

Climate Change (Emissions Reduction Targets) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Climate Change (Emissions Reduction Targets) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 51–EN);
 - a Financial Memorandum (SP Bill 51–FM);
 - a Policy Memorandum (SP Bill 51–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 51–LC).
3. This 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.

Outline of Bill provisions

4. The Bill amends the [Climate Change \(Scotland\) Act 2009](#) ("the 2009 Act") in the following ways:
 - sections 1 and 2 replace the system of annual and interim emissions reduction targets, which are focussed on Scottish emissions of greenhouse gases in a given year, with a system of periodic carbon budgets that are focussed on emissions over a number of years,
 - section 3 adjusts when the Scottish Government next has to produce a climate change plan so that that next plan reflects the new system of carbon budgets.

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5. Section 4 does not amend the 2009 Act, but is closely connected to the amendments to that Act made by sections 1 and 2. Specifically, section 4 makes provision about the first exercise of the regulation-making power to set Scottish carbon budgets that section 1 inserts into the 2009 Act.

6. The Bill's remaining sections, contained in Part 2, deal with the matters usually dealt with at the end of an Act, such as when it comes into force and the short title by which it may be formally cited.

7. The Bill provides for 4 regulation-making powers:

- Section 1 inserts into the 2009 Act a new section A4, which empowers the Scottish Ministers to make regulations setting Scottish carbon budgets.
- Section 1 also inserts into the 2009 Act a new section A5, which empowers the Scottish Ministers to make regulations modifying the period for which Scottish carbon budgets (other than the last) must be set.
- Section 2 inserts into the 2009 Act a new section 13A(2B), which empowers the Scottish Ministers to make regulations setting a notional Scottish carbon budget for the purposes of performing a calculation that sets a ceiling on the number of purchased carbon units that can be credited to the net Scottish emissions account for a period.
- Section 5 confers a power on the Scottish Ministers to make provision ancillary to the Bill's substantive provisions.

Rationale for subordinate legislation

8. The Government has, in considering the matters that should be dealt with by subordinate legislation and the appropriate level of parliamentary scrutiny for subordinate legislation, had regard to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances,
- the need to make appropriate use of valuable parliamentary time, and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provisions passed by the Parliament.

Delegated powers

Section 1, inserted section A4: Budget-setting regulations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

9. Section 1 of the Bill inserts a new section A4 into the Climate Change (Scotland) Act 2009. The new section enables the Scottish Ministers to make regulations setting Scottish carbon budgets. The Explanatory Notes address more fully the purpose of Scottish carbon budgets, which are a new concept being added to the 2009 Act by the Bill. Broadly, a Scottish carbon budget is an amount of carbon dioxide equivalent allocated to a given period. Not having the net Scottish emissions account exceed that amount over the period is called a Scottish carbon budget target. Part 1 of the 2009 Act, as modified by the Bill's provisions, will create duties on the Scottish Ministers to ensure the targets are met and keep the Scottish Parliament informed about whether the targets are being met and the extent to which they anticipate their proposals and policies will ensure targets for future periods will be met.

10. Regulations under inserted section A4 will set out the amount of carbon dioxide equivalent that constitutes the Scottish carbon budget for a period. The regulations will identify the periods for which budgets are set, but this must be done within the framework of inserted section A4(3), which is to say that each period apart from the last must be 5 years. The final period for which a budget is set will be the period ending with the net-zero emissions target year (as defined by [section A1 of the 2009 Act](#)). As that year may fall fewer than 5 years after the end of the preceding period for which a budget is set, the final Scottish carbon budget period may be shorter than 5 years.

Reason for taking power

11. The level at which the Scottish carbon budget for a period is set should be informed by expert scientific advice about what is credibly achievable within that period as part of a pathway to the net-zero emissions target, which is that the net Scottish emissions account for 2045 will be at least 100% lower than the baseline (see section A1 of the 2009 Act).

