

CLIMATE CHANGE (EMISSIONS REDUCTION TARGETS) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Climate Change (Emissions Reduction Targets) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

3. In this memorandum:

“the 2009 Act” means the Climate Change (Scotland) Act 2009,

“baseline” has the meaning given by section 11(1) (the baseline) of the 2009 Act,

“emissions reduction targets” has the meaning given in section 98 (interpretation) of the 2009 Act (as amended by section 20(4) of the Bill),

“net Scottish emissions account” has the meaning given by section 13(1) (the net Scottish emissions account) of the 2009 Act,

“net-zero emissions target” has the meaning given by section A1(1) (the net-zero emissions target) of the 2009 Act,

“net-zero emissions target year” has the meaning given by section A1(2) of the 2009 Act,

“relevant body” has the meaning given by section 20A (the relevant body) of the 2009 Act (inserted by paragraph 7 of the schedule to the Bill). Accordingly, where no order has been made under section 24(1) of the 2009 Act, it means the UK Committee on Climate Change established under section 32 of the Climate Change Act 2008, and

“target-setting criteria” means the matters mentioned in section 2B(1) (the target-setting criteria) of the 2009 Act (inserted by section 5 of the Bill).

OUTLINE OF BILL PROVISIONS

Summary and Background

4. The Bill amends the 2009 Act to make provision setting targets for the reduction of greenhouse gases and to make provision about advice, plans and reports in relation to those targets.

5. The Bill comprises:

Part 1 — Emissions reduction targets

Part 2 — Emissions accounting

Part 3 — Reporting and planning duties

Part 4 — Minor and consequential modifications

Part 5 — Final provisions

6. Part 1 makes provision in relation to emission reduction targets. In particular, it makes provision for a net-zero emissions target, increases to 90% the emissions reduction target for 2050 (up from 80%), increases to 56% the emissions reduction target for 2020 (up from 42%), and sets new emissions reduction targets for 2030 and 2040 (of 66% and 78% respectively). It also makes provision setting annual targets for every other year between 2020 and 2050. In addition, for reporting purposes only, it establishes new annual targets for 2017, 2018 and 2019.

7. Part 2 makes provision in relation to emissions accounting. In particular, a new rule provides that carbon units surrendered as a result of the operation of an emissions trading scheme may not be credited or debited from a net Scottish emissions account for a period after 2016. Another new rule provides that the amount of carbon units purchased by the Scottish Ministers that may be credited to a net Scottish emissions account is zero. These rules can only be disapplied to the extent that regulations subject to the affirmative procedure provide otherwise. This Part also adjusts the way in which international carbon reporting practice is applied for the purposes of assessing and reporting under a new section 33 of the 2009 Act.

8. Part 3 makes provision in relation to reporting and planning duties. In particular, it replaces the previous annual reporting requirements in relation to emissions with new reporting requirements. It also replaces requirements in relation to reports on policies and policies with a new requirement to lay before the Scottish Parliament a climate change plan every 5 years and to also lay reports, each relevant year, assessing the progress towards implementing the proposals and policies contained in each substantive chapter of the most recent plan.

9. Part 4 makes minor and consequential modifications to the 2009 Act. Part 5 makes provision in relation to ancillary matters, commencement and the short title.

10. Further detail on the changes made by the Bill and on the policy objectives expected to be achieved can be found in the Financial Memorandum and the Policy Memorandum referred to above.

RATIONALE FOR SUBORDINATE LEGISLATION

11. The Bill confers seven subordinate legislation making powers on the Scottish Ministers and also modifies one existing subordinate legislation making power, described in more detail below.

12. Most of the new powers are inserted into the 2009 Act. For each power inserted into the 2009 Act, the power is identified by reference to the section of the 2009 Act which confers it.

13. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable parliamentary time; and
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation.

DELEGATED POWERS

Section 1 (inserting section A1(2) into the 2009 Act) – Power to set a net-zero emissions target year

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

14. Section 1 inserts a new section A1 (net-zero emissions target) into the 2009 Act. The following paragraphs refer to the subsections of new section A1.

15. Subsection (2) confers a power on the Scottish Ministers to, by regulations, specify a year which is to be the year in which the ‘net-zero emissions target’ is to be met. The net-zero emissions target is the target, in subsection (1), of ensuring that the net Scottish emissions account for the year specified in the regulations is a least 100% lower than the baseline.

