information which must be included in a fixed penalty notice provided for by regulations. Inserted section 26A(5) provides a non-exhaustive list of other things that the regulations may provide for.

34. Inserted section 26A(5) was amended at Stage 2 to include the ability to confer powers to enter land (other than dwelling houses), for or in connection with the issuing of fixed penalty notices.

Reason for taking power

35. The reasons for taking this power remain as set out in the DPM. However, there are currently no express powers of entry for national park authority staff in relation to enforcement of national park byelaws. Sections 24 and 26 of the Land Reform (Scotland) Act 2003 provide powers of entry in relation to access rights. National Park Authority staff have been using such powers for byelaw enforcement, however they can only enter land to enforce national park byelaws if the contravention is related to access rights (for example in relation to camping management byelaws in Loch Lomond and the Trossachs National Park).

36. In order to future proof the legislation and ensure that the FPN regime is comprehensive and takes account of any future byelaws that do not relate directly to access rights, the ability to potentially confer powers to enter land (other than dwelling houses), for or in connection with the issuing of fixed penalty notices is considered necessary.

37. These additional powers of entry are solely for the purpose of enforcing byelaw breaches and issuing FPNs where this would be considered to be the most effective enforcement measure.

Choice of procedure

38. The choice of procedure remains the same as at Stage 1, i.e., negative if the regulations revoke a reference to a byelaw or specifying that a byelaw has been replaced by a byelaw which has substantially the same effect and otherwise the affirmative procedure applies. Before making any regulations, Scottish Ministers (or if delegated, Scottish Natural Heritage) must consult persons they consider to be interested in or affected by the issuing of FPNs for national park byelaw offences. The reasons for using this parliamentary procedure applying to this power remain as set out in the DPM.

Part 4: Deer management

Section 27: Offence of shooting a deer with a shotgun

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

39. Section 27 of the Bill creates a new offence of shooting a deer with a shotgun, along with a corresponding ability for Scottish Natural Heritage (“SNH”) to authorise the activity in appropriate circumstances. It does so in subsection (2) by inserting a new section 17ZA into the Deer Scotland Act 1996 (the “1996 Act”). Subsection (1) of section 17ZA sets out the offence and the sections to which it is subject.

40. Section 27(5) inserts a definition of “shotgun” into section 45 of the 1996 Act, consistent with the definition contained in the Firearms Act 1968 (the 1968 Act).

41. During Stage 2, the Bill was amended to remove the definition of “shotgun” that would be inserted into the 1996 Act by the Bill and replace it with a new definition of “shotgun” to be established by regulations made by the Scottish Ministers. This definition would apply only to the 1996 Act.

42. The amendment has the effect of requiring Scottish Ministers, before making the regulations, to consult such persons as they consider may have an interest in, or otherwise be affected by, those regulations.

Reason for taking power

43. During the course of Stage 1, concerns were raised by SNH and other stakeholders that the definition of a shotgun in section 1(3)(a) 1968 Act, which was the definition used by Bill to be inserted into the 1996 Act, may inadvertently permit the use of certain firearms to shoot deer without an authorisation from SNH because they do not fall within the statutory definition used in the 1968 Act, despite such weapons being shotguns in practice.

44. This amendment creates a regulation making power that will enable Scottish Ministers to define the term shotgun by regulations for the purposes of the 1996 Act.

45. This will allow Scottish Ministers to ensure that all relevant information and evidence is obtained before defining the term “shotgun” and will ensure that other weapons, which should be considered to be shotguns but are not currently captured under the definition in section 1(3)(a) of the 1968 Act, can be appropriately regulated in terms of their use to shoot deer in Scotland.

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46. Such a power would also allow Scottish Ministers to further limit the type of shotguns which can be used to shoot deer if future data on the welfare impact of shotguns suggested such a restriction was warranted.

Choice of procedure

47. Given the highly technical nature of the definition being provided for by regulation and the fact that before laying such regulations the Scottish Ministers will be required to consult such persons as they consider may have an interest in, or otherwise be affected by, those regulations (which would include those with expertise in the area of firearms) the negative procedure is considered to be appropriate.

Section 28 Register of authorised persons

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: Revised

Provision

48. Section 17A of the 1996 Act contains a regulation making power to establish a register of persons competent to shoot deer. Section 28 of the Bill amends section 17A of the 1996 Act to enable regulations to also provide for the registration of authorisations for specified activities. Section 28(2)(a) allows for the establishment and operation of a register of persons, who are (either or both) competent to shoot deer in Scotland, and authorised to carry out one or more of the specified activities.

49. Section 17A includes the power of Scottish Ministers to, by regulations, require registered persons or owners or occupiers of land to submit cull returns to NatureScot.