12. Rather than set Scottish carbon budgets on the face of the Bill without the benefit of that advice, the Government's view is that it is better for the Parliament to approve the general legislative scheme for Scottish carbon budgets first, and for the specific budgets to then be set by regulations (subject to parliamentary oversight through the affirmative procedure) once expert advice from the UK Climate Change Committee has been received. This approach ensures that the UK Climate Change Committee can advise about the levels at which budgets should be set with certainty about the legislative context within which the budgets are to operate. It also ensures that there is adequate time for that advice to be prepared. In order for the Bill to achieve one of its principal aims, namely deferring the deadline for producing a climate change plan until the necessary legislative changes have been made to allow a competent plan to be produced, the Bill needs to have been enacted sooner than it is reasonable to expect the UK Climate Change Committee to be able to provide sound advice on the appropriate level of Scottish carbon budgets.

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13. Beyond those reasons for taking a power to initially set the budgets, the Government considers it appropriate for there to be a power that can be used to change the budgets to allow for the possibility of:

- legislative changes, for example if the net-zero emissions target year were to be changed, the periods for which budgets are set would need to be adjusted,
- changes in climate science, for example the methodology by which a factor used in setting the budgets initially may be refined meaning that the basis for that initial assessment of what would be achievable is no longer based on best international practice in making such assessments, and
- changes in other technologies that affect what is understood to be credible by way of a target for a given period, for example a new technology may emerge which makes it possible to pursue a more ambitious path for the decarbonisation of a particular sector.

14. The Parliament considered it appropriate to confer a power to make regulations modifying interim targets, which Scottish carbon budgets are to replace, when it passed both the Bill for the 2009 Act and the Bill for the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019.

Choice of procedure

15. The power to set Scottish carbon budgets is to be subject to the affirmative procedure.

16. It should be noted, by way of further procedural requirements, that in making regulations under the inserted section A4, the Scottish Ministers must take into account the latest advice they have from the UK Climate Change Committee, which will be available to the Parliament and wider society because section 2E of the 2009 Act requires Ministers to publish the advice. Section 2 of the Bill will compel Ministers to seek the Committee's advice before setting the first Scottish carbon budgets, and thereafter they are required to seek it periodically by section 2C of the 2009 Act. Moreover, as soon as practicable after laying draft regulations under inserted section A4 before the Parliament for approval, Ministers will also be required to lay before the Parliament a statement setting out the extent to which the proposed budgets take account of the advice, as well as the target-setting criteria (which are set out in section 2B of the 2009 Act).

17. These procedural arrangements for the making of regulations setting Scottish carbon budgets are consistent with the current arrangements for the making of regulations setting interim targets, which Scottish carbon budgets are to replace.

18. The Government considers these procedural arrangements to be appropriate given the significance of the level at which Scottish carbon budgets are set for the scheme of the amended Climate Change (Scotland) Act 2009.

Section 1, inserted section A5: Alteration of periods

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

19. Section 1 of the Bill inserts a new section A5 into the Climate Change (Scotland) Act 2009. The new section A5 enables the Scottish Ministers to make regulations to modify subsection (3) of section A4 (which is also inserted by section 1 of the Bill). Inserted section A4(3) stipulates that Scottish carbon budgets are generally to cover a 5 year period, apart from the final budget which can be for a shorter period to allow for the end of the budget period having to coincide with the net-zero target emissions year, which is fixed by section A1 of the 2009 Act. The regulation-making power under section A5 will be expressly constrained so that it can only be used for the purpose of aligning the periods covered by Scottish carbon budgets with similar periods under international agreements to which the United Kingdom is a party.