16. Subsection (3) requires the Scottish Ministers to publish a statement as soon as reasonably practicable after laying a draft of regulations under subsection (2). This must set out their reasons for proposing to specify the year, the extent to which the proposed year takes account of the “target-setting criteria” in section 2B of the 2009 Act (inserted by section 5 of the Bill), and whether the proposed year is consistent with the most up-to-date advice they have received from the relevant body and, if it is not, the reasons why.

17. Subsection (4) provides that the duty to meet the net-zero emissions target applies after the first regulations have been made under subsection (2). Subsection (5) provides that any subsequent regulations must revoke the previous regulations, and cannot specify a later year unless this is consistent with advice received from the relevant body.

Reason for taking power

18. The Scottish Ministers are committed to Scotland setting a target for net-zero levels of greenhouse gas emissions as soon as the evidence suggests this is a credible option. Accordingly, the power in subsection (2) to specify, by regulations, the year is sought due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

Choice of procedure

19. It is considered appropriate that regulations made using this power are subject to the affirmative procedure. This means that they cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the Parliament to fully scrutinise any proposals for draft regulations which are likely to be politically sensitive and attract stakeholder attention given this is the focus of all the targets that can be set under the Bill.

Section 4 (inserting section 2A(1) into the 2009 Act) – Power to modify the percentage figures for the 2050 target and each interim target

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

20. Section 4 inserts a new section 2A (modification of the 2050 and interim targets) into the 2009 Act. The following paragraphs refer to the subsections of new section 2A.

21. Subsection (1) confers a power on the Scottish Ministers to, by regulations, modify any percentage figure applying for the purposes of the 2050 target or any of the interim targets. The regulations are subject to the affirmative procedure.

22. Subsection (2) provides that the regulations may not substitute a lower percentage figure if that would be either: inconsistent with advice from the relevant body, lower than a figure for an earlier interim target, or lower than 100% for a year which is the same or later than the net-zero emissions target.

23. Subsection (3) provides that, in preparing a draft of regulations to be made under subsection (1), the Scottish Ministers must have regard to the target-setting criteria and the most up-to-date advice they have received from the relevant body.

24. Subsection (4) provides that the duty in subsection (5) applies in the event that both: (i) the Scottish Ministers lay a draft of regulations under section A1(2) which propose to specify a net-zero emissions target year of 2050 or earlier, and (ii) one or more percentage figures applying for the purposes of the 2050 target, or any interim target for a year which is the same as or later than the proposed net-zero emissions target year, is lower than 100%. In this event, subsection (5) provides that the Scottish Ministers must, simultaneously or as soon as reasonably practicable

afterwards, lay before the Scottish Parliament a draft of regulations under subsection (1) which modify to 100% each such lower percentage figure.

25. Subsection (6) requires the Scottish Ministers to publish a statement, as soon as reasonably practicable after laying draft regulations under subsection (1), setting out for each proposed modification of a percentage figure by the regulations: their reasons for proposing it, the extent to which it takes account of the target-setting criteria, and whether it is consistent with the most up-to-date advice they have received from the relevant body.

Reason for taking power

26. In their independent advice on the design of the target framework for the Bill the Committee on Climate Change highlighted the importance of being able to vary target levels in both directions, in order to take account of future changes in circumstances – including international science and law and also potential changes to the emissions measurement science that underpins the target framework. In the particular case of changes to the measurement science, these can go in both directions – leading to targets becoming either impossible, or much too easy, to deliver. Both situations could undermine the credibility of the target framework, hence the need for the power to operate in both directions. It is emphasised that the power cannot be used to substitute a lower percentage figure for the 2050 target or an interim target if that figure is, among other things, inconsistent with the most up-to-date advice received from the relevant body.

27. Accordingly, the power in subsection (1) to, by regulations, modify one or more of the percentage figures applying for the purposes of the 2050 target or the interim targets is sought due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

Choice of procedure

28. As the regulations made using this power amend primary legislation, it is considered appropriate that they are subject to the affirmative procedure. This means that they cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the Parliament to fully scrutinise any proposals for draft regulations which might attract stakeholder attention.

