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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Climate Change (Emissions Reduction Targets) (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; 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;

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

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 4 September and 6 and 13 November 2018, the Delegated Powers and Law Reform Committee considered the delegated powers in the Climate Change (Emissions Reduction Targets) (Scotland) Bill (“the Bill”).ⁱ The Scottish Government issued a Delegated Powers Memorandum (“DPM”).ⁱⁱ
2. This Scottish Government Bill was introduced by the Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, on 23 May 2018.
3. The Committee submits this report to the lead Committee for the Bill (the Environment, Climate Change and Land Reform Committee) under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Overview of the Bill

4. The aim of the Bill is to set, in light of the Paris Climate Change Agreementⁱⁱⁱ more ambitious targets for the reduction of greenhouse gas emissions by the Scottish Ministers. The existing targets, and provisions supporting these targets, are currently set out in the Climate Change (Scotland) Act 2009 (“the 2009 Act”). This Bill seeks to amend the 2009 Act, by amending its Parts 1, 2 and 3.
5. The Bill is divided into 5 Parts, with one schedule of modifications to the 2009 Act. It 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. The Scottish Government describes the Bill as having a primary and a secondary objective. The primary objective of the Bill is to raise the ambition of the greenhouse gas emissions reduction targets set out in the 2009 Act and its associated subordinate legislation; the secondary objective is to improve transparency.

ⁱⁱⁱ The Paris Climate Change Agreement is an agreement within the UN Framework Convention on Climate Change dealing with greenhouse gas emission mitigation, adaptation and finance, starting in 2020. Under the Agreement, each country must plan and report regularly on its contribution to mitigate global warming (available [here](#))

Delegated Powers Provision

7. At its meeting on 4 September 2018, the Committee agreed that it was content with the powers contained in:
 - Section 4
 - Section 5
 - Section 10(2)
 - Section 13(1)(b) and (c)
 - Section 14(1) and (2)
 - Section 23
 - Section 24(2) and (3)
8. At that meeting, the Committee also agreed to write to the Scottish Government to raise a question on the delegated powers provision in section 1 of the Bill, inserting section A1(2) into the 2009 Act.

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

9. Section 1 of the Bill inserts new section A1(2) into the 2009 Act. It enables the Scottish Ministers to specify, in regulations, a year which is to be the year in which the “net-zero emissions target” is to be met. This will be known as the “net-zero emissions target year”. Once that year is identified in regulations, the Scottish Ministers must ensure that in that year the “net Scottish emissions account” is at least 100% lower than the baseline.

Committee Consideration

10. The Committee noted that, *after* laying the regulations in the Parliament the Scottish Ministers must publish a statement setting out their reasoning for proposing that year as the “net zero emissions target year”, along with:
 - the extent to which the proposed net zero emissions target year takes account of the target-setting criteria, and

- whether the proposed net zero emissions target year is consistent with the most up-to-date advice received from the “relevant body” (the UK Committee on Climate Change (“the UKCCC”).
11. In drafting the regulations, however, the Scottish Ministers are not explicitly required to have regard to either of these matters.
 12. The Committee compared this regulation-making power to that inserted by section 4 of the Bill, at new section 2A of the 2009 Act. That power enables the Scottish Ministers to adjust the percentages representing the emissions reduction targets set for particular years.
 13. Unlike section A1, in preparing regulations under this provision, Scottish Ministers are obliged to have regard to the target-setting criteria and the most up-to-date advice received from the relevant body. Similarly to section A1, after laying the regulations, the Scottish Ministers are required to publish a statement setting out their reasoning, the extent to which the target-setting criteria have been taken into account, and whether the modification is consistent with the most up-to-date advice they have received from the relevant body.
 14. The Committee sought an explanation from the Scottish Government for this difference in approach in the two arguably comparable powers. This correspondence is reproduced in the Annex to this report.
 15. The Scottish Government takes the view that the requirement to have regard to the criteria and advice, in preparing the regulations proposing the net-zero emissions target year, is implicit. The Scottish Government considered that, due to the requirement for Scottish Ministers to publish a statement after laying draft regulations setting out their reasoning, the extent to which the net-zero emissions target year takes account of the criteria and whether the proposed year is consistent with up-to-date advice, Ministers will have to have had regard to those criteria and that advice in preparing the regulations.
 16. The Committee considered that, as the Bill makes the requirement to “have regard to” the criteria and the most up-to-date advice explicit in the comparable power at new section 2A(3) of the 2009 Act, its absence in section A1 might cast doubt on its implicit incorporation elsewhere.
 17. The Scottish Government correspondence states that Ministers will consider these matters in preparing regulations. The Committee considers, however, that an arguably implicit requirement does not have the strength of a requirement in primary legislation to “have regard to” certain matters prior to laying regulations.
 18. The Scottish Government’s response also highlights section 8 of the Bill, which inserts new section 2E into the 2009 Act. This provision obliges Ministers – if they do not lay regulations identifying a net-zero emissions target year in response to advice to that effect from the UKCCC – to make a statement to the Scottish Parliament setting out their reasoning for not specifying that year/accepting that advice.
 19. The Committee was reassured that this section of the Bill (section 8), and those at sections 6 and 7 (requiring Scottish Ministers to seek advice regularly from the UKCCC (which advice must take account of the target-setting criteria), to publish

that advice, and publicly to react to receipt of the advice), generally support the incorporation of up-to-date expert advice and the target-setting criteria in the decisions of Government.