50. The Bill was amended at Stage 2 to the effect that provision can be made relating to the information to be requested under this power in relation to either planned cull returns and/or actual cull returns, and the period of time that planned cull returns may cover.

Reason for taking power

51. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

52. The reasons for using this parliamentary procedure applying to this power remain as set out in the DPM.

Part 4A: Building regulations: integral swift nest boxes

Section 33B: Building regulations: integral swift next boxes

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: Revised (existing power in other Act)

Provision

53. Section 1 of the Building (Scotland) Act 2003 (“the 2003 Act”) gives Scottish Ministers powers to make regulations (“building regulations”) with respect to the design, construction, demolition and conversion of buildings and the provision of services, fittings and equipment in or in connection with buildings. Before making such regulations, Scottish Ministers must consult such persons as appear to them to be representative of the interests concerned.

54. Section 33B requires that Scottish Ministers must, within 12 months beginning with the day after Royal Assent, introduce regulations under Section 1 of the 2003 Act to make provision for the installation of an average of one integral swift nest box per dwelling or unit greater than five metres in height and in accordance with “best practice guidance except where such installation is not practicable or appropriate”, “best practice guidance” is defined as meaning British Standard BS 42021: 2022.

Reason for taking power

55. The reasons given during the Stage 2 debate for taking this delegated power were to introduce a ready-made and cost-effective solution to addressing the decline of the common swift population. The cited cause for such decline being a lack of nesting sites and installation of energy efficiency measures in new and existing buildings that have squeezed out nesting habitats for small birds within buildings.

56. The Scottish Ministers already have powers to introduce such regulations or requirements through section 1 of the 2003 Act, however, section 33B obliges them to make use of their existing power, within the time frame specified.

Choice of procedure

57. Given the technical nature being provided for by regulation and the fact that before laying such regulations Scottish Ministers will be required to consult such persons as considered to have an interest in, or otherwise be affected by, those regulations, the negative procedure to which regulations under section 1 of the 2003 Act are subject, is considered to be appropriate.

Part 4D: Scallop shells

Section 33E: Clean scallop shells: exclusion from waste and animal by-product controls

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

58. The amendment requires that the Scottish Ministers *must*, by regulations, provide that clean, tissue-free shells of King scallops and Queen scallops are not treated as waste in the following regulations, when used for the purposes set out in subsection (2).

- the Environmental Protection Act 1990 (or any subordinate legislation made under that Act);
- the Waste (Scotland) Regulations 2011 (S.S.I. 2011/226);
- the Waste (Scotland) Regulations 2012 (S.S.I. 2012/148); and
- animal by-products for the purposes of the Animal By-Products (Enforcement) (Scotland) Regulations 2013 (S.S.I. 2013/307).

59. Subsection (5) provides that regulations under subsection (1) may, in particular make provision relating to:

- standards and certification for shell cleaning and processing;
- record-keeping and traceability requirements;
- conditions or limitations on the use of shells to protect the environment and public health; and
- labelling and information requirements for consignments placed on the Scottish market for the purposes listed in subsection (2).

60. Before making any regulations under this Part, the Scottish Ministers must consult the bodies listed in subsection (6).

Reason for taking power

61. The reasons given during the Stage 2 debate for taking this delegated power were that at present clean scallop shells are treated as waste or animal biproducts, and this creates unnecessary regulatory burden and disposal costs for scallop processors.

62. It was further stated that a duty on the Scottish Ministers to make regulations to remove the classification of scallop shells as either animal by-products or as waste would reduce disposal costs for processors and create opportunities for innovative

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businesses to repurpose shells supporting jobs and the local economy while also removing ambiguity and ensuring proportionate regulation. It would also support circular economy ambitions.

63. No reason was given as to why the amendment requires that new regulations must be made to provide that clean, tissue-free shells of King scallops and Queen scallops are not treated as animal by-products for the purposes of the Animal By-Products (Enforcement) (Scotland) Regulations 2013 (S.S.I. 2013/307) as these by-products are already outside scope of the animal by-products regime. Article 2(2)(f) of Regulation (EU) No 1069/2009 (assimilated law) on animal by-products already provides that the animal by-products regime does not apply to “shells from shellfish with soft tissue and flesh removed”.

64. Likewise it was not set out why the power requires that regulations must be made with regard to the Waste (Scotland) Regulations 2011 (S.S.I. 2011/226) and the Waste (Scotland) Regulations 2012 (S.S.I. 2012/148) as both these regulations have been revoked.

Choice of procedure

65. Subsection (7) sets out that regulations made under this provision are subject to the affirmative procedure. The reason given for the choice of procedure was to ensure that sufficient parliamentary scrutiny of the regulations could be undertaken.

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