29. In addition, the regulation-making power under this section effectively replaces powers under the 2009 Act to modify the interim 2020 target (section 2(3) of the 2009 Act) and to modify annual targets (section 6(1)(b) of the 2009 Act). Both of these existing order-making powers are subject to the affirmative procedure and it is considered appropriate that the new regulation-making power which replaces them should also be subject to the affirmative procedure.

Section 5 (inserting section 2B(3) into the 2009 Act) – Power to modify the target-setting criteria

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

30. Section 5 inserts a new section 2B (the target-setting criteria) into the 2009 Act. The following paragraphs refer to the subsections of new section 2B.

31. Subsection (3) confers a power on the Scottish Ministers to, by regulations, modify subsections (1) and (2) so as to add, remove or vary the description of a target-setting criterion.

32. Subsection (1) provides that the “target-setting criteria” are the criteria mentioned in paragraphs (a) to (k) of that subsection. The first criterion is the objective of not exceeding the “fair and safe Scottish emissions budget”. This expression is defined in subsection (2).

33. In requesting advice from the relevant body under section 2C of the 2009 Act (inserted by section 6 of the Bill), views on the earliest achievable net-zero emissions target year are to take account of the target-setting criteria and views on whether the percentage figures applying for the purposes of the 2050 target and each interim target are appropriate is by reference to these criteria. The Scottish Ministers must also have regard to these criteria when preparing a draft of regulations under section 2A(1) of the 2009 Act (inserted by section 4 of the Bill).

Reason for taking power

34. Having a power to amend the target-setting criteria will allow the Scottish Ministers to ensure the most relevant criteria are being considered when reviewing targets over the long time horizon of the Act resulting from the Bill, without having to bring forward primary legislation.

35. Accordingly, the power in subsection (3) to, by regulations, modify the criteria is sought due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

Choice of procedure

36. As the regulations made using this power amend primary legislation, it is considered appropriate that they are subject to the affirmative procedure. This means that they cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the Parliament to fully scrutinise any proposals for draft regulations which might attract stakeholder attention.

37. In addition, the regulation-making power under this section effectively replaces a power under the 2009 Act to modify the target-setting criteria (section 6(1)(d) of the 2009 Act). That existing order-making power is subject to the affirmative procedure and it is considered

appropriate that the new regulation-making power which replaces it should also be subject to the affirmative procedure.

Section 10(2) – Power to modify the percentage figures for the 2017, 2018, and 2019 targets

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

38. Subsection (2) of section 10 confers a power on the Scottish Ministers to, by regulations subject to the affirmative procedure, modify one or more of the percentage figures applying for the purposes of 2017, 2018 and 2019. The percentage figures which apply for the purposes of these years are set out in subsection (1) as a target of, respectively, at least 52.4%, 54.0% and 55.0% lower than the baseline.

39. But subsection (3) provides that a draft of regulations to be laid under subsection (2) may propose the modification of a percentage figure only if;

- the Scottish Ministers have, at the same time as or before laying the draft of regulations under subsection (2), laid a draft of regulations under section 2A(1) (modification of 2050 and interim targets) of the 2009 Act proposing to modify the percentage figure applying for the purposes of the interim target for 2020,
- the figure proposed to be modified is in respect of a year in relation to which the Scottish Ministers have not yet reported on under section 33 of the 2009 Act, and
- the Scottish Ministers have, before laying a draft of the regulations, had regard to the most up-to-date advice they have received from the relevant body about the figure proposed to be modified.

Reason for taking power

40. The 2017, 2018 and 2019 targets have been set, for reporting purposes only, relative to the 2020 interim target (following advice from the Committee on Climate Change). These targets are dealt with separately to annual targets for the period 2021 to 2049, which are instead to be set by virtue of section 3 to 3B of the 2009 Act (inserted by section 9 of the Bill) by reference to the interim targets, the 2050 target and, where the year is specified, the net-zero emissions target.

41. This separate treatment is needed as these years have already occurred (or will have partially occurred prior to the Bill becoming an Act), but the emissions statistics are not yet available. As such, annual targets for 2017, 2018 and 2019 have been set for reporting purposes relative to the 2020 target. If the relevant body advises a change to percentage figure for the 2020 target, the power is sought to modify these targets to ensure they remain aligned to any revised 2020 target.