Reason for taking power

20. The emissions reduction targets in the 2009 Act exist against the backdrop of global initiatives to tackle climate change. It may be that it would be best for the period of Scottish carbon budgets to be aligned to the milestones of one or more of those initiatives. For example, the UK Emissions Trading Scheme (which is established by [S.I. 2020/1265](#)) currently operates on the basis of allocation periods that span 5 years, but this could be changed by the UK Government which will itself be concerned to keep its periods aligned with the UK's international obligations. Notably, for that reason the Climate Change Act 2008 includes an equivalent power for the UK Government to change the period covered by a carbon budget set under that Act (see [section 23 of the 2008 Act](#)).

Choice of procedure

21. The power, under inserted section A5, to modify inserted section A4(3) is to be subject to the affirmative procedure.

22. The way in which the power may be exercised is closely constrained by subsection (2) of inserted section A5. Nevertheless, the Government considers the affirmative procedure to be appropriate given the significance of the duration of Scottish carbon budget periods to the scheme of the Climate Change (Scotland) Act 2009 as it would operate if the Bill were passed. In particular, the duration of Scottish carbon budget periods will affect the frequency of reporting to the Parliament about whether the targets arising from the budgets have been met.

Section 2(11), inserted section 13A(2B): Setting notional Scottish carbon budget

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

23. Section 2(11) inserts new subsections (2A) to (2C) into section 13A of the Climate Change (Scotland) Act 2009. The purpose of those new subsections is more fully explained in the Explanatory Notes. In brief, they are concerned with the limit to the number of units purchased through carbon trading schemes that can be used to lower the net Scottish emissions account for a particular period. Section 13A of the 2009 Act, as modified by the Bill, will provide a formula for calculating the maximum number of purchased carbon units that can be used to lower the net Scottish emissions account for a period covered by a Scottish carbon budget. That formula involves calculating the difference between the level of one budget and the budget preceding it. There is a difficulty in applying the formula in relation to the first period to be covered by a Scottish carbon budget because there is no preceding budget from which the difference can be calculated. To resolve this difficulty, inserted subsection (2B) allows the Scottish Ministers to make regulations setting a notional budget for the period prior to the one covered by the first actual budget. The notional budget has no relevance beyond calculating the ceiling on the use of purchased carbon units for the purposes of section 13A.

Reason for taking power

24. The notional budget that is to be set by the regulations needs to make sense relative to the actual budget set for the first period to be covered by a Scottish carbon budget. The actual budgets are to be set by regulations (see the discussion above in relation to inserted section A4). Therefore, the setting of the notional budget cannot take place until the content of the first regulations under inserted section A4 is known.

Choice of procedure

25. The power to set a notional Scottish carbon budget for the period prior to that covered by the first actual budget will be subject to the affirmative procedure.

26. The setting of actual carbon budgets will be subject to the affirmative procedure. The level at which the notional budget is set is less important than the level at which the actual budgets are set, as the setting of the notional budget is only relevant to the operation of section 13A of the 2009 Act. The matter that it will govern, namely the Government's ability to use purchased carbon units to lower the net Scottish emissions account, may nevertheless be significant in assessing whether or not Scottish carbon budget targets are being met. Accordingly, the Government considers it appropriate for

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the setting of the notional budget to be scrutinised by the Parliament in the same way as the setting of the actual budgets.

Section 5: Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if amending primary legislation, otherwise negative

Provision

27. Section 5 of the Bill provides that the Government can use regulations to make changes to the law connected to the changes made by the Bill and regulations made under the powers the Bill confers.

Reason for taking power

28. Any new law may give rise to the need for a range of ancillary provisions. The case for taking a power of this kind is that it would not make for an effective use of the Parliament's or the Government's resources if further primary legislation had to be passed to deal with minor matters which require to be dealt with in order to give full effect to a Bill that the Parliament has already passed.

Choice of procedure

29. As is usual for an ancillary power of this kind, regulations made under it which textually modify primary legislation will be subject to the affirmative procedure. Otherwise, regulations made under it will be subject to the negative procedure. The Government considers this to be appropriate as it is the approach to scrutiny that the Parliament typically endorses in relation to regulations under this kind of enabling power.

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