20. The Committee, however, distinguished the situation covered by section 8 of the Bill (where the advice of the UKCCC as to the identification of a net-zero emissions target year is not accepted, and Ministers must explain their decision against the backdrop of the publication of up-to-date advice), from that covered by section A1 (where Scottish Ministers prepare regulations to identify the net-zero emissions target-year but are not explicitly required to “have regard to” particular matters).
21. The Scottish Government response acknowledges that there is a lack of consistency between the provisions of new section A1, and those of new section 2A, due to the absence in the former provision of an equivalent to section 2A(3). The Government offers to consider amending the Bill for consistency if in the Committee’s view “*it would be beneficial for the two sections to be consistent in form*”.
22. The Committee agreed to ask the Scottish Government to amend the Bill for consistency and clarity on this issue.

Recommendations

23. **The Committee recommends that the Scottish Government brings forward an amendment for the power in section A1 (introduced by section 1 of the Bill), mirroring for that power the provision that is made at new section 2A(3) (introduced by section 4 of the Bill).**
24. **The Committee reports that it is content with the remaining delegated powers provisions contained in the Bill.**

Annex

LETTER TO THE SCOTTISH GOVERNMENT 6 SEPTEMBER 2018

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 4 September and seeks an explanation of the following matters:

Section 1 (inserting section A1(2) into the Climate Change (Scotland) Act 2009 (“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**

Section 1 inserts new section A1 (the net-zero emissions target) into the 2009 Act. New section A1(2) confers power on the Scottish Ministers to specify by regulations the year in which the “net-zero emissions target” is to be met. This year would become the “net-zero emissions target year”.

The Committee is content with the power in section 1 of the Bill, that inserts section A1(2) into the 2009 Act, in principle, and finds it acceptable that it is subject to the affirmative procedure.

However, the Committee asks for clarification on the following matter:

Section A1 does not require the Scottish Ministers, in preparing regulations to specify the net-zero emissions target year, to have regard to the target-setting criteria and the most up-to-date advice received from the UK Committee on Climate Change. Once the regulations have been laid, however, the Scottish Ministers are required by subsection (3) to publish a statement setting out their reasoning, and – notably - the extent to which the proposed net-zero emissions target year takes account of the target-setting criteria, and whether that year is consistent with the most up-to-date advice received from the UK Committee on Climate Change.

The power may be compared to that in section 4 of the Bill, which inserts a new section 2A into the 2009 Act, permitting modification of the 2050 and interim targets. In preparing regulations under new section 2A(1), regard must be had to the target-setting criteria and the most up-to-date advice from the relevant body (new section 2A(3)). Once the regulations have been laid, under new section 2A(6) the Scottish Ministers must publish a statement similar to that described in section A1(3) setting out their reasoning, the extent to which the target-setting criteria have been taken account of, and whether the proposed modification is consistent with the most up-to-date advice received.

Please explain why in section A1, although the Scottish Ministers must publish a statement on the extent to which target-setting criteria were taken into account, and whether the net-zero emissions target year is consistent with the most up-to-date advice received from the relevant body, there is no requirement to have regard to target-setting criteria or advice from the relevant body in preparing the regulations, along similar lines to new section 2A(3).

RESPONSE FROM THE SCOTTISH GOVERNMENT 2 OCTOBER 2018

Thank you for your letter of 6 September to James Hynd seeking an explanation around aspects of the delegated powers at section 1 of the Climate Change (Emissions Reduction Targets) (Scotland) Bill. The Committee, while noting that it is content with section 1 in principle asked for clarification on one aspect.

“Please explain why in section A1, although the Scottish Ministers must publish a statement on the extent to which target-setting criteria were taken into account, and whether the net-zero emissions target year is consistent with the most up-to-date advice received from the relevant body, there is no requirement to have regard to target-setting criteria or advice from the relevant body in preparing the regulations, along similar lines to new section 2A(3).”

Our view is that a requirement to have regard to the criteria and advice is implicit under the provisions of the bill. As the committee noted, section a1 requires draft regulations to be accompanied by a ministerial statement setting out the extent to which a proposed net-zero emissions target year takes account of the criteria and whether the year is consistent with the most up-to-date advice. In addition, the statement must give reasons for proposing the year. In order to prepare the draft regulations and that statement, ministers will have to have regard to those criteria and that advice. Likewise, section 8 of the bill places duties on ministers which would require ministers to have regard to those matters if regulations were not laid in draft.