42. Accordingly, the power in section 10(2) to, by regulations, modify the percentage figures applying for the purposes of 2017, 2018 and 2019 is sought due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

Choice of procedure

43. As the regulations made using this power amend primary legislation, it is considered appropriate that they are subject to the affirmative procedure. This means that they cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the Parliament to fully scrutinise any proposals for draft regulations which might attract stakeholder attention.

Section 13(1)(b) and (c) (modifying section 13 of the 2009 Act), read with section 13(2) (modifying section 96(7) of the 2009 Act) – extension of power to enable the Scottish Ministers to make provision about the circumstances in which carbon units may not be credited to or debited from the net Scottish emissions account for a period

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

44. Existing section 13(5) of the 2009 confers a power on the Scottish Ministers to, by regulations, make provision about the circumstances in which carbon units may be credited to the net Scottish emission account for a period.

45. Subsection (1)(b) of section 13 of the Bill modifies this existing power so as to make clear that the Scottish Ministers may also use it to make provision about circumstances in which carbon units may not be credited to, or debited from, the net Scottish emissions account for a period.

46. Subsection (1)(c) of section 13 of the Bill also imposes a new restriction on the exercise of this power by providing that the amount of carbon units purchased by the Scottish Ministers that may, by virtue of regulations made using the power, be credited to the net Scottish emissions account for a period is zero, unless regulations under section 13A of the 2009 Act (inserted by section 14 of the Bill) specify a higher limit.

47. Subsection (2) of section 13 of the Bill repeals paragraph (a) of section 96(7) (subordinate legislation). This ensures that all regulations made under section 13(5) will be subject to the affirmative procedure.

Reason for taking power

48. Existing section 13(5) of the 2009 Act only confers a power to, by regulations, make provision about circumstances in which carbon units may be credited to or debited from the net

Scottish emissions account for a period. The Scottish Ministers wish to be able to make provision about circumstances in which such units may not be credited to or debited from such an account. For example, to remove a previously established mechanism for the crediting or debiting of units.

49. Accordingly, an extension to the regulation-making power in section 13(5) is sought due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable parliamentary time.

50. The limitation under the new subsection (5A) is intended to provide the default position that carbon units purchased by the Scottish Ministers cannot be credited to the net Scottish emissions account for any year, unless regulations under section 13A specify a higher limit. This is introduced given the Bill repeals the limits set by order under section 21.

Choice of procedure

51. The existing power to make regulations under section 13(5) of the 2009 Act is subject to the affirmative procedure. Section 13(1)(b) of the Bill will extend this power slightly to make clear that the Scottish Ministers may also use it to make provision about circumstances in which carbon units may not be credited to, or debited from, a net Scottish emissions account. Where only this extension to the power is used, it would further restrict options for crediting or debiting carbon units. Whilst it might be argued that such provision need only be subject to the negative procedure, it is considered appropriate that all regulations made using this power should continue to be subject to the affirmative procedure.

52. This will mean that the regulations cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the Parliament to fully scrutinise any proposals for draft regulations (whether or not relying solely or in part on the extension to the power), which might attract stakeholder attention due to the sensitivities that are likely to arise should the Scottish Ministers make provision about circumstances in which carbon units may or may not be credited to, or debited from, a net Scottish emissions account.

Section 14(1) and (2) (which, among other things, inserts section 13A into the 2009 Act) – Power to set a limit (higher than zero) on the amount of carbon units purchased by the Scottish Ministers that may be credited to the net Scottish emissions account for a year

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative if increasing a limit, otherwise negative

Provision

53. Section 14(1) of the Bill inserts a new section 13A (permitted use of carbon units purchased by the Scottish Ministers) into the 2009 Act. Except where otherwise specified, the following paragraphs refer to the subsections of new section 13A.

54. Subsection (1) of new section 13A confers a power on the Scottish Ministers to, by regulations, set a limit representing the maximum amount of carbon units purchased by them that may be credited to the net Scottish emissions account for a year.

55. Subsection (2) provides that the limit must not exceed an amount which represents 20% of the planned reduction in the net Scottish emissions account for that year. Subsection (3) sets out how this planned reduction is to be calculated.

56. Subsection (4) provides that a limit may only be set for a year which has not yet been reported on under section 33 of the 2009 Act (as substituted by section 16 of the Bill) and which ends no more than 10 years after the year in which the regulations are made.

57. Where draft regulations are laid under subsection (1) proposing an increase to any such limit, subsection (5) requires the Scottish Ministers to publish a statement setting out their reasons for proposing the increase and whether the proposed new limit is consistent with the most up-to-date advice they have received from the relevant body. This statement must be published as soon as reasonably practicable after the draft regulations are laid.

58. Section 14(2) of the Bill inserts a new paragraph (aa) into section 96(7) (subordinate legislation) of the 2009 Act. Regulations laid under section 13(5) of the 2009 Act are generally subject to the affirmative procedure by virtue of section 96(4) of the 2009 Act. But new paragraph (aa) ensures that where the regulations do not propose an increase to a limit, the regulations are subject instead to the negative Parliamentary procedure.

Reason for taking power

59. The Bill imposes a new default rule that the amount of carbon units purchased by the Scottish Ministers that may, by virtue of regulations under section 13(5) of the 2009 Act, be credited to or debited from the net Scottish emissions account for a period is zero, unless regulations under section 13A of the 2009 Act specify a higher limit in relation to that period.

60. The power in section 13A(1) is sought to enable the Scottish Ministers set a higher limit (i.e. a limit higher than zero) representing the maximum amount of carbon units purchased by them that may be credited to the net Scottish emissions account for a year. The power allows that previously raised limits can be further amended in either direction, including returning them to zero.

61. Accordingly, an extension to the regulation-making power in section 13(5) is sought to due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable Parliamentary time.

Choice of procedure

62. It is considered appropriate that regulations made using this power are generally subject to the affirmative procedure to align with the current requirements for regulations made under section 13(5) of the 2009 Act. This means that they cannot be made unless a draft of them has been laid before, and approved by resolution of, the Scottish Parliament. This is to enable the

Parliament to fully scrutinise any proposals for draft regulations which might attract stakeholder attention due to the sensitivities that are likely to arise should the Scottish Ministers seek to set a limit (higher than zero) on the amount of carbon units purchased by the Scottish Ministers that may be credited to a net Scottish emissions account.

63. However, where regulations made using this power do not propose an increase to any limit on the maximum amount of carbon units that may be credited to the net Scottish emissions account for a year, it is considered appropriate that the regulations are instead subject to the negative procedure. In this case, any such regulations must be laid before the Scottish Parliament. Parliament may, before the expiry of a further period of 40 days, resolve that the regulations be annulled. Where it does so, the Scottish Ministers must revoke the regulations. This is considered appropriate as reducing a limit is less likely to attract stakeholder attention.

Section 23 – Power to make ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative if textually amending an Act, otherwise negative

Provision

64. Section 23(1) and (2) confers a power on the Scottish Ministers to, by regulations, make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate in connection with or for giving full effect to the Bill. The regulations may modify any enactment (including the Bill) and make different provision for different purposes.

Reason for taking power

65. The Bill may give rise to a need for a range of ancillary provisions. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

66. Accordingly, the regulation-making power in section 23(1) and (2) is sought to due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable Parliamentary time.

Choice of procedure

67. Regulations made under this power which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this power are subject to the negative procedure. This approach is typical for ancillary powers of this type.

Section 24(2) and (3) – Power to appoint the days on which Bill provisions come into force

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no procedure

Provision

68. Section 24(2) and (3) confers a power on the Scottish Ministers to, by regulations, appoint the days on which the provisions of the Bill come into force, except for sections 21 to 25 which come into force on the day after Royal Assent (by virtue of section 24(1)). The regulations may include transitional, transitory or saving provision, and make different provision for different purposes.

Reason for taking power

69. The Scottish Ministers consider it appropriate for the main provisions of the Bill to be commenced on such days as they may appoint. Such provisions may require to make transitional, transitory or saving provision, and make different provision for different purposes.

70. Accordingly, the regulation-making power in section 24(2) and (3) is sought to due to the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation, and the need to make proper use of valuable Parliamentary time.

Choice of procedure

71. It is considered appropriate that regulations made under this power are subject only to the laying requirement in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This requires that the regulations are laid before the Scottish Parliament as soon as practicable after they are made (and, in any event, before they are due to come into force). The regulations will appoint the days on which provisions of the Bill are to come into force, only after the terms of those provisions have been passed by the Parliament.

*This document relates to the Climate Change (Emissions Reduction Targets) (Scotland) Bill
(SP Bill 30) as introduced in the Scottish Parliament on 23 May 2018*

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